QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Arbuthnot and Anor v Queensland law Society* [2024] QCAT 125
PARTIES:	**HELEN MARY ARBUTHNOT** **MAUREEN ANN DAVEY** (applicant) **v** **QUEENSLAND LAW SOCIETY** (respondent)
APPLICATION NO/S:	OCR004-20
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	24 April 2024
HEARING DATE:	15 March 2024
HEARD AT:	Brisbane
DECISION OF:	Hon. Duncan McMeekin KC, Judicial Member
ORDERS:	**1. Subject to any submissions from the parties as to the proper orders I order:** **(a) The application is allowed.** **(b) That the applicants' claim on the Legal Practitioners Fidelity Guarantee Fund in the sum of $840,760 be admitted.** **(c) That the sum of $840,760 be paid out to the applicants in their capacity as administrators of the estate of Peter James Saunderson (deceased) from the Legal Practitioners Fidelity Guarantee Fund together with interest on that amount pursuant to s 384 LPA from 30 July 2015.** **(d) That the respondent pay the applicants' reasonable legal costs of making and proving the claim pursuant to s 383(1) LPA.**
CATCHWORDS:	PROFFESSIONS AND TRADES — LAWYERS — FIDELITY AND GUARANTEE FUNDS — CLAIMS AGAINST FUND — review of decision under *Legal Profession Act 2007* (Qld) — where the respondent rejected the applicants claim on the Legal Practitioners' Fidelity Guarantee fund —where a solicitor drew a will for a client and was made executor under that will — where

	the solicitor paid themselves as beneficiary under the will — whether the solicitor was dishonest — whether there was a 'failure to pay' the applicants who were not named in the will — whether the applicants suffered a pecuniary loss by reason of claimed default
	Legal Profession Act 2007 (Qld) s 359, s 374, s 392 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20 *Succession Act 1981* (Qld)
	Dore (as executor of the will of WHB Chenhall (dec'd) [2006] QCA 494 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 *Legal Services Commissioner v Slipper* [2019] QCAT 146 *Nock v Austin* (1918) 25 CLR 519 *O'Brien & Anor v Smith & Anor* [2012] QSC 166 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165
APPEARANCES & REPRESENTATION:	
Applicant:	R A Kipps, instructed by Merthyr Law
Respondent:	L Sheptooha, instructed by Queensland Law Society

REASONS FOR DECISION

[1] This review concerns the right of the applicants to make a claim on the Legal Practitioners Fidelity Guarantee Fund established under s 359 of the *Legal Profession Act* 2007 (Qld) ("LPA"). The respondent, by its management committee, rejected the claim. The applicants seek a review of that decision under s 392 LPA.

[2] The amount claimed is $840,760.

Principles governing review

[3] My task under the statute is to "produce the correct and preferable decision": s 20(1) *Queensland Civil and Administrative Act 2009* ("QCAA"). The applicants are entitled to a fresh hearing on the merits: s 20(2) QCAA.

The legislation

[4] The right to claim against the fidelity fund is governed by Part 3.6 of the LPA. The crucial provision is at s 374 which, relevantly, provides:

> **Claims about defaults**
>
> (1) A person who suffers pecuniary loss because of a default to which this part applies may make a claim against the fidelity fund to the law society about the default.

[5] Section 356 provides the following definitions of the key concepts:

> ***default***, in relation to a law practice, means—
>
> (a) a failure of the practice to pay or deliver trust money or trust property that was received by the practice in the course of legal practice by the practice, if the failure arises from an act or omission of an associate that involves dishonesty; or
>
> (b) a fraudulent dealing with trust property that was received by the law practice in the course of legal practice by the practice, if the fraudulent dealing arises from or is constituted by an act or omission of an associate that involves dishonesty.
>
> ***pecuniary loss***, in relation to a default, means—
>
> (a) the amount of trust money, or the value of trust property, that is not paid or delivered; or
>
> (b) the amount of money that a person loses or is deprived of, or the loss of value of trust property, as a result of a fraudulent dealing.

[6] So it is necessary for the claimant to show they have suffered pecuniary loss, that there has been a "default" as defined, and that the "default" caused the loss. Here the applicants rely on paragraph (a) of the definition of "default" and allege that there was a failure of the practice to pay or deliver trust money to them that was received by the practise in the course of that practise and that failure arose from an act or omission of an associate that involved dishonesty.

[7] As will be seen there is no doubt that the monies in question here were trust monies as defined. Schedule 2 to the LPA provides inter alia:

> ***"trust money*** means money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice,…"

As explained in *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [96]: "The general explanation is therefore to be read as covering any money confided to the care or disposal of the law practice in circumstances which indicate that the money has been earmarked for purposes not being purposes of the practice itself."

The Issues

[8] At the heart of the dispute is the conduct of a solicitor, Robin John Slipper. He was the sole practitioner/director of Slipper Lawyers Pty Ltd, an incorporated legal practise. For simplicity I will refer to the practice at times as Mr Slipper's practice, as indeed in effect it was.

[9] The applicants are the administrators with the will of a deceased estate. They assert that Mr Slipper was dishonest. They assert Mr Slipper took virtually the entirety of that residuary deceased estate for his own benefit when he had no right to any of it and when he well knew he had no such right.

[10] The respondent asserts that while Mr Slipper took the benefit of the estate there is no evidence that he dishonestly did so. The respondent also maintains that the applicants fail to show the essential requirement under s 374 LPA – that there was a "default" as defined.

The Background

[11] It is necessary to go into some detail of the background facts.

[12] In February 2011 Peter James Saunderson (now deceased) engaged Mr Slipper to prepare a will.

[13] There is no sworn evidence of what transpired between the two men.

[14] The only evidence of the instructions Mr Slipper received are two file notes found on Mr Slipper's file, no doubt prepared by Mr Slipper, perhaps dated 22 February 2011 (there is some doubt about that date as it is indecipherable on the copy I have and Mr Slipper contended for the day prior in correspondence) and 28 February 2011 purportedly setting out Mr Saunderson's instructions, and two letters addressed to Mr Saunderson, both dated 28 February in almost identical terms save for two additions in one version ("version 2"). Whether the file notes or letters accurately set out the instructions received is unknown. There is no evidence that Mr Saunderson was made aware of their contents or otherwise adopted them, save to the extent they are reflected in the will.

[15] I will return to those documents.

[16] The will was prepared and executed by the testator on 28 February 2011. Mr Slipper and a secretary in his office witnessed the execution of the will.

[17] By the terms of the will Mr Slipper was appointed executor of the will and trustee of the estate and in that capacity to hold estate assets on trust.

[18] Clause 3 of the will is the dispositive clause. It provides:

> "I give devise and bequeath the whole of my estate … unto my executor and trustee UPON TRUST … [provisions dealing with payment of debts, duties and bequests (of which there were none)]… and to hold the balance then remaining ("my residuary estate") UPON TRUST to my trustee to distribute same at his sole discretion to whomever, including the support of young footballers through schooling, equipment, tours and the like."

[19] There is no express mention of Mr Slipper taking as a beneficiary in the will.

[20] Mr Saunderson died on 30 April 2013. Hereinafter he will be referred to as the deceased. His estate is estimated as comprising around $1,800,000.

[21] On 6 May 2013 Mr Slipper in his capacity as executor of the deceased's estate entered into a retainer with his law practise. Mr Slipper obtained a grant of probate of the will in common form on 2 September 2013. Mr Slipper swore an affidavit supporting the application for probate in which he said, after confirming that he was the person named as executor in the will: "I know of no other matter which might bear on my standing as a fit and proper person to realise and administer the estate as required by the Succession Act 1981 and the Uniform Civil Procedure Rules 1999."

[22] There followed various dealings with the monies in the estate:

(a) Mr Slipper created a corporate entity, Pathways Pty Ltd, and on 12 March 2014 in his capacity as solicitor transferred $5,000 from his trust account to that corporate entity.

(b) On 15 May 2014 in his capacity as executor Mr Slipper opened a bank account entitled "Mr RJ Slipper as executor for the estate of Peter James Saunderson" ("the estate account") and the following day caused the sum of $1.2 million to be paid from his trust account to the estate account as an "interim distribution".

