LEGAL PRACTICE TRIBUNAL

BS 9619/04

JUDGMENT

[2005] LPT 002

Moynihan J **27 September 2005**
(helped by Mr K Horsley and Dr S Hayes)

LEGAL SERVICES COMMISSIONER (Applicant)

v

MICHAEL VINCENT BAKER (Respondent)

- **Introduction**
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- **The lawyer client relationship**
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    - ***Charges 13 and 14 – Daniela Maria Hajistamoulis***
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    - ***Offensive Language – Charges 17 and 18***

  Note Charges 4, 5, 7(a), 8, 11, 12 and 15 were withdrawn.
- **Summary of outcome**

Introduction

[1] **MOYNIHAN J:** The Legal Services Commissioner (the *Commissioner*) has brought a number of charges against Michael Vincent Baker (the *practitioner*) arising out of events which occurred in respect of the conduct of the legal practice of Baker Johnson (the *firm*) from 1997 to 2002.

[2] There were originally 18 charges. Charges 4, 5, 7(a) 8, 11, 12, 14, 15 are no longer pursued. There are applications to substitute a fresh charge 14 and to amend charges 1, 3, 9(k), (l) and 10. Charges up to 16 arise out of the *practitioner's* role in the conduct of the affairs of five clients of the *firm*. Charges 17 and 18 arise out of his use of offensive language to or in the presence of a client and of staff.

[3] Section 278 of the *Legal Profession Act 2004* ("*the Legal Profession Act"*) gives the Tribunal power to amend an application if it is reasonable in all the circumstances and does not affect the fairness of the proceedings.

[4] The *practitioner* did not submit that the fairness of the proceedings would be affected by allowing the amendments. Rather it was submitted that the charges in their amended form do not have reasonable prospects of success and the amendments should be refused on the basis it is not reasonable to do. That being so it was agreed that the question of leave to substitute or amend should be disposed of in the context of dealing with the substantive issues of whether a substituted or amended charge was made out.

[5] For that reason the reference to the charge or charges in what follows is to the proposed amended or substituted charges.

[6] The charges have their origins in complaints which came to the attention of the Law Society before the *Legal Profession Act* became law. There was correspondence between the Society and the *practitioner* (including his solicitor) about the various complaints and action proposed by the Law Society.

[7] By a letter of 1 October 2003[1] the Society sent the practitioner a draft of proposed charges and invited a response. The draft charges essentially reflected the current charges before the Tribunal, although they are not identical with them. The *practitioner's* solicitors responded by letters of 20 and 26 November 2003[2].

[8] That was the position when the *Legal Profession Act* became law on 1 July 2004. The newly appointed Legal Services Commission reviewed that position and on 5 November 2004 brought the charges, some of which are now to be withdrawn or are the subject of application for amendment or substitution.

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1 Doc 26; affidavit of Michael Vincent Baker; exhibited p 6

2 Doc 26; affidavit of Michael Vincent Baker; exhibited pp 17 and 30

Some background

[9] The *practitioner* was admitted to practice as a solicitor on 16 December 1971 and has been continuously in practice since. From 1972 to 1 July 2004 he was a principal of *the firm* and he now practices as a consultant to it.

[10] The *practitioner* and Steven Johnson were the *firm's* principals during the events giving rise to the charges. These events extended from mid 1997 to late 2002. Johnson had little or no direct involvement in any of the events giving rise to the charges. The *firm* had offices in the Brisbane CBD and at Springwood, Burpengary, Clayfield and the Gold Coast and an office at Woodford which was visited on a regular basis.

[11] In addition to the principals the *firm* employed a number of lawyers of varying degrees of experience together with support staff. The *firm* is said to have had a busy practice which focused on a "swift and cost effective service of litigation clients".

[12] The *practitioner's* role had been primarily in the *firm's* Brisbane office but during the events arising for consideration here his focus was shifting to the Gold Coast office and its clients.

[13] As will emerge the practitioner's involvement in the events giving rise to charges varied from client to client. Three of the five clients whose affairs give rise to charges were clients of the Springwood office, it will be necessary to say something about arrangements concerning the business of that office later.

