SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Nichols* [2018] QCA 158
PARTIES:	**LEGAL SERVICES COMMISSIONER** (appellant/cross-respondent) **v** **GEORGE NICHOLS** (respondent/cross-appellant)
FILE NO/S:	Appeal No 9789 of 2017 SC No 3668 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 175
DELIVERED ON:	6 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2018
JUDGES:	Fraser and McMurdo JJA and Flanagan J
ORDERS:	**1. Appeal dismissed.** **2. The appellant to pay the respondent's costs of the appeal.** **3. Cross-appeal dismissed.** **4. The respondent to pay the appellant's costs of the cross-appeal.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – JURISDICTIONAL ERROR – where the appellant exercised a discretionary power under s 448 of the *Legal Profession Act* 2007 (Qld) to dismiss a complaint against two legal practitioners – where the appellant had delegated investigation of the complaint to a Senior Investigator – where the appellant had accepted the Senior Investigator's recommendation that the complaint be dismissed – where information included in the Senior Investigator's report was incorrect – where the learned primary judge held that the appellant had committed jurisdictional error in exercising the s 448 power – whether the learned primary judge erred – whether the appellant impermissibly imposed pre-conditions on the exercise of his statutory function – whether the appellant did not in fact exercise his statutory function ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – MANDAMUS – GENERALLY – where the learned

primary judge made an order in the nature of *mandamus* under part 5 of the *Judicial Review Act* 1991 (Qld) – whether the learned primary judge made an express finding, requisite to *mandamus*, that the appellant had failed or refused to exercise jurisdiction – whether the learned primary judge should have refused to grant an order of *mandamus,* because any jurisdictional error was immaterial and would not affect any future outcome

Judicial Review Act 1991 (Qld), s 41
Legal Profession Act 2007 (Qld), s 448

Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146; [2008] HCA 32, cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611; [1999] HCA 21, applied
R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407; [1944] HCA 42, applied
Re Operative Plasterers Workers Federation of Australia; Ex parte Brown (1992) 67 ALJR 179; (1992) 46 IR 53, considered
Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22; [2015] HCA 51, applied

COUNSEL: G R Rice QC for the appellant/cross-respondent
M D Martin QC, with B J Kabel, for the respondent/cross-appellant

SOLICITORS: Legal Services Commissioner for the appellant/cross-respondent
Mills Oakley for the respondent/cross-appellant

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Flanagan J. I agree with those reasons and with the orders proposed by his Honour.

[2] **McMURDO JA:** I agree with Flanagan J.

[3] **FLANAGAN J:** On 9 September 2016 the appellant, pursuant to s 448(1)(a)(i) of the *Legal Profession Act* 2007 (Qld) ("the Act"), dismissed a complaint concerning an employed solicitor and a partner of the same firm. The appellant's letter of 9 September 2016 enclosed copies of two internal memoranda also dated 9 September 2016 from a Senior Investigator of the Legal Services Commission.

[4] The learned primary judge found that the appellant, in exercising his power to dismiss the complaint, committed jurisdictional error which warranted prerogative relief, namely an order in the nature of *mandamus* under part 5 of the *Judicial Review Act* 1991 (Qld). His Honour set aside the decision of the appellant dismissing the complaint and ordered the appellant to reconsider the matter according to law. His Honour further ordered the appellant to pay the respondent's costs of and incidental to the proceedings to be assessed on the standard basis rather

than on the indemnity basis which had been sought by the respondent. The respondent cross-appeals in relation to this costs order.[1]

[5] The appellant appeals on three grounds:

1. The learned judge erred in holding that the "misdirection" relied upon involved a jurisdictional error by the appellant in "misapprehending or disregarding the nature or limits of his functions or powers".

2. The learned judge erred in ordering reconsideration of the subject complaint when the appellant's having "misdirect(ed) himself" in the manner relied on by his Honour did not amount to failure or refusal by the appellant, actual or constructive, to perform his statutory functions.

3. Alternatively, the learned judge erred by not exercising his discretion to refuse the relief sought.

[6] For the reasons which follow, both the appeal and cross-appeal should be dismissed.