(c) On 2 June 2014 Mr Slipper withdrew $20,000 from the estate account.

(d) On 11 July 2014 Mr Slipper in his capacity as solicitor acting for himself as executor received the proceeds of the sale of the deceased's unit and passed those proceeds comprising $85,289.72 in the form of a bank cheque to himself as executor.

(e) On the same date Mr Slipper withdrew from the estate account the sums of $1,040,000 and $25,000. The larger sum was paid into a bank account in the name of Mr Slipper's wife as trustee for a family trust.

[23] According to Mr Slipper's file, two claims were brought against the estate, one by the deceased's former wife and one by a person claiming to be in a de facto relationship with the deceased at the time of his death. In each case the claim was settled by an agreement by Mr Slipper as executor to pay from the estate the sum of $250,000. Documents were located on the file recording these matters. Both claims were settled in or about early February 2014.

[24] The former wife's claim which was commenced before the deceased's death, was brought in the Federal Circuit Court, it being an application for a division of matrimonial property under the *Family Law Act 1975*. In a letter from the two solicitors acting for the respective parties (with Mr Slipper representing the estate) to the Registrar of the court advising of a settlement there appears in a section headed "Summary of Matter": "The deceased's will provides for his entire estate to pass to". The line is then blank.

[25] The de facto made a claim for further and better provision under Part IV of the *Succession Act 1981* (Qld). A Deed of Settlement was found in Mr Slipper's files. It recites that the de facto had "sort (sic) provision from the estate as the deceased's de facto partner" and that she believed that she was an "eligible applicant pursuant to the Succession Act". The only basis on which the de facto could be an eligible applicant was if she was the "spouse" of the deceased as defined in s 5AA(2) *Succession Act*. The preamble to the Deed records that the agreement had been reached without admission of liability and to avoid the costs and uncertainty of litigation. The dispositive clause in the will is quoted in the Deed but there is no mention of the size of the estate or that Mr Slipper was the intended beneficiary.

[26] On 16 July 2014 the Law Society commenced a trust account investigation into Mr Slipper's practice. The investigation was completed on 21 July 2014 and a report completed on 31 July 2014. The investigator uncovered a number of matters of concern regarding the Saunderson estate:

(a) The estate of Mr Saunderson was not entered in the Register of Powers and Estates kept by the legal practice. Whilst the will was entered in the Register, on the face of the Register Mr Saunderson was not shown as deceased and so the estate was not recorded as having commenced. This failure breached s 57 *Legal Profession Regulation 2007*. Despite responding by letter to the

concerns raised by the investigator, and agreeing to rectify the omission, no explanation was offered by Mr Slipper for the omission.

(b) The investigator called for certain trust ledger records including the trust ledgers with balances from 1 January 2013 to 16 July 2014. In that period over $1,800,000 of estate monies had been distributed. After commenting that he would have expected the trust transactions to have appeared in the reports he had called for the investigator reported: "The trust ledger or part of the trust ledger for the file does not appear in these reports. The effect of the omission of all or part of the trust ledger for the file from the records is that the probability of the file being selected for examination is significantly reduced." The records produced consisted of over 70 consecutively numbered pages. An accidental omission, in copying for example, seems impossible. Mr Slipper responded by letter of 15 September 2014: "I am currently at a loss to explain the omission of trust account records from consecutive pages. I shall investigate the matter further and revert to you within 10 days." No further response was ever provided. He was invited to do so on two further occasions but made no response.

(c) The investigator assumed that Mr Slipper was the sole beneficiary under the will. He identified that the sum of $1,040,000 had been paid out of the estate to an account in Mr Slipper's wife's name. The investigator pointed out that Mr Slipper appeared to have breached several provisions of the conduct rules. The relevant rules in place at the time the will was drawn were the *Legal Profession (Solicitor) Rule 2007*. The investigator was concerned with potential breaches of rule 9.1.1 (conflict of interest between solicitor and client), r 9.1.2 (the exercise of any undue influence) and r 9.2 (not to accept instructions where the solicitor's interest may conflict with the client's). More significantly here the investigator pointed out the plain breach of r 10.2 – a solicitor "must decline to act" on instructions to "Draw a will under which the solicitor or the solicitor's law practice or associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the solicitor is also to be appointed executor) or the reasonable professional fees of the solicitor or the solicitor's law practice". As well the solicitor must "offer to refer the person, for advice, to another solicitor who is not an associate of the solicitor."

(d) The investigator was of the view that the affidavit in support of the probate application in which Mr Slipper swore that he knew of no reason why he was not a fit and proper person to administer the estate was deficient in that Mr Slipper did not inform the Court that he was in breach of the conduct rules. Merely annexing a copy of the will to his affidavit was not sufficient to bring those matters to the attention of the court. The investigator pointed out that the will or the gift to the solicitor under the will may be invalid, that if that were so the intestacy rules applied changing the beneficiaries, and that "pending the order of a court or the *informed* consent of the beneficiaries" (emphasis in the original) the whole amount distributed to the solicitor should be repaid to the trust account.

[27] On 28 July 2014, and at the "suggestion" of the investigator, Mr Slipper repaid, or caused to be repaid, the sum of $1,040,000 to his trust account. This repayment was

described in the law practice's client ledger as "Estate benefit" and credited to a matter described as a "commercial (*sic*) matter" in Mr Slipper's name.

[28] Following receipt of the investigator's report Mr Slipper sought senior counsel's advice regarding the validity of the will, the validity of his receiving a benefit under the will, and the likelihood of the Legal Services Commissioner being successful in disciplinary proceedings due to exceptional circumstances. Those advices, dated 13 August 2014, were to the effect that the will was valid and probate in common form properly granted, that the court would make a declaration under s 11(3)(c) of the *Succession Act* such that the gift under the will was not void, and that there were strong grounds for concluding that Mr Slipper had not conducted himself so as to give rise to a finding of unsatisfactory professional conduct or professional misconduct. The only clue as to the matters put before counsel is a chronology set out in the advice. What original documents he had, if any, being unknown. Counsel does not refer to some significant matters. I will return to the point.

[29] Approximately one year later, on 28 July 2015, Mr Slipper as executor directed himself as solicitor to "distribute the net proceeds of the estate to my corporate entity Pathways Pty Ltd" and two days later the sum of $1,030,760, the balance of the estate funds, was duly transferred to Pathways.

[30] The amount claimed by the applicants against the fidelity fund relate to that last mentioned payment. The applicants brought action against Mr Slipper and his wife. A sum of $190,000 was paid, apparently by Mrs Slipper, to settle the proceedings against her. Hence the net amount now sought of $840,760.

[31] The respondent submits that the estate was fully administered in accordance with Mr Slipper's instructions (as executor) to himself (as solicitor) by 30 July 2015 when the payment referred to in paragraph [29] was made.

[32] The trust account of Slipper Lawyers Pty Ltd was closed on 18 May 2016 and held no trust monies at all from 31 May 2016. The law practice was sold and became a new incorporated practice on 14 September 2015. Mr Slipper ceased to hold a practising certificate on 2 October 2015.

[33] Pathways Pty Ltd, Mr Slipper's corporate entity to which the estate monies were paid on 30 July 2015, was deregistered on 30 July 2017.

The file notes and letters

[34] I mentioned earlier that apparently relevant file notes and letters were located on Mr Slipper's files. One file note, apparently the first in time given the context, appears to be dated 22/2/11. The note reads, to the extent it can be deciphered:

Will of Saundo

Instructions rec'd 9.15AM

P – $\frac{1}{0}$

P lucid – as normal

E & T – my friend RJS

No specific gifts

Benefit : all to E&T distribute at sole discretion to whomever will RJS

I said also to support young footy players through schooling, equip, tours & like.

HAVE NOT provided for "Bitch" of wife Margaret Marie Sanderson nee Bond as we sep on 14/1/10 at which time she returned to Canada – and she adequately provided for during our short relationship. Have commenced Div proceedings as at date of will.

She is a bitch blah blah

→ Remains be cremated & ashes at Allambe Gardens Nerang, & small bronze plaque erected in memory

Discussed charities – not interested at all

Sisters – no

Confirmed P had no children

- In a relationship with Marie (peru) and if marries one day may make provision for her at that time
- Until then to RJS all
- Told him contravenes Conduct Rules – he said it's what I want.