[14] The clients, the conduct of whose affairs give rise to most of the charges, retained the *firm* to act in respect of personal injury damages claims or various versions of no win /no fee arrangements. Charges 17 and 18 fall into a different category.

The *Legal Profession Act* and the Tribunal

[15] The charges are founded on complaints made to the Law Society before the *Legal Profession Act* became law. As a consequence of the operation of ss 612 and 614 of that *Act* the charges are to be determined by reference to the meaning of "professional misconduct" and "unprofessional conduct or practice" within the meaning of the *Queensland Law Society Act* 1952 (the *Law Society Act*).

[16] Under the *Law Society Act* a practitioner could be charged with:

> "Malpractice, professional misconduct or unprofessional conduct or practice"[3].

[17] In *Adamson v Queensland Law Society Inc*[4] "professional misconduct" was dealt with in these terms:-

> "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency."

[18] Section 3B of the *Law Society Act* dealt with "unprofessional conduct or practice" in these terms:

> "(1) A practitioner commits 'unprofessional conduct or practice' if the practitioner, in relation to the practitioner's practice, is guilty of -
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> (a) serious neglect or undue delay; or
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> (b) the charging of excessive fees or costs; or
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> (c) failure to maintain reasonable standards of competence or diligence; or
>
> (d) conduct described, under another Act, as unprofessional conduct or practice.
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> (2) Subsection (1) does not, by implication, limit the type of conduct or practice that may be regarded as unprofessional for this Act;"

[19] In *In re (a practitioner of the Supreme Court)*[5] the Full Court of the Supreme Court of South Australia said:

> "In our view 'unprofessional conduct' is not necessarily limited to conduct which is disgraceful or dishonourable' in the ordinary sense of those terms. It includes, we think, conduct which may be reasonably held to violate the standard of professional conduct observed or approved of by members of the profession of good repute and competency."

[20] The *Legal Profession Act* apparently contemplates that "unprofessional conduct or practice" could amount to "professional misconduct" provided it is of such a nature and seriousness as to satisfy the test laid down in *Adamson*[6].

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3 s 5F

4 [1990] 1 Qd R 498 at 507 per Thomas J

5 [1927] SASR 58

6 [1990] 1 Qd R 498

[21] The *Legal Profession Act* having constituted the Legal Practice Tribunal provides for lay and practitioner panels for the purpose of panel members "helping the Tribunal". Section 444(2) of that *Act* provides that the panel members do not constitute the Tribunal; it is to be "helped by them". The *Act* is otherwise silent as to the roles of panel members appointed to deal with a particular matter.

[22] For the purposes of this application Mr Ken Horsley was appointed from the practitioner panel and Dr Sharon Hayes from the lay member panel.

[23] They were provided with copies of the same material filed and provided to me which was read prior to the commencement of the hearing. They attended the hearings, were provided with copies of exhibits, asked questions when they chose to do so and discussed issues. The decisions reflected in these reasons are however mine, based on the evidence and in the light of submissions by counsel.

[24] Paragraph 475 of the *Legal Profession Act* provides that the Tribunal:

> "(a) must comply with natural justice; and
> (b) must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it; and
> (c) is not bound by the rules of evidence; and
> (d) may inform itself of anything in the way it considers appropriate."

[25] Section 479 of the *Legal Profession Act* provides that the Tribunal may act on contentious allegations.

> "**479 Standard of proof**
>
> (1) If an allegation of fact is not admitted or is challenged when a disciplinary body is hearing a discipline application, the body may act on the allegation if the body is satisfied on the balance of probabilities that the allegation is true.
> (2) For subsection (1), the degree of satisfaction required varies according to the consequences for the relevant Australian legal practitioner or law practice employee of finding the allegation to be true.
> (3) ….".

[26] The section reflects the considerations canvassed in *Briginshaw v Briginshaw*[7] and *Rejfek v McElroy*[8]. Those considerations were applied to solicitors' disciplinary proceedings in *Adamson*[9].