Background

[7] The learned primary judge summarised the background facts, noting that they were "relatively uncontroversial":[2]

> "[4] In 2009 the applicant and his family were engaged in the subdivision and construction of a number of homes. The development was pursued through a company called Asden Developments Pty Ltd which was responsible for the payment of builders and contractors. Its sole director was the applicant's daughter-in-law. She separated from his son in 2010.
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> [5] The applicant's son commenced proceedings in the Federal Magistrates Court against his wife with respect to custody and property and the applicant and other members of his family were joined to those proceedings on the basis that the property comprising the development was matrimonial property.
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> [6] The applicant paid $270,000 in December 2010 at the request of his daughter-in-law to Asden for the purpose of paying its creditors. That money was banked into a bank account with Suncorp in the name of Asden. The daughter-in-law then caused $264,531.02 to be withdrawn and to be deposited into another account in the name of Asden with the Bank of Queensland. On 21 December 2010 she withdrew $236,500 from the Bank of Queensland account and deposited it into another Bank of Queensland account in the name of Urban Property Consulting Pty Ltd whose director was a 'pre-insolvency expert' advising her.
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> [7] Of the $236,500 deposited into the Bank of Queensland account in the name of Urban Property, $180,000 was

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1 The learned primary judge gave leave to appeal against this costs order on 22 September 2017 pursuant to s 64(1) of the *Supreme Court of Queensland Act* 1991: AB Vol 3, page 1230.

2 *Nichols v Legal Services Commissioner* [2017] QSC 175 at [4]-[26], AB Vol 3, pages 1219-1223; Appellant's Amended Outline of Argument, [7].

withdrawn and deposited into a bank account in the name of TGI Investments Pty Ltd, again with the Bank of Queensland. That company's sole director was the daughter-in-law.

[8] Between 8 February and 11 May 2011 the sum of $173,831.53 was transferred from the bank account in the name of TGI Investments to the daughter-in-law's solicitors. The sum of $30,000 was deposited on 8 February 2011 and $143,831.53 on 11 May 2011. Thereafter approximately $92,000 was transferred from the trust account to the firm in payment of the daughter-in-law's legal fees.

[9] On 16 December 2010 the applicant's then solicitors had demanded the return of the $270,000 from the daughter-in-law on the basis that it had not been used towards the cost of construction of the development property. The daughter-in-law gave that letter to the employed solicitor at the practice acting for her to receive advice about it. The entitlement to repayment of the $270,000 was said to be based upon the existence of a resulting or *Quistclose* trust in favour of the applicant given that the specific purpose for which the money had been paid, the payment of Asden's creditors, had failed. On 22 December 2010 the daughter-in-law had caused Asden to be wound up on a voluntary basis.

[10] On 1 May 2012 the matrimonial proceedings came on for trial before Federal Magistrate Jarrett. During the course of her cross-examination the daughter-in-law admitted that between 8 February 2011 and May 2011 she told her solicitor that she had caused the deposits and transfers of the money to which I have referred to be made ending with the deposit of $173,831.53 into the trust account of the firm of whom her solicitor worked.

[11] The matrimonial proceedings were then adjourned to allow the partners of the firm to be joined on the basis that they knowingly received trust property or knowingly assisted in a breach of trust by Asden or the daughter-in-law. It was also alleged against the solicitors that they applied $91,967 towards their fees knowing that such money was subject to a trust for the interests associated with the applicant and not his daughter-in-law.

[12] When the matrimonial proceedings came back on for trial on 13 March 2013, the partners in the solicitors' firm consented to judgment against them in respect of the claim brought by the applicant and his family including an amount for interest and costs on the standard basis. The hearing proceeded and judgments were also obtained on the merits against the daughter-in-law, Urban Property and the "pre-insolvency expert" who had advised the daughter-in-law about these steps. The daughter-in-law and the adviser were subsequently declared bankrupt and Urban Property was wound up.

[13] On 9 August 2013 the applicant lodged a complaint with the respondent with respect to the employed solicitor's conduct in applying the relevant funds towards payment of legal fees when, it was alleged, he knew that the funds had been paid by the applicant for the purposes of paying creditors of Asden.

[14] The complaint was investigated by reference to the Queensland Law Society pursuant to s 435 of the *Legal Profession Act* 2007. The QLS investigator prepared a report on 2 September 2014 which recommended that the complaint should be dismissed pursuant to s 448(1)(a) of the *Legal Profession Act*.

[15] The daughter-in-law did not wish to cooperate with the investigation but the cross-examination to which I have already referred was provided to the investigator. From that cross-examination it should have been clear that the daughter-in-law's evidence had been that she told her solicitor that the applicant had provided $270,000 to Asden to pay its creditors but that the daughter-in-law did not use it for that purpose.