NOTE Peter very precise lucid as always

[35] A note, plainly dated 21/2 reads, again as best I can:

Saundo

21/2

Further notes:

Said to Peter I'll be in the shit because of benefit to me

If you want to leave to me then will should be prepared by another solicitor

Don't like them – except me

Recommended Hoffy, Senior [It is common ground that these refer to two solicitors]

Said he would do when he came back from o/s

Reiterated leave to someone else!

Said: → I've got no kids

→ No wife other than Canadian "bitch"

→ Don't want sisters to get

And I won't leave it to [?government] or charities!!!

I said: DO NOT DIE & change will or get another lawyer or a will kit when get back.

[36] A third note, dated as best I can tell 28/2/11, reads:

8.45 → 9.26

Peter $\frac{1}{0}$ → Read will

- Asked same questions

→ Adamant RJS E&T – no one else

Adamant to RJS/ said I wasn't comfortable with that as not supposed to go to me. Said ? I'd footballers

→ did not want benefit to sisters

→ I enquired about charities or any other purpose – NO!!

Ask about Reds/Suns etc etc

Also spoke about a BFA for Maria – and if gets really serious then will definitely do one doesn't want the same trouble with Canadian slut (Margaret)

Maybe make provision of $100k if stays 5 years

- said that seems reasonable

→ Doesn't like lawyers – except me !!!!

- said going o/s to Peru in day or so so wanted will done Now
- Peter very lucid (as usual) strong minded etc etc

Jess witnessed other girls busy/ N/A

Peter's signature

Will executed copy done for Peter – original in safe custody

[initial of solicitor (presumably) 28/2/11]

Note

Also spoke about EPOA and Advanced Health D. Yeah yeah will do when comes back

[37] Two letters addressed to the deceased were located on the file. Both bear date 28 February 2011. Both record "BY HAND". They are identical, and uncontroversial, save for the following.

(a) In the first paragraph of one version the letter reads: "We refer to the above matter and confirm your instructions for the writer to be the executor of your Will and Trustee of your estate (in the event of your death)."

(b) In the first paragraph of the other version (hereinafter referred to as the "second version" the letter adds after that first paragraph: "…(in the event of your death), not as your solicitor but in the capacity of a private person."

(c) There is added to the second version a second paragraph which reads: "Further I note your clear instructions that until a further will is executed the benefit is to the writer to do with as he chooses including for the benefit of young footballers."

(d) On one copy of the second version there appears a stamped "FILE COPY". On another copy there appears a hand-written note "In Peter's papers at Hope Island" with what is probably the initials of Mr Slipper.

(e) The solicitor's signature on the first version is quite different to the signature on the second version.

Mr Slipper's experience and relationship with the deceased

[38] By 2011 Mr Slipper was a solicitor of some experience. He was 55 years of age and had been admitted for 17 years. He had been in sole practice since July 2004. He claimed extensive experience with wills and estates. He told the Societies' trust account investigator in a letter of 15 September 2014, a letter written for the purpose of responding to the significant concerns raised by the investigator mentioned above about the Saunderson estate, that he had prepared "several hundred wills" and currently held 410 in safe custody.

[39] So far as Mr Slipper's files show he had not acted for Mr Saunderson before 21 February 2011. In the letter just referred to, Mr Slipper said he held the following files for Mr Saunderson:

(a) Application for divorce, opened 21 February 2011;

(b) Property settlement, opened 21 February 2011;

(c) Will, opened 22 February 2011;

(d) Peace and good behaviour opened 1 November 2012;

(e) Estate file, opened 6 May 2013.

[40] Also in the letter appears the following: "I have no notes but say that the file note indicates that I had met him [ie Mr Saunderson] prior to 21 February 2011." No further information is offered of any prior contact.

[41] Despite ample opportunity to do so Mr Slipper has not identified any other contact with the deceased – not in his instructions to senior counsel when seeking advice on the validity of the claimed gift to himself (counsel notes: "From his limited knowledge of the deceased…"), or in any correspondence from his solicitors or himself to the Law Society whose investigator had raised significant concerns about the will, or to the Legal Services Commissioner who sought to have his name removed from the roll.

The standing of the Applicants

[42] The applicants are the sisters of the deceased and his sole surviving family members.

[43] On 28 February 2018 the applicants successfully applied to have Mr Slipper removed as executor and trustee of the estate and were themselves appointed as administrators. Probate of the will was revoked. Orders were then made vesting all the deceased's property in the applicants as administrators and Mr Slipper was ordered to transfer all property of the deceased in his possession or control to the applicant's solicitors. Apparently by then no property remained in his possession.

[44] The respondent points out that these proceedings did not involve the legal practise but were against Mr Slipper personally in his capacity as executor.

[45] Letters of administration with the will were issued to the applicants on 9 March 2018.

[46] The validity of the dispositive clause of the will is in question. If the gift of the residuary estate made under the will is invalid, then the intestacy rules apply. The applicants may, and probably would, take under the intestacy rules.

A Supreme Court action

[47] The applicants made a claim on the fidelity fund in April 2018. The application was disallowed on 14 November 2019. This application for review was brought promptly however the respondent obtained a stay of the application contending that the applicants had not exhausted their remedies against Mr Slipper and his related entities. The applicants then brought action in the Supreme Court against Mr Slipper and his wife. The action against Mr Slipper was brought in negligence, for breaches of executor and fiduciary duties, and in restitution. The claim against Mrs Slipper, in her personal capacity and as trustee of a family trust, sought restitution.

[48] The proceedings were compromised at mediation. Mrs Slipper agreed to pay $190,000 to the applicants and did so. Orders were made by consent on 20 March and 17 April 2017 in summary as follows:

(a) A declaration that Mr Slipper had no entitlement, whether directly or indirectly, to receive any disposition of property under the will from the deceased's estate;

(b) Judgment was entered for the applicants against Mr Slipper in the sum of $1,505,653.08 inclusive of interest;

(c) Judgement was entered for Mrs Slipper against the applicants;

(d) There was no order as to costs and all previous costs orders were vacated.

[49] The applicants have recovered no monies from Mr Slipper. He has made no response to their demands. Property searches indicate he holds no property. He filed for bankruptcy and is now an undischarged bankrupt. The relevant form supporting his filing shows assets in the form of cash held of minimal amount.

Mr Slipper ceases to practise

[50] I mentioned above that Mr Slipper no longer holds a practising certificate. On 19 May 2014 the Legal Services Commission filed an application in this Tribunal to have Mr Slipper's name removed from the roll. Eventually 18 charges were brought, three of which were based on the facts here.

[51] The 15 unrelated charges concern over-charging, or not charging in accordance with a client agreement and the like. Some resulted in findings of professional

misconduct and some unsatisfactory professional conduct. None bear on the issues here and for present purposes they should be ignored.

[52] Following a contested hearing the Tribunal recommended that Mr Slipper's name be removed from the local roll: see *Legal Services Commissioner v Slipper* [2019] QCAT 146 (later referred to as the "strike off application"). While Mr Slipper had his solicitors respond to the other charges brought, in respect of the three relevant to the Saunderson estate Mr Slipper said: "The respondent does not plead to charges 16 to 18 (including the particulars pleaded in support) on the basis of a right to assert a claim to privilege against self-incrimination." I draw no inference from that plea. On 1 July 2019 Mr Slipper was struck off the role.