[27] There is no occasion to doubt that a finding of unprofessional conduct or practice is fraught with serious consequences for a practitioner; more so if the finding is of professional misconduct.

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7 (1938) 60 CLR 336
8 (1965) 112 CLR 517
9 [1990] 1 Qd R 498

[28] On 13 December 2004 the Tribunal gave directions for the exchange of affidavits and provision of a statement of agreed facts. In the event the parties were unable to agree to a statement. A document described on its face as a statement of agreed facts[10] was however admitted by consent as constituting "admissions" made by the *practitioner*.

[29] The hearing proceeded on affidavit evidence. The *Commissioner* did not call oral evidence but relied on the affidavits by the complaining clients and others**.** The *practitioner* did not require any of the deponents in the *Commissioner's* case to be called or made available for cross examination.

[30] The *practitioner* swore an affidavit, gave evidence and was cross examined. Brian James Briggs and Shane Graeme Alexander were called to give evidence and cross examined in the *practitioner's* case.

[31] After the conclusion of the evidence comprehensive written arguments were supplemented by oral submissions.

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10 Ex 4 (5 April 2005)

The lawyer client relationship

[32] A lawyer's individual personal responsibility to a client is "the essence" of the relationship[11]. Lawyers have a position of special influence over clients in the conduct of the client's affairs and are obliged to serve and protect the client's interests at all times[12].

[33] The lawyer should put the client's interest first and treat the client fairly and in good faith, giving due regard to a client's position of dependence upon the practitioner, and the client's dependence on the lawyer's training and experience and the high degree of trust clients are entitled to place in lawyers.

[34] Lawyers should assist their clients to understand issues, their rights and obligations so as to allow the client to give proper instructions, particularly with respect to compromise[13]. Communication should be consistent with the client's knowledge and sophistication[14].

[35] The clients out of whose affairs these charges (except the last two) arose were seeking to recover damages for negligence arising out of motor vehicle, work place or other accidents. The *practitioner* and the *firm* were held out as having particular interest and competence in that area of practice and were obliged to conduct the litigation in the manner most advantageous to the client.

[36] The clients were not wealthy or sophisticated people experienced in legal matters. They therefore were particularly reliant on the *practitioner* and the *firm* for advice and to act in their interest in the conduct of their affairs and for gaining an understanding of their legal rights.

[37] The retainers of those clients were generally on a contingency basis because the clients were unable to fund the litigation from their own resources and their financial circumstances were such that they could not easily meet any costs order against them.

[38] The fact that such retainers were a developing field at the time these were entered into seems to me not to be a factor mitigating the *practitioner's* responsibilities, rather the contrary.

[39] The circumstances of the clients whose business has given rise to these complaints was such as to require the practitioner and the *firm* to pay particular attention to ensure that the client understood the terms of the retainer and the contents of any document the client was required to sign defining the relationship with the *firm*.

[40] In such circumstances here practitioners must be scrupulous in putting the client's interest before their own not least because or the potential of a conflict between the client's interest and the *practitioner's* interest in being paid.

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11 *Re Bannister and Legal Practitioners Ordinance 1970-1975; Ex parte Hartstein* (1975) 5 ACTR 100 (Full Court)

12 Dal Pont, G E *Lawyers Professional Responsibility in Australia and New Zealand* 2nd ed LBC Information Services, Pyrmont (NSW) 2001, p 168; *Sims v Craig Bell and Bond* [1991] 3 NZLR 535 at 544

13 Dal Pont, G E *Lawyers Professional Responsibility in Australia and New Zealand* 2nd ed LBC Information Services, Pyrmont (NSW) 2001, p 75

14 *EVBJ Pty Ltd v Greenwood* (1988) 88 ATC 4977 at 4979-80 per Brownie J

The obligation to supervise

[41] Charges 6, 13, 14 and 16 directly raise supervision issues and supervision is relevant in varying degrees to a consideration of other charges.