[16] The employed solicitor did provide a written response to the complaint in a letter dated 21 August 2014 in which he asserted that the money received from the daughter-in-law when received by the firm was money belonging to the matrimonial property pool. That was said to follow from the daughter-in-law's involvement in the family group behind the development. He also said that the money placed into the trust account was verified by the daughter-in-law and her adviser as having the character of matrimonial property, not the species of trust property alleged by the applicant. He argued that, therefore, the drawing down of those funds to pay legal fees was completely regular. He went on to say that the allegations that the property had a particular character were not made until 5 April 2012 which was leading up to a trial on 1 May 2012 where the money had been in the firm's trust account since February 2011.

[17] He believed the allegation that there had been a *Quistclose* trust was raised on the first day of the hearing on 1 May 2012, some 18 months after the money was advanced to the daughter-in-law. He pointed out also that the firm by which he was employed was required to withdraw as the daughter-in-law's solicitor on the record as a result of the allegations that were then made about the use of those funds.

[18] He asserted legal professional privilege in respect of his communications with the daughter-in-law and claimed privilege in respect of the allegation that he had misappropriated trust moneys.

[19] It was submitted for the applicant in this case that the solicitor admitted receiving the letter of demand from the applicant's then solicitors dated 23 December 2010 but did not say what

he was told by the daughter-in-law in respect of it nor the advice that he gave. No doubt his concern about legal professional privilege would have been relevant to that response by him. He was criticised however for not saying what he was told specifically by the daughter-in-law or her adviser that constituted verification that the money placed into the trust account had the character of matrimonial property.

[20] The Queensland Law Society's investigator concluded his report by seeking directions from the respondent regarding the commencement of a further investigation against the partners of the law practice for failing to supervise their employed solicitor's conduct after April 2011 regarding the payment of the daughter-in-law's legal costs and outlays from the trust money. As the Queensland Law Society's investigator said: 'After this date, it appears [the employed solicitor] knew or ought to have known that the nature of the trust money had changed and that it should not be applied towards the cost liability' of the daughter-in-law.

[21] That conclusion was available because the daughter-in-law had provided her solicitors with a chronology on 28 April 2011 identifying the source of the funds paid into their trust account.

[22] The respondent forwarded that investigation report and a letter from the Law Society to the applicant on 30 September 2014 agreeing with the investigator's report, the Queensland Law Society's recommendation and informed the applicant that no further action would be taken with respect to his complaint. That letter raised the possibility of also investigating the female partner of the solicitors' firm in respect of a concern about her supervision of the employed solicitor but said that it would not be in the public interest to undertake such an investigation.

[23] On 13 April 2015 the applicant applied for an earlier review of the respondent's decision to take no further action with respect to the initial complaint communicated in the letter of 30 September 2014. That application was dismissed by consent by an order of 28 July 2015 on the respondent undertaking to revoke the decisions the subject of that application and to reconsider them taking into account the matters raised in the applicant's written submissions filed 21 July 2015.

[24] It is apparent that the respondent delegated his review of the complaint to a senior investigator who, by an affidavit filed in these proceedings, recorded that she had considered those written submissions. That was a conclusion available also from a comparison of her report with the content of the written submissions. She, nonetheless, recommended that neither the female partner of the firm nor the employed solicitor be further investigated. The respondent by his letter dated 9 September 2016 accepted those recommendations.

[25] There were responses from both the employed solicitor and the partner to the senior investigator's inquiries which are criticised by the applicant as not addressing the issue of when the employed solicitor and/or the firm were led to believe that the money in the trust account was matrimonial property and available for payment of the fees. The partner's contention was that whatever degree of supervision might be thought to have been reasonable, she would not have discovered that the money paid into the trust account was impressed with a trust of the nature alleged by the applicant. The reconsideration by the respondent's senior investigator of the complaint pointed out that the applicant's argument in his complaint against the employed solicitor and in his previous application to this court was that the employed solicitor knew that the money received by the firm into its trust account was the subject of a trust in favour of the applicant. The investigator then went on then to say:

> 'I have completed a reconsideration of [the applicant's] complaint against [the employed solicitor] and I have noted therein that it would have been the court that decided in the end whether it was or wasn't matrimonial property. In this respect I am in agreement with the statement made about the position being one that needed to be determined on evidence at trial.
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> However, in this matter, there has been no determination made by the Court as to whether or not the moneys paid to [the daughter-in-law] were "impressed with a trust" or formed part of the "matrimonial" property.
>
> Furthermore, this is not a determination that can now be made by you, the Commissioner. It is simply not within your powers under the Act to make.'