[53] In relation to the matters here the Tribunal found that that Mr Slipper took in excess of $1 million from the estate when he was not entitled to do so. However the Tribunal was not prepared to find that he did so knowing he was not so entitled. The precise findings on the question of Mr Slipper's mental state when he distributed the monies to himself are at paragraphs [441]-[442]:

> [441] The identified difference between the particulars supporting this charge and those supporting charge 16 was the allegation in paragraph 3.2.6 that the respondent knew or should have known that he was not entitled to take the money which formed the residue of the estate. Reliance was orally placed primarily on s 11 of the *Succession Act*. It is apparent from the diary notes that the respondent believed that he was to receive a benefit under the will. Given the experience claimed by the respondent he ought to have known that, having witnessed the execution of the will, he was not entitled to take the residue of the estate, unless an order was made under s 11(3) of the *Succession Act*.
>
> [442] Mr Rice contended that the charge raised "a conscious decision" on the part of the applicant, and his state of mind. The issue is his state of mind, not at the date when he executed the will, but when he took the estate. The fact that the respondent witnessed the execution of the will, believing he was to take a benefit under it, strongly suggests that he did not advert to s 11 at that time. **Beyond his apparent experience with wills and estates, there is no evidence that the respondent was conscious of the effect of s 11 when he took the residue. The (untrue) assertion of repayment, made in May 2015, is far from compelling evidence of this. The evidence is insufficient to establish that the respondent actually knew he had no entitlement to take the money at the time when he took it.** However, it is a matter which he ought to have known. On that basis, charge 18 is established." (my emphasis).

[54] I mention this reasoning as the management committee relied on it in rejecting the applicant's claim on the fund. It is important to note that the Tribunal in the strike out application assumed that the residuary estate of $1,040,000 was paid out in July 2014 and so the Tribunal concentrated on Mr Slipper's state of mind in July 2014. The agreed facts here are that the final payment out of the law practice trust account by Mr Slipper was a year later. I am concerned with his state of mind then.

[55] It is now known that the two facts underpinning the refusal by the Tribunal to make the finding of a conscious decision by Mr Slipper to take what he knew was not his, referred to in the passage I have emphasised above, do not reflect the true state of affairs in July 2015.

[56] First, Mr Slipper was very much aware of the effect of s 11 *Succession Act* when he distributed the monies from his trust account to Pathways. He had sought and obtained the advice of senior counsel in August 2014 which had specifically dealt with the s 11 point at length.

[57] Secondly, Mr Slipper did pay monies back into his trust account that he had distributed to his wife – see paragraph [29] above. The method he adopted concealed the fact of repayment from the investigators and led to his solicitor conceding to the Tribunal a fact that was not true, namely that Mr Slipper had not repaid any monies as his solicitor had earlier claimed and the investigator had been told – see paragraphs [409] and [405] of the decision. I will discuss the available inferences in due course.

An entitlement under the will?

[58] The principal contested issue is whether the applicants can show that Mr Slipper took the benefit of the residuary estate knowing that he was not entitled to it. It is common ground that the onus of proof lies on them. The standard of proof, while on the balance of probabilities, must bring into account the gravity of such an allegation.

[59] I am not sure that it is seriously contested that Mr Slipper had no entitlement to take the estate, as opposed to having an honest but mistaken belief that he did so. Obviously, if he was entitled to be paid the monies then there can be no relevant default in the law practice paying out the estate monies to him.

[60] In case it is in issue I find that he had no such entitlement.

[61] The applicants rely on the declaration and orders made on 20 March 2017, years after the last payment out in 2015, in the proceedings they brought against Mr Slipper and his wife, declaration and orders made by consent, that Mr Slipper had no entitlement directly or indirectly to receive any disposition of property from the estate and his consenting to judgement in a sum in excess of $1.5 million.

[62] I entertain considerable doubts that declarations and orders made by consent, so not after a forensic dispute with judicial findings, and in another forum, and with one of the parties in this litigation not represented or heard, binds the result here. The principles underlying res judicata, issue estoppel, and *Anshun* like estoppel simply are not engaged.

[63] The assumption seems to be that Mr Slipper would not have agreed to these orders and declaration unless they were plainly right. That does not necessarily follow. While his consent to these orders is consistent with the applicant's' case and inconsistent with the action expected of an honourable solicitor, as the respondent contends there were commercial reasons at play. Mr Slipper could have good reason to compromise and consent to orders that have nothing to do with the merits of the action. First, he saves costs. Secondly, he may have first ensured that the bulk of the monies were beyond the reach of the applicants, so the declarations and orders sought were irrelevant to him. Thirdly, and allied to the previous point, he may well

have anticipated then precisely what has occurred and simply organised his affairs to end in bankruptcy. Again, the orders and declaration do not affect him. Fourthly, by the time of the compromise he already faced 15 charges brought by the Legal Services Commissioner (not the three relating to this matter) and he might well have thought his chances of retaining his right to practise were slim and unlikely to be much further damaged by these concessions.

[64] For these reasons I decline to simply adopt the effect of the consent declaration and orders. It is necessary then that I reach my own conclusion as to the effect of the will.

[65] Was the payment out authorised by the will? The competing possible constructions are that clause 3 left the residuary estate on trust to Mr Slipper as executor and trustee to hold on trust for the beneficiaries or alternatively gave to him personally the benefit of the residuary estate. In either case, there are insurmountable difficulties in the way of Mr Slipper having an entitlement to the residuary estate.

[66] The proper construction of the dispositive clause was carefully considered in the strike off application. There is no new argument here. The Judicial Member, Peter Lyons QC (as he then was), explained why the preferable construction was that the clause did not leave the residuary estate to Mr Slipper beneficially but rather on trust, and why that trust was void for uncertainty. I agree with all that the Judicial Member has written there – see particularly at [429].[1]

[67] I consider it to be trite law that to be valid the beneficiaries of a non-charitable trust must be identified with sufficient certainty. Margaret Wilson J summarised the law in *O'Brien & Anor v Smith & Anor* [2013] 1 Qd R 223; (2012) QSC 166:

> [26] The requirements for a valid trust are described in Jacobs' Law of Trusts in Australia:
>
> "There are four essential elements present in every form of trust: the trustee, the trust property, the beneficiary or charitable purpose, and the personal obligation annexed to property."
>
> [27] With some exceptions (principally charitable trusts), any trust must have a beneficiary (or object), and a purported trust without a beneficiary is void. The degree of certainty with which the beneficiaries of a private trust must be identified varies according to whether it is a fixed trust or a discretionary trust.
>
> [28] The beneficiaries of a fixed trust must be identified with sufficient precision to satisfy "list certainty" – i.e. it must be possible for the trustees, or the Court in their stead, to identify all of them.
>
> [29] In the case of a discretionary trust, the beneficiaries must be defined with sufficient certainty to satisfy "criterion certainty" – i.e. it must be possible to say with certainty whether any given individual is or is not a member of the

[1] *Legal Services Commissioner v Slipper* [2019] QCAT 146

> class of persons intended as beneficiaries, even though it may not be possible to identify every member of the class. Nevertheless, their definition must not be:
>
> "... so hopelessly wide 'as to not form anything like a class' so that the trust is administratively unworkable or ... one that cannot be executed."
>
> (citations omitted)

[68] The evident purported intention of clause 3 was to create a discretionary trust. The class of beneficiaries, to the extent they are defined in clause 3 ("to whomever, including the support of young footballers through schooling, equipment, tours and the like"), is "so hopelessly wide 'as to not form anything like a class'", hence the trust is void.

[69] I remain of that view even if the extraneous materials are brought into consideration under s 33C *Succession Act* for the reasons explained by Peter Lyons QC in the strike off application.

[70] But even if I am wrong in that and the proper construction of clause 3 was to leave the estate to Mr Slipper beneficially the gift is rendered void by s11(2) of the *Succession Act* as Mr Slipper was an interested witness. Section 11 provides:

> **11 When an interested witness may benefit from a disposition**
>
> (1) This section applies if a disposition of property is made by a will to a person (the ***interested witness***) who attests the execution of the will.
>
> (2) The disposition is void to the extent it concerns the interested witness or a person claiming under the interested witness.
>
> (3) However, subsection (2) does not apply if—
>
> (a) at least 2 of the people who attested the execution of the will are not interested witnesses; or
>
> (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition under the will and have the capacity to give the consent; or
>
> (c) the court is satisfied that the testator knew and approved of the disposition and it was made freely and voluntarily by the testator.

[71] No application has ever been made to the court to satisfy subsection 11(3)(c). Subparagraph (3)(a) does not apply. Absent the consent of the persons identified in s 11(3)(b), until such an application was made, and the ruling of the court obtained, the gift was void. There was an argument about subparagraph 11(3)(b) to which I will come. As will be seen I find that such consent was not obtained.

An honest belief?