[42] A practitioner should properly supervise all legal professional work carried out on their behalf. Vicarious liability aside, a practitioner's legal and fiduciary duties to a client are not avoided or reduced by delivering that client into the care of an employee, whether or not that employee is legally qualified. The supervision required however varies according to the employee's experience, qualifications and role and with the type and complexity of the work[15].

[43] The *practitioner* acknowledged that as a partner he had ultimate responsibility for shortcomings in the *firm's* practice but not for every failure to detect or prevent infractions by staff members. This may be accepted as a general proposition.

[44] In his affidavit filed by leave on 29 March 2005 the *practitioner* conceded that he had not exhibited the highest standards of professional conduct and had pertinently failed in his duty to see that those standards were applied to every retainer of every client[16].

[45] He stated he prided himself on his commitment to the interests of clients and that some matters had not been before the Tribunal and had been conducted in that way. Much of this he said stemmed from mistakes made in matters in which he had ultimate supervisory responsibility as senior partner in the *firm* and partner in charge of many of the matters the subject of charges. In that sense he accepted and had always accepted responsibility for all of the many mistakes, errors of judgment "…and so on".

[46] In general terms when new instructions were received by the *firm* a file was opened and it was allocated to one of the two partners. If the *practitioner* was the allocated partner responsible his initials (MVB) would appear on all correspondence sent out in that matter.

[47] The *practitioner* did not consider that the fact he was the partner allocated a particular matter meant that he had much, or indeed any, knowledge or involvement with the client or the file[17]. So far as he was concerned the fact that he was the designated partner gave him no greater responsibility than that arising because he was a partner, being 'partner responsible' had no particular significance[18].

[48] The *practitioner* would not necessarily know if a new matter had been opened in which he had been nominated as partner responsible. He was 'not given a list… telling me that these had been opened up in my name, so I wouldn't have even known that my name would be put on it'[19].

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15 Dal Pont, G E *Lawyers Professional Responsibility in Australia and New Zealand* 2nd ed LBC Information Services, Pyrmont (NSW) 2001, pp 77-78

16 Doc 26; affidavit of Michael Vincent Baker; paras [40-41]

17 Doc 26; affidavit of Michael Vincent Baker; para 20

18 T 95:20 through to 99:17. Mr Briggs' evidence confirms that nothing in particular was thought to arise from the practitioner's position as partner responsible for a particular file T 127:50.

19 T 99:14

[49] The *practitioner* stated that he had very little to do with client matters out of the Brisbane office, these apparently were Mr Johnson's responsibility as a partner. He was in charge of all matters at the Gold Coast office. As will emerge he did not have direct contact with some complaints and varying levels of contact with others.

[50] So far as the Springwood office[20] was concerned the practitioner spoke of a system that a "senior solicitor", Brian Briggs (*Briggs*), was assigned, at least to some extent, responsibility for monitoring files being conducted by more junior practitioners at the office[21].

[51] *Briggs* was not based at Springwood and the *practitioner* did not specifically instruct him in relation to the way in which that supervision was to occur or the way in which *Briggs* should deal with any concerns that may arise as a consequence of his supervision[22].

[52] *Briggs*, in cross examination, described his rule in these terms:

> "You were the supervising solicitor we were told, of this file? --
>
> Supervising Solicitor as in I was directed to go to Springwood to review files, to review issues about liability, to review issues of client agreements, to review issues of progressing the files. I wasn't there conducting the file or – you have to remember I was there once a fortnight, probably, half a day having to review numerous files –
> – on the first day I saw this file there was probably 50 files on the boardroom table. I didn't sit there and read the entire files."[23]

[53] In summary, so far as the practitioner is concerned, being nominated as partner responsible did not impose any particular additional responsibility. Further, whilst the evidence suggests that *Briggs* was assigned responsibility to supervise files in the Springwood office, aside from evidence that some files[24] were inspected once a fortnight, there is no evidence about the functioning, safeguards or objectives of that system from the clients' perspective. The reviews seem to have been directed at least as much to the *firm's* interest in the progress of files and the recovery of fees as to the client's interests.