[26] Unfortunately, however, for her proper consideration of the issue, there had been a determination made by the Federal Magistrates Court of this very issue albeit after the judgment by consent had been entered against the solicitors.[3] In his decision Federal Magistrate Jarrett made it clear that he was satisfied that the funds paid to the daughter-in-law were paid for the specific purpose of paying the creditors of Asden. He referred to the cross-examination of the daughter-in-law to that effect which I have already mentioned and concluded that a *Quistclose* trust had been established for the purpose of paying the creditors of Asden. His Honour also concluded that the daughter-in-law received the funds on behalf of Asden and dealt with them inconsistently with the basis on which they were given to Asden. He also concluded that this was a case where there had been a very clear breach of trust."

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3 See *Nichols & Nichols & Ors* [2013] FCCA 1296.

[8] From a reading of the internal memoranda of the Senior Investigator to the appellant[4] there were four considerations that informed the Senior Investigator's opinion that the evidence was insufficient to establish a reasonable likelihood a disciplinary body would find that the relevant conduct was unsatisfactory professional conduct or professional misconduct. First, the Senior Investigator considered that "[t]he crucial element in this equation has always been the knowledge of [the employed solicitor] at the time of the monies being deposited into the firm's trust account".[5] Second, any determination that the funds were either impressed with a trust or constituted matrimonial property was one which was required to be made by a court.[6] Third, there had been no such determination made by a court. This was not correct as observed by the learned primary judge.[7] Federal Magistrate Jarrett had found that a *Quistclose* trust had been established for the purpose of paying the creditors of Asden Developments Pty Ltd.[8] Fourth, it was not within the appellant's powers under the Act to make this determination. Implicit in these four considerations is the assumption that any reasonable likelihood of a disciplinary body finding either unsatisfactory professional conduct or professional misconduct required a determination that the funds utilised by the firm to pay the daughter-in-law's legal fees were impressed with a trust and that the employed solicitor knew this at the time the funds were deposited with the firm.

[9] The appellant adopted and acted upon the opinion and recommendation of the Senior Investigator. In his letter dated 9 September 2016 the appellant referred to his power to dismiss a complaint if satisfied that there is no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct as defined in the Act. The letter continued:

> "The LSC memorandum informs me that on the basis of the findings and recommendations made on the reconsideration of Mr Nichols' complaint against [the employed solicitor], there is insufficient evidence to establish a reasonable likelihood of a finding by a disciplinary body that conduct of [the partner] would amount to unsatisfactory professional conduct or professional misconduct. …
>
> I am satisfied having considered this information that the matter has been properly investigated and I agree with the recommendations that have been made that I take no further action in relation to the complaint for the reasons set out in the LSC Internal Memorandum …
>
> I propose accordingly to take no further action on the complaint pursuant to section 448(1)(a)(i) of the Act and to close the file accordingly."[9]

The reasons of the learned primary judge

[10] The learned primary judge noted the submission of the respondent:

> "… that there has been a jurisdictional error by [the appellant] in accepting a report based on the assumption that he had no power to

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4 AB Vol 3, pages 996-1006.
5 AB Vol 3, page 1005 (third paragraph).
6 AB Vol 3, page 998 (second last paragraph).
7 *Nichols v Legal Services Commissioner* [2017] QSC 175, [26].
8 *Nichols & Nichols & Ors* [2013] FCCA 1296 at [55].
9 AB Vol 3, pages 994 – 5.

> pursue the allegation that the funds were paid from the solicitors' trust account to themselves as fees in breach of the *Quistclose* trust found to have existed by Federal Magistrate Jarrett. The argument is that the factual error that there was no determination of that issue in the Federal Magistrates Court coupled with the misunderstanding of the nature of the Commissioner's powers to pursue that issue as part of the investigation led to [the appellant] clearly misapprehending or disregarding the nature or limits of his functions or powers."[10]

[11] A misapprehension or disregard of the nature or limits of the decision-maker's functions or powers is one of the eight classes of jurisdictional error identified in Aronson and Groves, *Judicial Review of Administration Action*[11] cited with approval by Kirby J in *Federal Commissioner of Taxation v Futuris Corporation Ltd*.[12]

[12] The learned primary judge accepted the respondent's submission concluding:

> "The [appellant] did not need to make a determination about whether the relevant funds were impressed with a trust and in misdirecting himself in that fashion erred in the exercise of his jurisdiction by misapprehending or disregarding the nature or limits of his functions or powers. That the error seems more palpable because the actual decision made by the learned Federal Magistrate emphasises that such a finding had already been made is really strictly irrelevant to the question of principle."[13]