[72] That then brings me to the principal point argued. In July 2015 Mr Slipper as solicitor paid monies from his trust account to himself beneficially. He was not

authorised by the will to do so. Did he have an honest belief at the time of payment that he did have such authority? Before embarking on a consideration of the evidence I acknowledge the difficulties the parties are under. The inquiry is into Mr Slipper's state of mind, and he has provided virtually no assistance to the authorities and none to the parties. Thus, the task is to consider the inferences that can be drawn from the available evidence.

[73] Before embarking on an analysis of the evidence I record that both parties referred to the High Court decision of *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 and the discussion there of the concept of "dishonesty". The LPA itself merely provides in the definitions schedule that "dishonesty includes fraud". The various judgements make clear that "dishonesty" is an ordinary concept and not a term of art. Most helpful for present purposes is the reference made by each of Gaudron J [55] and Hayne J [121] in their separate reasons to the judgment in *Peters v The Queen* (1998) 192 CLR 493 at 503 [16] that "in most cases where honesty is in issue, the real question is whether an act was done with knowledge or belief of some specific thing or with some specific intent." The focus here is on Mr Slipper's knowledge or belief as to his entitlement to pay himself the monies held on trust by his practise to the benefit of the deceased estate.

[74] As mentioned, the Tribunal expressly declined to make that finding of dishonesty when considering the actions of Mr Slipper in the strike off application. Again I do not consider that I am bound by the findings there and no submission was made that I should be. Apart from the fact that the parties here were not before the Tribunal then, the evidence before me differs.

[75] The Law Society contends that there was no relevant dishonesty here, or at least that the applicants cannot demonstrate that Mr Slipper was dishonest to the required standard of proof, bearing in mind the gravity of the allegation. The evidence is consistent, so it is submitted, with Mr Slipper having an honest belief (with his solicitor hat on) that he was entitled to pay monies to himself in his capacity as beneficiary.

[76] The Law Society points to the following matters as being entirely consistent with Mr Slipper honestly believing that he was entitled to make the payments from the trust account that he did:

(a) The contents of the two file notes of 22 and 28 February and the two letters dated 28 February earlier referred to which evidence an intention by the deceased to leave his estate to Mr Slipper personally, and particularly the second version of the letter which reads: "I note your clear instruction that until a further will is executed the benefit is to the writer to do with as he chooses including for the benefit of young footballers";

(b) After distributing the sum of $1,040,000 from the estate account he had created to an account in his wife's name (as trustee for a family trust) on 11 July 2014 he caused such sum to be repaid to the trust account on 28 July 2014 during the Society's investigation of him. This payment was made in the context that the investigator suggested to him he should do so and in his report (dated three days later), the effect of which he had already plainly communicated to Mr Slipper, considered that the validity of the will was in question and concluded that "Pending the order of the court or the informed consent of beneficiaries entitled under the intestacy rules the whole amount

distributed to the legal practitioner director should be repaid to the trust account." Mr Slipper evidently took on board the investigator's comment.

(c) Following receipt of the investigator's report Mr Slipper sought senior counsel's advice, mentioned above, regarding the validity of the will, the validity of his receiving a benefit under the will, and the likelihood of the Legal Services Commissioner being successful in disciplinary proceedings due to exceptional circumstances. The seeking of that advice is consistent with him acting honestly.

(d) Only after receiving that advice, on 30 July 2015, did Mr Slipper then transfer the sum of $1,030,760 to Pathway's account from the estate account. The advice from senior counsel, it is said, was critical to Mr Slipper's state of mind as at 30 July 2015 when the payment was made. Senior counsel had drawn attention to s11 and so to the alternatives open to Mr Slipper being an interested witness.

(e) While no application was made to the court under s 11(3)(c) that was not the only path open to avoid the voiding effect of s 11(2) and honestly securing a benefit under the will under s 11. Mr Slipper could secure the written consent of the beneficiaries under s 11(3)(b). He did so, it is asserted, when settling the two claims made against the estate by the potential "widows".

[77] The applicants contend that these arguments are hardly convincing and overlook significant matters. The applicants' case is that while no one thing they can point to establishes a knowing and dishonest intent, the overall effect of the web of circumstances leads to the conclusion they contend for.

[78] I agree.

[79] I commence with the terms of the will itself. Mr Slipper was perfectly aware that he was not permitted to take a substantial benefit under any will that he drew. His own file note says that. If his file notes of the instructions he received accurately reflect those instructions, then he believed at the time he drew the will that he was to take the entire benefit of the estate. He therefore was required to send the deceased away. Rule 10.2 is perfectly plain – he must decline to act. Yet he did not do that. That provides some insight into his character. Alternatively, if the file notes do not reflect the deceased's instructions then it was not the case that all, or any, was intended to go to Mr Slipper. I do not assume that the notes are false – the bulk are plainly not - but the possibility that parts may be is not excluded by any incontrovertible fact or sworn evidence. I leave to one side the decidedly odd feature that one file note (dated 21/2) predates what seems to be the initiating instruction recorded in a file note seemingly dated 22/2/11 as I received no submissions on the point. I note that in his letter of 15 September 2014 Mr Slipper claimed to have received instructions on 21 February 2011.

[80] Next, the dispositive clause is odd. If the deceased wished Mr Slipper to take the entire residual estate that was a straightforward clause to draw. Yet nowhere does Mr Slipper's name appear as beneficially entitled. Perhaps to a lay person's eyes the discretionary trust created seems appropriate to have the estate distributed to young footballers or other worthy recipients. What the clause does not do is draw attention to the possibility that the whole estate is to go to the solicitor drawing the will. This has the effect of potentially concealing that fact from the testator and also from a Registrar of the court who might scrutinise the will later.

[81] These two points, of course, bring into question Mr Slipper's motivations from the outset of his instructions. It is not necessary for the applicants to succeed that they demonstrate a dishonest intent from the outset. And if all that was known were these two matters, no inference of dishonest intent could be drawn. I observe, however, that the facts that the deceased was in the process of divorcing his wife, had no offspring, had no interest in benefiting his siblings (which I assume is true as the applicants do not offer any evidence to the effect that they were close to their brother), intended to go overseas to commence a new life and relationship, and wanted to prefer strangers in his will, provide the almost perfect circumstance for a dishonest solicitor to seek to benefit from the estate, without much expectation of contest, and despite the testator's wishes.

[82] The one strong fact that suggests no dishonest intent at an early stage is the circumstance that Mr Slipper witnessed the will. That assumes Mr Slipper was aware of the prima facie voiding effect of s 11 *Succession Act*. Of course, if he was ignorant of that voiding effect at the time then this fact is a neutral one. His file notes suggest that he witnessed the will as none of his usual staff were available ("other girls busy/ N/A"). Another argument against any early formation of a dishonest intent is that any gift was probably a long way off - the deceased was relatively young (he died aged 60, two years later) and, so far as known, with no health problems known to him at the time (he died from multiple organ failure associated with metastatic cancer).

[83] Next, there is the decidedly odd circumstance of the two letters, both bearing the date on which the will was executed, in identical terms save for the two very important differences. Both those additions go to this issue of Mr Slipper taking under the will. The applicants' submission is that a possible explanation for the two letters is that upon receiving notice of the death and determining to take the benefit of the estate Mr Slipper sought to bolster his case that he was the intended beneficiary and so created the second version then. Counsel for the respondent could not suggest any reason for there being two letters. The inescapable point is that the existence of the second version is consistent with the hypothesis that Mr Slipper sought to bolster the case that the testator intended to benefit him personally. Why he thought he needed to do so, and when this thought occurred to him, are unknown. When the second letter came into being is unknown. The signature is quite different on the second version consistent with it being written at a different time. There is no evidence to support the truth of the handwritten note to the effect that the second version of the letter was located at the deceased's home. The effect of the letter plainly would be to assist any application under s 11(3)(c) of the *Succession Act*.

[84] Next, when Mr Slipper learns that Mr Saunderson has died the first step that he was obliged to take – record the date of death in his register of wills and estates – is not taken. An oversight by someone in his office? Possibly, but no explanation was put forward to the investigators (nor suggested to this Tribunal) to explain the processes in the office and how they could have failed. It remains an inexplicable failure of what should ordinarily be watertight procedures. The failure to record the death conceals the fact that Mr Slipper had, or should have, commenced the administration of the estate. Obviously trust account auditors may check this record in determining what files to call for.