Ground 1

[13] As observed by Kirby J in *Futuris*[14] the recognised "jurisdictional error" categories in Australia are not closed. The appellant did not submit that the category of jurisdictional error identified by the learned primary judge was not an identified class of jurisdictional error, rather that the error identified by his Honour at [25] of the Reasons did not involve any misapprehension by the appellant of his statutory function. Accordingly, any error by the appellant in considering that only a court could determine whether the moneys were impressed with a trust or constituted matrimonial property was an error committed within jurisdiction.[15]

[14] In seeking to demonstrate that the error was one within jurisdiction the appellant referred to the nature and content of the powers and functions of the Legal Services Commissioner under the Act. Section 583 establishes the position of Legal Services Commissioner, which is an appointment made by the Governor in Council.[16] Before recommending a person for appointment as the Legal Services Commissioner the Minister must be satisfied that the appointee is familiar with the nature of the legal system and legal practice and possesses appropriate qualities of independence, fairness and integrity.[17] The Legal Services Commissioner has a

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10 *Nichols v Legal Services Commissioner* [2017] QSC 175, [29].
11 Aronson and Groves, *Judicial Review of Administrative Action*, 5th ed, Lawbook Company 2013 [1.140].
12 [2008] HCA 32; (2008) 237 CLR 146 at 186, [134].
13 *Nichols v Legal Services Commissioner* [2017] QSC 175 at [34].
14 [2008] HCA 32; (2008) 237 CLR 146 at 185, [134].
15 Transcript of Proceedings, Court of Appeal, 22 March 2018, 1-3, lines 1-5.
16 Section 584(1).
17 Section 584(2).

number of powers and functions in relation to complaints made under chapter 4 of the Act. These include the power to summarily dismiss complaints where, for example, the Commissioner forms a view that the complaint requires no further investigation.[18]

[15] Part 4.7 of chapter 4 is headed "Decision of commissioner". Pursuant to s 447 the Commissioner may, as he "considers appropriate" start a proceeding before a disciplinary body. Relevantly for the purposes of this appeal s 448, which is in part 4.7, deals with the Commissioner's power to dismiss a complaint:

> "**Dismissal of complaint**
>
> (1) The commissioner may dismiss the complaint or investigation matter if satisfied that—
>
> (a) there is no reasonable likelihood of a finding by a disciplinary body of—
>
> (i) for an Australian legal practitioner—either unsatisfactory professional conduct or professional misconduct; or
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> (ii) for a law practice employee—misconduct in relation to the relevant practice; or
>
> (b) it is in the public interest to do so.
>
> (2) The commissioner must give the respondent and any complainant written notice about the commissioner's decision to dismiss the complaint or investigation matter."

[16] The term "unsatisfactory professional conduct" is defined in Schedule 2 to the Act by reference to s 418 which provides:

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

[17] The term "professional misconduct" is a defined term in Schedule 2 of the Act by reference to s 419 which provides:

> "(1) **Professional misconduct** includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
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> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a

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18 Section 432(2).

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

[18] The term "disciplinary body" is also a defined term in Schedule 2 and means either QCAT or the Legal Practice Committee.

[19] Section 448(1) gives the appellant a discretionary power to dismiss a complaint or investigation matter. This discretionary power however, may only be exercised if the appellant is "satisfied" that there is no reasonable likelihood of a finding of either unsatisfactory professional conduct or professional misconduct by a disciplinary body.

[20] The appellant submits that the relevant function, implicit in s 448(1), is to consider information and form an opinion about merits:

> "Providing the Commissioner is considering merits and applying the correct test, being whether there are reasonable prospects of success of a discipline proceeding, he is at liberty to err in the assessment he makes.
>
> Here, the error relied on by his Honour, that 'the (Commissioner) did not need to make a determination about whether the relevant funds were impressed with a trust', was an error in consideration of the merits. The appellant considered that there was an obstacle to proof of a disciplinary charge. It was within his jurisdiction to do so, even if incorrectly."[19]

[21] This submission should be rejected. The appellant has, in my view, misapprehended his statutory function. By accepting the recommendations of the Senior Investigator in the internal memoranda the appellant, in effect, impermissibly imposed two pre-conditions or threshold requirements in exercising his statutory function. The first pre-condition was the requirement for a determination (either by a court or by the appellant) as to whether the moneys paid to the daughter-in-law were impressed with a trust or formed part of the matrimonial property. The second pre-condition was that the employed solicitor had to know that the $173,831.53 paid to the trust account of the firm had come from the bank account of Asden Developments Pty Ltd.