[85] Next, Mr Slipper swears an affidavit supporting the probate application. The affidavit was plainly misleading. He should have disclosed that he had drawn the

will and that on his view he considered himself the sole beneficiary under the will. Mr Slipper was aware of the conduct rules and aware he should not have drawn a will under which he enjoyed a significant benefit. So much is evident from his file notes. Thus, he knew of matters that pertained to his fitness to carry out his executorial duties that he failed to reveal to the Court – namely his position of conflict in respect of those who may have had a claim on the deceased's bounty. I am confident that had Mr Slipper revealed the true position, not only that he had drafted the will, that he was the executor under the will, and that he had witnessed the will, but that on his interpretation of the will he took personally the entire residuary estate of over $1,000,000, the Registrar would not have granted probate. The conflicts involved were manifest. I am confident that the profession is very much aware that there are many thousands of applications for probate every year and that the Court relies heavily on the profession to bring to its attention any matters of concern. Given his experience it would be surprising if Mr Slipper did not know this. On its face no benefit passed to Mr Slipper under the will. Even an extremely astute Registrar was unlikely to perceive the massive conflict here. In my view the inference is plainly open that Mr Slipper appreciated this and assumed that, if he said nothing, he had a reasonable chance of obtaining probate.

[86] Next, despite numerous transactions involving nearly $2,000,000 of trust monies, nothing appears in the trust ledgers. Again, that omission remains unexplained. Mr Slipper had ample opportunity to explain what is a startling omission. And the effect of those omissions was to make it significantly more unlikely that the trust account auditors would call for the file. Again, I am confident that someone of Mr Slipper's experience would be well aware of how the auditing systems worked. The material shows he had been audited before. Again the inference is plainly open that there was an attempt to conceal these transactions from the auditors.

[87] Among those payments out of trust were the two sums of $250,000 to the divorced spouse and to the de facto. The position of the former wife can be put to one side. It is common ground that she and the deceased divorced prior to his death. She had no entitlement as a spouse. I observe that in the settlement letter sent to the Federal Circuit Court seeking consent orders to be made the size of the estate is expressly mentioned.

[88] There is no mention in the Deed of Settlement with the de facto of the size of the estate. There is no mention that Mr Slipper is beneficially entitled as opposed to holding the estate on trust. There is no mention that the benefit to him will be in excess of $1,000,000. Significantly for present purposes the Deed does not record that the de facto consented "to the distribution of the disposition under the will".

[89] These matters will be relevant when considering counsel's advice.

[90] Next, Mr Slipper tells the investigator, after the investigator had discovered the file, determined the ethical breaches, and questioned the validity of the dispositive clause, that he had repaid the monies to trust. What he did not tell the investigator or indeed anyone else, was that he repaid the monies to his trust account in his name, not back to the estate. Plainly the investigator's suggestion that he repay the monies was intended to protect the true beneficiaries of the estate in case Mr Slipper was not a proper beneficiary. Mr Slipper could not but have understood this. Yet he pays the money back on trust for himself. I do not see that an honourable solicitor who thought he may have made a mistake in his handling of the will would do that.

[91] The explanation for this sleight of hand must remain in the realms of speculation but it had the effect of preserving to an extent Mr Slipper's position however matters transpired. He could argue he had done the honourable thing, more or less, and repaid the monies to preserve the position of the true beneficiaries. He could argue that he had acted in accordance with his honest belief that he was entitled to the monies. He could argue in mitigation of penalty. And if all his problems blew over, he could pay himself the monies perhaps with no one the wiser. His action had the effect of successfully concealing the repayment from the investigators. In a sense it was to Mr Slipper's disadvantage that the Tribunal in the strike off application thought that he had lied about the repayment. But it was a disadvantage that he was obviously prepared to suffer and, as it turned out, had no effect on the findings on the strike off application, if that was ever a concern.

[92] A further point is that upon receipt of the investigator's report Mr Slipper could, as the applicants submit, have applied to the Court for guidance as to the efficacy of the gift to himself under s 96 *Trusts Act 1973* or s 6 *Succession Act 1981*. He did not do so.

The effect of senior counsel's advice

[93] The next event is crucial to the arguments here.

[94] Mr Slipper seeks senior counsel's advice. The respondents advance two arguments. First that the seeking of advice is an indicium of good faith. That is what an honest solicitor might well do. Secondly, that counsel's advice supplied the necessary basis for an honest belief that Mr Slipper was entitled to take the monies in trust.

[95] I agree with the first point, provided counsel was given all the facts and relevant documents and asked to address the relevant questions. It is not known what counsel was given as no brief to counsel has ever been located. In the advices counsel sets out his understanding of the chronology and relevant facts. He assumes the correctness of his instructions. However there are some indications that counsel was not given all the original material, as opposed to being asked to assume things, and so did not have the full picture:

(a) There is no statement showing any awareness of the existence of the two versions of the letter of 28 February – only the second version and its important additions are quoted. Given that senior counsel was aware of the principles set out in *Nock v Austin* (1918) 25 CLR 519 per Isaacs J which he quotes – that "the circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will" – the failure to address the implications of the two versions of the letter suggests very strongly that he did not know of it. That circumstance would require some explaining and make the task of discharging the suspicion all the harder.

(b) There is no discussion of the failure to properly maintain the will register or to record the trust ledgers. Again that goes to the suspicion issue. Counsel could hardly think those issues are irrelevant.

(c) There is no awareness in the advices of the investigator's concern as to how probate was obtained and what the investigator considered to be the misleading affidavit in support - which is nowhere mentioned. The question of

the obtaining of probate is dealt with in a few lines and with no examination of the failure to draw to the court's attention the manifest conflicts. That is puzzling. It may be that the investigator's report was not yet to hand although it is apparent that the investigator discussed his concerns with Mr Slipper in the course of his investigations and before his written report was completed; and

(d) On the crucial question of the satisfaction of s 11(3)(b) counsel says in respect of both the divorced wife and the de facto that they **implicitly** knew of the size of the estate. That statement is simply wrong in relation to the divorced wife. There the size of the property pool is expressly mentioned and indeed the percentage range in which the proposed settlement fell. Of course, even senior counsel can make slips.

[96] Certainly if it be assumed, as counsel did, that the file notes are accurate and the second version of the letter of 28 February 2011 was given to the deceased before he executed the will, and that was all that was known, that would provide a strong basis for satisfying a court that the requirements of s 11(3)(c) were met – "that the testator knew and approved of the disposition and it was made freely and voluntarily by the testator." Despite the ethical breaches the gift would stand: *Dore (as executor of the will of WHB Chenhall (dec'd)* [2006] QCA 494 at [53]-[55]. Whether an application to the court either for probate or under s 11(3)(c) would have been successful given the suspicion that the court brings to such enquiries and given the many disturbing features that I have discussed, and which counsel does not discuss, is another matter.

[97] I turn then to the respondent's argument that there was no need for an application to the court under s 11(3)(c) because Mr Slipper could honestly believe, and did(or at least it is not shown that he did not) that he had the consent of the potential beneficiaries on intestacy and so came within subparagraph (3)(b). Senior Counsel advised, after assuming the prospective beneficiaries implicitly knew of the size of the estate: "While it is clear there is no express consent, I believe that it is clearly arguable that the implication of the settlement with each of [the divorced spouse] and [the de facto] is that they impliedly consented in writing to the distribution of the deceased's estate to Slipper."

[98] In my view that advice is plainly wrong. I appreciate that is not the issue here. Rather it is whether Mr Slipper honestly believed it to be right. But the defects in reasoning are profound.

[99] First, the Deed is directed not to the de facto's entitlements if the dipositive clause be found to be void because Mr Slipper is an attesting witness. Rather it is directed to her entitlements on a family provision application. There is no recognition that the entire estate might fall to be disposed of under the intestacy rules nor any recognition of the de facto's putative rights under those rules.