[22] As to the first pre-condition, it was no part of the appellant's function under s 448(1)(a)(i) to consider whether he had the power to make a determination about whether the moneys were impressed with a trust. Nor was such a determination being made by a court relevant to the exercise of his statutory function.

[23] As to the second pre-condition, the learned primary judge, in outlining the background facts, referred to the partners of the firm having consented to judgment

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19 Appellant's Amended Outline of Argument, [28]-[29].

in respect of the claim based on them knowingly receiving trust property or knowingly assisting in a breach of trust by Asden Developments Pty Ltd or the daughter-in-law.[20] The partners, having consented to judgment, are taken to have admitted the allegations in the relevant counterclaim alleging that they knowingly received trust property or knowingly assisted in a breach of trust.[21] The appellant under s 448(1)(a)(i) had to be satisfied that there was no reasonable likelihood of a finding by a disciplinary body of either unsatisfactory professional conduct or professional misconduct. Such "satisfaction" should not have been confined to the issue whether the employed solicitor knew that the $173,831.53 paid to the firm's trust account had come from the bank account of Asden Developments Pty Ltd and was impressed with a trust. As is evident from the factual background outlined by the learned primary judge[22] the issue of whether the use made by the employed solicitor of the moneys in the firm's trust account was a knowing breach of trust is not limited to when the moneys were first received but rather to when they were disbursed. $30,000 was received on 8 February 2011 and a further $143,831.53 on 11 May 2011. Thereafter approximately $92,000 was transferred from the trust account to the firm in payment of the daughter-in-law's legal fees. These disbursements were made after the daughter-in-law had provided the firm with a chronology on 28 April 2011 identifying the source of the funds paid into their trust account.

[24] By limiting the exercise of his statutory function under s 448(1)(a)(i) by reference to these two pre-conditions or threshold requirements, the appellant has not actually exercised his statutory function. He has not formed the opinion required by s 448(1)(a)(i), namely that there is no reasonable likelihood of a finding by a disciplinary body of either unsatisfactory professional conduct or professional misconduct. As both "unsatisfactory professional conduct" and "professional misconduct" are given wide definitions by the Act and are matters which the Act contemplates will be determined by a disciplinary body (such as QCAT), by accepting the opinion and recommendation in the internal memoranda, the appellant has misapprehended the nature of his statutory function.

[25] Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*[23] observed that a determination that a decision-maker is "satisfied" (or not) of a statutory criterion which must be met (here before the discretionary power to dismiss a complaint arises) goes to the jurisdiction of the decision-maker. Gummow J quoted Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*:[24]

> "[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist."

Latham CJ continued:

> "What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the

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20 *Nichols v Legal Services Commissioner* [2017] QSC 175 at [11]-[12]; AB Vol 3, pages 1220-1221.

21 Second Further Amended Defence and Counterclaim of the Second, Third, Fourth and Fifth Respondents, [23]-[26]; AB Vol 2, pages 605-606.

22 See [5] above.

23 [1999] HCA 21; (1999) 197 CLR 611 at 651, [131].

24 [1944] HCA 42; (1944) 69 CLR 407 at 430.

> opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent …"[25]

[26] In *Wei v Minister for Immigration and Border Protection*, Gageler and Keane JJ considered s 116(1)(b) of the *Migration Act* 1958 (Cth) which provides that subject to certain exceptions, "the Minister may cancel a visa if he or she is satisfied that … its holder has not complied with a condition of the visa". Their Honours, by reference to both *Eshetu* and *R v Connell* stated:[26]

> "The 'satisfaction' required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the *Migration Act* is a state of mind. It is a state of mind which must be formed reasonably and on a correct understanding of the law."

[27] As correctly identified by the learned primary judge, the appellant erred in the exercise of his jurisdiction by misapprehending or disregarding the nature or limits of his functions or powers.[27] By limiting the exercise of his statutory function to considerations of whether it had been determined that the moneys were impressed with a trust or that the employed solicitor knew this, the appellant has not actually formed the opinion required by s 448(1)(a)(i).

Ground 2

[28] The basis of this ground is that the learned primary judge made no express finding that the appellant had failed or refused to exercise jurisdiction so as to warrant the grant of an order in the nature of *mandamus*.