[100] Secondly, there is nowhere mentioned in the Deed that Mr Slipper is to take the entire residual estate beneficially. It is the disposition to him that must be consented to. That he takes the entire estate is not revealed. Rather the dispositive clause is quoted with its concealment as to who the real beneficiary is to be. It is one thing for a putative spouse to give way to worthy beneficiaries preferred by the deceased (such as even young footballers). It is quite another to do so in favour of a person who was a virtual stranger to the deceased. And it is noteworthy that in the letter sent to the Registrar of the Federal Circuit Court, at about the same time as the Deed

was drawn, the identity of the beneficiaries is not revealed. Mr Slipper was evidently not inclined to reveal the receipt of a substantial gift under the will.

[101] Thirdly, there is no mention of the size of the estate. No basis is offered as to why a court would be satisfied that the de facto implicitly knew of the size of the estate. Presumably, counsel assumed that because the de facto was apparently represented by a firm of solicitors based in Queensland (as their name appears on the Deed as representing her) they would have ascertained the size of the estate in advising her to compromise. Nothing is known of their instructions – that is, were they asked to advise? If they did make enquiry there is no evidence of what they were told. One would normally expect that such an important matter to be recorded in the preamble to the Deed but it is not. Such a recital would be very effective in protecting the estate from further claims by the putative spouse on the basis she had been misled. I observe that if the de facto could establish a claim as the spouse of the deceased, and the gift under cl 3 of the will was void, the de facto would be entitled to the entire estate on an intestacy: see s 35(1) and Schedule 2 Part 1 *Succession Act 1981* (Qld).

[102] If the de facto assumed Mr Slipper took beneficially and appreciated the size of the estate, as counsel assumes, then the de facto was potentially giving up at least $1,000,000 if she was the spouse for the purpose of Queensland law. I say "at least" as in the proceedings in the Family Court the property pool is said at the lower end of estimates to be between $1,800,0000 and $2,000,000. There is nothing in the Deed of Settlement to show that the de facto appreciated any of this.

[103] Fourthly, there was no evidence available to counsel, and there is no evidence before me, as to the advice the de facto received.

[104] The notion that a Court would accept that an implied consent was shown by the execution of the Deed in these circumstances is fanciful. It is fundamental that any consent must be an informed one. Mr Slipper was in a fiduciary position. He could not prefer his interests to those to whom he owed the duty without their informed consent: *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 199 [78] per McHugh, Gummow, Hayne and Callinan JJ: "the fiduciary is under an obligation, **without informed consent**, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the fiduciary and those to whom the duty is owed." (my emphasis)

[105] So far as the Deed shows the de facto was ignorant of every essential fact to make an informed decision and so provide an informed consent to the disposition.

[106] If Mr Slipper had selectively set out the facts he wanted counsel to adopt then he might have entertained some doubt about the accuracy of counsel's advice on the point. But that is not known. What is known is that he did not appear to act on that advice.

[107] But even accepting that advice was accurate, counsel does not go so far as to assert that the assumption of implied consent by the de facto was the end of Mr Slipper's difficulties. There remains the problem that the de facto may not have any entitlement at all to the estate. So far as counsel's recitation of the facts show he had only a very limited knowledge of matters relevant to that central question - whether the de facto could in fact show that she was the "spouse" as defined in s 5AA(2) *Succession Act*. Nowhere does counsel deal with the issue. He does not advert to the

indicia in s 32DA of the *Acts Interpretation Act 1954* and indeed it seems he knew very little about the relationship.

[108] To qualify as a "spouse" the legislation requires that the de facto relationship be in existence for two years prior to death. Could the de facto show this?

[109] There is no recital in the Deed of any fact that would enable a Court to form a view as to the de facto's prospects of establishing her entitlement as a spouse. What was known to counsel, and, so far as the files kept by Mr Slipper show (and it seems obvious all is not now available eg the passport referred to by counsel is not apparently available now), to Mr Slipper, is this: the summary contained in the Family Law proceedings states that the deceased separated from his wife in January 2010; the deceased went to Peru to take up a life with the de facto on 4 March 2011 whom he had met previously, and he died on 30 April 2013 – a period of two years and just shy of two months; it is not known when the deceased met the de facto or what relationship there was between them prior to him travelling to Peru in 2011, or indeed when living in Peru; the deceased returned to Australia from Peru, but it is not known when; he saw Mr Slipper on 30 October 2012 regarding an upcoming Magistrates' Court hearing according to the assumptions made by senior counsel; he died in Peru; it is not known when he left Australia and travelled back to Peru where he died. That, as best I can glean, is the sum total of the knowledge available. If the de facto did qualify, then she barely did.

[110] On the information available no lawyer could possibly have assumed that the de facto would certainly qualify under the legislation. That is reflected in the amount of the settlement of her claim and the uncertainty of litigation is mentioned in the preamble. The point is that absent certainty as to the de facto's entitlement as spouse the potential beneficiaries on intestacy were the siblings, a fact senior counsel recognised. To be confident of satisfying the requirements of s 11(3)(b) it was their consent that was needed as well as that of the de facto. That too counsel recognised. Their consent was never sought. Again a fact recognised in counsel's advice.

[111] Having recognised these limitations on the s 11(3)(b) point counsel then turned to s 11(3)(c) and expressed his view on the prospects of a court finding in favour of the disposition there. His view was a positive one.

[112] Thus, counsel had not expressed an unequivocal view that Mr Slipper had obtained all necessary consents and in my view, no lawyer could construe his advice as doing so. At its highest counsel claimed the point was "clearly arguable" that Mr Slipper had the de facto's implied consent (while not exploring the arguments for and against) but pointed out he lacked the consent of other prospective beneficiaries, and so turned his attention to the only remaining way of avoiding the effect of s 11(2).

[113] Further the applicants point out that it seems Mr Slipper did not take the view himself that he had the necessary written consents. In response to the assertion in the Statement of Claim at paragraph 31(b) that the "purported disposition is void pursuant to section 11 of the *Succession Act 1981* (Qld)", Mr Slipper pleaded at paragraph 31(a)(v) of his Defence that "the deceased knew and approved the contents of the will, including the disposition clause, within the meaning of section 11(3)(c) of the Succession Act". Nowhere in the Defence, or in any communication, did Mr Slipper assert that he believed that he had the written consent of all potential beneficiaries.

[114] That is sufficient to dispose of the respondent's argument set out in paragraph [76](e) above. I find that by this settlement deed with the de facto Mr Slipper did not satisfy the requirements of s 11(3)(b) *Succession Act*, nor did he believe so, nor could he have honestly believed so.

[115] Finally, there is this striking feature. After obtaining counsel's advice Mr Slipper does nothing for nearly 11 months. If the assumption be that despite his extensive experience with wills and estates Mr Slipper was ignorant of the provisions of s 11 *Succession Act* and unaware that a gift to a witness of the will was prima facie void, then that assumption was gone on receipt of counsel's advice. He knew then he had either to obtain the consent of the beneficiaries who would take on an intestacy or he had to seek the order of the court. He did neither. In my view that is telling. Counsel had told him that he should be successful on an application under s 11 to the court. The respondents submit that Mr Slipper is an honest man, under the honest belief that the testator intended for him to take his substantial estate, and he has now been told you must make this application. Yet he does not take that necessary step. If he was an honest practitioner there was not the slightest reason not to make the application – apart from his prospects of success. His actions suggest his view of his prospects were a lot less sanguine than counsel's. Eventually he pays out the monies sitting in his trust account to himself. By then he knows that he is not entitled to do so. I cannot see that any other inference is open save that he knew he was not entitled to the gift and decided to take it.

[116] Why the lengthy wait? There is no evidence on the point but the effect was that Mr Slipper had time to consider the many charges he faced and his likelihood of remaining in practice, and he had time to ascertain whether any other possible beneficiaries, such as the applicants, might emerge to contest the gift and none did. It is known that he received notice on 24 February 2015 that the Legal Services Commissioner intended to investigate the Saunderson estate file which resulted in the three further charges and by far the most serious charges being brought against him. Perhaps the time was seen by him as opportune.