[29] The appellant accepts that such a failure may be constituted by a constructive failure to exercise jurisdiction. As explained by Gaudron J in *Re Operative Plasterers Workers Federation of Australia; Ex parte Brown*:[28]

> "It is not every error that will ground prerogative relief. So far as *mandamus*, which is sought in this case, is concerned, there must be an error amounting to a refusal to exercise jurisdiction. Such an error, it is well established, may be constituted by what is said to be a constructive failure to exercise jurisdiction that is, a mistake of some kind, the effect of which is that the Commission has failed to do that which it is obliged to do, whether pursuant to constitutional requirement or pursuant to statute.
>
> There is, of course, a clear distinction between an error of that kind and an error within jurisdiction where the tribunal concerns simply fails to apply some principle or to discharge some legal obligation which does not, however, affect jurisdiction as such. An example of an error of the latter kind would be one in which the tribunal failed to

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25 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407 at 432.
26 *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; (2015) 257 CLR 22 at 35, [33]-[34].
27 *Nichols v Legal Services Commissioner* [2016] QSC 175 at [34]; AB Vol 3, 1225.
28 (1992) 46 IR 53 at 53-54.

> have regard to matters which should be taken into account in the exercise of a discretion."

[30] As I have found in relation to Ground 1 that the learned primary judge did not err in finding that the appellant had committed jurisdictional error, it follows that Ground 2 also fails. The discretionary power to dismiss the complaint could only be exercised if the appellant was of the opinion that there was no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct. While the appellant's letter of 9 September 2016 uses the language of s 448(1)(a)(i), the requisite opinion was never formed.

[31] Further, I do not accept that the learned primary judge made no express finding that there had been a failure on the part of the appellant to exercise his statutory function.

[32] At [29] of the Reasons, his Honour noted the jurisdictional error as being that the appellant accepted a report based on the assumption that he had no power to pursue the allegation that the funds were paid from the solicitors' trust account to themselves in breach of the *Quistclose* trust. This was coupled with the appellant's misunderstanding of the nature of his powers to pursue that issue as part of the investigation. This in turn led the appellant to misapprehending or disregarding the nature or limits of his functions or powers. At [32] his Honour made specific reference to the relief sought pursuant to s 43 of the *Judicial Review Act* "on the basis that the [appellant] had not performed his public duty".

[33] When these two paragraphs are read with his Honour's conclusion at [34] of the Reasons that the appellant "erred in the exercise of his jurisdiction by misapprehending or disregarding the nature of limits of his functions or powers", his Honour has made an express finding that there has been at least a constructive failure by the appellant to perform his statutory function.[29]

Ground 3

[34] The appellant submits that this Court should interfere with the primary judge's discretionary grant of prerogative relief on the basis that the jurisdictional error identified by his Honour could not affect the appellant's exercise of power to dismiss the complaint. The appellant submits:

> "Whether there was, or was not, a court determination of the question whether the money paid to the solicitors' trust account was 'impressed with a trust' was not pertinent to the merits assessment of either solicitor's knowledge of the character of the money. On a reconsideration of the complaint as a result of his Honour's order, the merits of bringing a discipline application could not be altered or enhanced by awareness of Jarrett FM's ruling, since it is irrelevant to the real issue. In that sense, his Honour's order is, with respect, futile and pointless."[30]

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29 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 per Latham CJ; *Plaintiff S 157/2002 v Commonwealth* (2003) 211 CLR 476 at 506, [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

30 Appellant's Outline of Argument, [52], citing *Carey v President of the Industrial Court Queensland & Anor* [2004] 2 Qd R 359; [2004] QCA 62 at [23] per McPherson JA (with whom Davies JA and Mackenzie J agreed). This case simply supports the proposition that irrespective of the introduction of s 41(2) of the *Judicial Review Act* 1991 the discretion in granting or withholding relief by

[35] There are three primary reasons why this submission should be rejected. The first is that no submission was made to the learned primary judge to the effect that prerogative relief should not be granted because such relief would be "futile and pointless".[31]

[36] The second is that the jurisdictional error identified by the learned primary judge was that the appellant misdirected himself in considering a determination that the relevant funds were impressed with the trust was first required to be made for there to be any reasonable likelihood of a finding by a disciplinary body of either unsatisfactory professional conduct or professional misconduct. His Honour specifically found at [34] of the Reasons that the court determination of Jarrett FM was "strictly irrelevant to the question of principle". It follows that the exercise of his Honour's discretion in granting an order in the nature of *mandamus* was not founded, as submitted by the appellant, on there being a court determination of the question whether the money paid to the solicitors' trust was impressed with a trust.

[37] Thirdly, the appellant erroneously identifies the "key question" as being whether the employed solicitor was aware that the moneys received into the firm's trust account was subject to a trust.[32] The opinion that the appellant was required to form for the purposes of s 448(1)(a)(i) of the Act was that there was no reasonable likelihood of a finding by a disciplinary body of either unsatisfactory professional conduct or professional misconduct. The formation of that opinion did not require a determination by the appellant that the moneys were either impressed with a trust or that the employed solicitor had such knowledge at the time the moneys were received into the firm's trust account. As discussed in [23] above, any enquiry as to whether the employed solicitor was knowingly involved in a breach of trust should be directed to when the funds were disbursed. There is no basis for suggesting that the appellant in properly exercising his statutory function will form the same opinion.

[38] There is one further reason to reject the appellant's submission. The learned primary judge's order requiring the appellant to reconsider was expressed in the following terms:

> "The respondent consider the applicant's complaint against [the employed solicitor] and [the partner] dated 9 August 2013 according to law and taking into account the reasons for judgment in this proceeding delivered on 29 August 2017 and the applicant's outlines of argument filed on 21 July 2015 and 20 January 2017."[33]

[39] His Honour made express reference to submissions previously made by the respondent.[34] These submissions included reference to the chronology prepared by the daughter-in-law on 28 April 2011.[35] This chronology was emailed by the daughter-in-law to the employed solicitor on the same date.[36] By reference to that chronology the

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prerogative writ "has survived the alteration in form and nomenclature" introduced by the *Judicial Review Act*.

31 That no such submission was made is evident from an examination of the Appellant's Written Submissions at first instance, AB Vol 3, pages 1189-1202, and the Transcript of Proceedings, AB Vol 1, pages 1-79.

32 Appellant's Amended Outline of Argument, [48].

33 AB Vol 3, page 1229.

34 Applicant's Submissions filed 21 July 2015, AB Vol 3, pages 1135-1151; Applicant's Submissions filed 20 December 2016, AB Vol 3, pages 1171-1188.

35 AB Vol 2, pages 630-653.

36 AB Vol 2, page 629.

respondent had submitted to his Honour below that the employed solicitor having received the chronology would have become aware or should have become aware that the moneys were impressed with a trust. Both sets of filed submissions also referred to the fact that the partners of the firm had consented to judgment on the counterclaim for a pleaded case based upon both the first and second limbs of the rule in *Barnes v Addy*.[37]

[40] His Honour's order requires the appellant to reconsider the exercise of power under s 448(1)(a)(i) by reference not only to his Honour's Reasons but also to the respondent's submissions below. The order therefore contemplates a comprehensive review by the appellant in forming the requisite opinion, untainted by jurisdictional error. There is no present basis for asserting that upon such review the result will be the same. In that sense, I do not accept that his Honour's order was either "futile" or "pointless".[38]

Cross-Appeal

[41] The respondent sought indemnity costs before his Honour on the basis that the conduct of the appellant had been unreasonable.

[42] There is no suggestion that his Honour erred in applying the correct principles for an award of indemnity costs on the grounds of unreasonableness.[39]

[43] The exercise of discretion is sought to be challenged on the basis the learned primary judge misapprehended or failed to take into account a relevant fact, namely that the appellant was on notice about the existence of the determination of Jarrett FM from September 2015.

[44] This was not however, the basis for his Honour's finding that the appellant had committed jurisdictional error. His Honour found that the determination of Jarrett FM was in fact "strictly irrelevant".[40] As to the finding of jurisdictional error, there were no special or unusual features of the conduct of the litigation by the appellant that warranted an order for indemnity costs. This was conceded.[41] The jurisdictional error identified by his Honour was committed by the appellant in seeking to perform his statutory function. No error has been demonstrated in his Honour's exercise of discretion in refusing to award indemnity costs.

Disposition

[45] I would make the following orders:

1. Dismiss the appellant's appeal.
2. The appellant to pay the respondent's costs of the appeal.
3. Dismiss the respondent's cross-appeal.
4. The respondent to pay the appellant's costs of the cross-appeal.

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37 (1874) LR 9 Cth App 244; *Farah Constructions v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at 140, [111], [112] and at 159, [160]; Applicant's Outline of Argument filed 20 December 2016, AB Vol 3, page 1185, [60].

38 Appellant's Amended Outline of Argument, [52].

39 *Nichols v Legal Services Commissioner (No 2)* [2017] QSC 203 at [3]; AB Vol 3, page 1227.

40 *Nichols v Legal Services Commissioner* [2017] QSC 175 at [34]; AB Vol 3, page 1225.

41 Transcript of Proceedings, Court of Appeal, 22 March 2018, 1-29, lines 15-20.