[117] It is worth noting the many assumptions of incompetence and ignorance that underlie the attempt to demonstrate that Mr Slipper held an honest but mistaken belief as to his entitlement. Perhaps he did not realise that the conduct rules forbade him to act if he was to take a substantial benefit rather than require him to merely suggest some alternative solicitors (although his file note suggests he was so aware – "Said to Peter I'll be in the shit because of benefit to me"; "If you want to leave to me then will should be prepared by another solicitor"); perhaps he was ignorant of the rule concerning interested witnesses; perhaps he was unaware that the dispositive clause that he drew established a trust and was so hopelessly wide that it would inevitably be held void for uncertainty if challenged; perhaps despite the deceased's plain instructions he felt too modest to put his own name into the will as a beneficiary; perhaps he did not perceive the massive conflict he was in when seeking probate; perhaps he conducted an office so incompetently run that deaths of deponents of wills held in custody and distributions of trust monies went unrecorded; perhaps it is a coincidence that the records he failed to keep had the effect of hiding the benefit under the will from the auditors. Perhaps all this ineptitude just happens to coincide with the gift of a fortune of over $1,000,000 and that from a relative stranger. It can be said in his favour that senior counsel found a way to gloss over some of these difficulties. For myself, to accept all this is to accept improbability piled on improbability. Given that Mr Slipper did not follow the

advice he had been given I suspect that he too thought that all this would be too much for any court to accept should he make the application counsel advised.

[118] On the other hand, if there was a perfectly competent and informed but dishonest mind at work, all becomes perfectly plain.

Default

[119] I turn to the respondent's second argument. The applicants rely on paragraph (a) of the definition in s356. They contend that the legal practice received trust monies for the purpose of paying those monies to the estate or the beneficiaries entitled under the will. It is now known that the practise did not do so. In paying out those monies to the nominee of Mr Slipper the practice actioned an "invalid instruction". Had the practice not done so the monies would have remained in the trust account and so have been available on 28 February 2018 when the applicants became administrators. So the submission goes.

[120] In support of the submission the applicants refer to the decision of the High Court in *Legal Services Board v Gillespie-Jones* and the minority judgement at [133]:

> "...There is a default within the meaning of the Part where a law practice, by reason of the dishonesty of an associate, fails to pay or deliver trust money according to the mandate on which the trust money was received and is held by the law practice. The default lies specifically in that failure to pay or deliver trust money, not in any broader pattern of dishonest conduct of which that failure might form part."

[121] The applicants assert that the law practice failed "to pay or deliver trust money according to the mandate on which the trust money was received and [was] held" by the practice. That mandate is to be found in the instructions in the will. That failure came about because of the dishonesty of an associate of the practice.

[122] The respondent Law Society submits that a fundamental flaw in the applicants' argument is that there was no relevant instruction to the legal practice to pay or deliver trust monies to the applicants. The Law Society relies on the statement of principle in the majority judgment in *Gillespie-Jones* at [56]. After observing that "[N]either a proprietorial interest nor any entitlement to the trust money or property is required, beyond the fact that, but for the default, the trust money or property would have been paid or delivered to the person" the majority said in relation to that statement:

> [56] A qualification is necessary with respect to the last statement. A person will not have suffered pecuniary loss as a result of a default merely because, had monies not been misappropriated, there would have been sufficient trust money to meet the person's claim. This seems to us to be the approach taken by her Honour the primary judge. There can be no "failure to pay or deliver" trust money or property unless there is an extant instruction to the practice to pay or deliver the money or property, and it is not complied with. The instruction must necessarily be to pay or deliver the trust money or property to an identifiable person. It is that person who will suffer loss if the instruction is not complied with.

[123] The Society submits that there was no such extant instruction here – to the contrary the instruction received from the executor named in the will was to pay out to the nominee Pathways Pty Ltd. The submission reads:

> "… to the extent that the applicants contend that the "extant instruction" to the law practise was contained in the will, the will contains no such instruction. Rather, the will appoints Mr Slipper as the executor and trustee of the deceased's estate and contains distribution and other provisions, none of which comprises any instruction to the law practise to pay any trust monies to the applicants."

[124] The Society points out that the applicants were appointed administrators years after the trust monies were paid out, they therefore had no entitlement to be paid the monies in 2015 when the law practice paid out the estate monies to Mr Slipper's nominee, that there can be no failure to pay monies by the time the applicants were appointed as no trust monies were by then held by the law practice, and that the monies were in fact paid out in accordance with the instructions of the named executor and trustee. Thus it is said there can be no relevant "default".

[125] In my respectful view, there are two errors in the respondent's submission.

[126] The first is that the respondent's submission that there needs to be shown an "extant instruction" directed to the law practice to pay monies to the administrators misunderstands the effect of the majority view in *Gillespie-Jones*. The majority did not, in my respectful opinion, intend to say, and nor did their Honours say, that an applicant must always demonstrate an "extant instruction". Rather the point of the passage cited was that if no proprietorial interest or entitlement to the trust money or property could be shown, then it became necessary to prove an extant instruction to demonstrate default within the meaning of s 356 LPA.

[127] The passage cited was directed to the particular problem in the case. There the barrister was claiming that because of the defalcations made by the solicitor he had not been paid – that is that the depletion of the monies held on trust by those defalcations resulted in his loss. He could not say that any particular fund was impressed with a trust in his favour, but only that there would have been enough left over for him to be paid had the solicitor not acted dishonestly. The fact that the client had paid monies into trust expecting that expenses incurred by the solicitor on his behalf (such as barrister's fees) would be met did not give the barrister any proprietorial interest or entitlement to those monies. Hence, he needed to show an "extant instruction" in his favour and he could not.

[128] The facts here are very different. Here the applicants can show an entitlement to trust money absent any extant instruction – the trust is created in the applicants' favour by the terms of the will and the subsequent order of the Court whereby they replaced the trustee nominated in the will. No further "extant instruction" is necessary. The monies were received by the law practice for the benefit of the deceased estate and continued to be held by the law practice for the benefit of that estate. By order of the Court the applicants stand as the persons entitled to receive the assets of the deceased estate. True they achieved that status long after the payment out. But absent Mr Slipper's dishonesty the trust monies would remain in the trust fund for the benefit of the rightful beneficiaries.

[129] The second error in my respectful view is that the respondent mischaracterises the claim brought. The respondent's arguments centre on the timing of the appointment

of the administrators. The arguments are that by the time the administrators had been appointed the estate had been fully administered in accordance with Mr Slipper's instructions (to himself), such that no trust monies were, by then, held by the law practice, so that there could then be no failure to pay to the administrators and so no "default" as defined.

[130] In my view those arguments are misguided. Here the law practice paid out trust monies to someone who was not entitled to those monies. The associate of the law practice who made that payment knew that the recipient was not so entitled. The converse to the action of paying out trust monies to a person not entitled is that you fail to pay to those who are entitled. Here the payment out was done dishonestly and so the resultant failure to pay to those who are entitled is brought about by a dishonest act.

[131] Hence the claim here is that the law practice failed to pay trust monies to the persons rightfully entitled to those monies – presently the administrators. The cause of that failure is integral to the claimed "default". The default occurred on 30 July 2015 and continues. But for that wrongful payment out by Mr Slipper to his own nominee in July 2015 the monies would be still held to the benefit of the estate and the rightful beneficiaries, held in trust by the executor named in the will until 27 February 2018 and thereafter, by order of the court, by the applicants as administrators. That claim falls squarely within the definition of "default" and is made out.

Abandoned submission

[132] The respondent did not maintain its submissions that the amount sought to be recovered was reasonably available from some other source – see s 385 LPA.

Conclusion

[133] There is no doubt that the applicants have suffered pecuniary loss by reason of the claimed default.

[134] In my opinion the applicants have satisfied the elements of s 374 LPA.

[135] Subject to any submissions from the parties as to the proper orders I order:

(a) The application is allowed.

(b) That the applicants' claim on the Legal Practitioners Fidelity Guarantee Fund in the sum of $840,760 be admitted.

(c) That the sum of $840,760 be paid out to the applicants in their capacity as administrators of the estate of Peter James Saunderson (deceased) from the Legal Practitioners Fidelity Guarantee Fund together with interest on that amount pursuant to s 384 LPA from 30 July 2015.

(d) That the respondent pay the applicants' reasonable legal costs of making and proving the claim pursuant to s 383(1) LPA.

[136] The parties have 14 days to make further submissions as to the orders that should be made in accordance with these reasons.