[54] The events in respect of the conduct of the affairs of *Jorgensen*, *Hajistamoulis* and *Allan-Lowther* support a conclusion that this was an inadequate arrangement. Whether it amounted to misconduct or unprofessional conduct was only to be determined in the context of a particular charge in which it arises as an issue.

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20 The charges involving Mrs Jorgensen, Mrs Hajistamoulis and Mr Allan-Lowther relate to events at the Springwood office.

21 T:96.04

22 T 96:12

23 T 127:14

24 Nutley was the practitioner's client.

The charges

[55] It is convenient to deal with some general considerations and then the individual charges in terms of the client to which they relate; there are multiple charges, some in the alternative, in respect of a number of clients. I will deal with the charges it is sought to amend in their amended form; see [2].

[56] A prosecuting body in circumstances such as this is bound by the terms of the charges laid. That is a function of the requirement of natural justice that a party must know the case against them and have an opportunity to meet it.

[57] In his affidavit filed on 29 March 2005[25] the *practitioner* deposed as to his attitude to the charges in these terms:

> '2. I deeply regret the circumstances which have brought the charge before this Tribunal. I acknowledge the seriousness of the charge, and the particulars thereof, although I do note that none of the charges or the particulars contains any allegation that I acted dishonestly or wilfully improperly[26] in any way. I concede immediately that I have (as I shall say in more detail later), in the matters before the Tribunal, not exhibited the highest standards of professional conduct. I have personally failed in my duty to see that those standards are applied to every retainer from every client.
>
> 3. I pride myself on my commitment to the interests of clients. The firm which I founded endeavours to give every client a swift, effective and cost-effective resolution to his or her matter. Some of the matters before the Tribunal have not been conducted in that way.
>
> 4. Much of this stems from mistakes made in matters for which I had ultimate supervisory responsibility. I was the senior partner of the firm and the partner in charge of many of the matters mentioned in the Notice of Charge. In that sense, I accept – have always accepted – responsibility for all and any mistakes, errors of judgment and so on.
>
> 5. I also accept that some of my personal conduct (that is, in the use of vulgar speech) caused offence to some staff and clients. I accept that conduct of that kind did not exhibit the highest standards of professional conduct. I accept that some practitioners (including, obviously, those on the Council who resolved to bring that charge) regard conduct of that kind as unprofessional conduct, which might be sufficiently serious to justify the attention of this Tribunal. Although I do not share that view, I understand it."

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25 Doc 26

26 The reference to dishonesty and wilfully is to be read in the light of the application to amend.

[58] These statements have to be evaluated in the light of the events to be canvassed in the following portions of these reasons.

Charge 1 – Keith Athol Nutley ("*Nutley*")

[59] Charge 1 alleges that the *practitioner* dishonestly charged *Nutley* professional fees when none were properly chargeable. Put shortly it is alleged that fees were charged on a basis inconsistent with *Nutley's* retainer (the terms on which he engaged the *firm*).

[60] The circumstances giving rise to the charge are as follows. On 29 July 1993 a different firm of solicitors acting on *Nutley's* instructions sued *Nutley's* general practitioner for damages for negligent failure to diagnose and treat *Nutley's* facial carcinomas.

[61] The claim had been on foot for some time when the doctor's solicitors made an offer that he would bear his own costs if *Nutley* discontinued the action. This was not accepted. As will emerge the action was resolved on that basis on 14 March 2000.

[62] In early September 1997 the solicitors who had commenced the action advised *Nutley* that they had been unable to obtain expert medical evidence to support his case and there was no point in pursuing it. *Nutley* decided to take a second opinion and on 3 September 1997 he and his wife met with the *practitioner*.

[63] His original solicitors had provided *Nutley* with copies of a medical report by Dr Hinckley which supported their advice. The *firm* subsequently obtained a report from another specialist but that did not support *Nutley's* claim either.

[64] *Nutley* and his wife swore affidavits as to their version of events. Neither were called to give evidence or for cross examination. It was submitted for the *practitioner* that the *practitioner* had reasonable grounds for concluding *Nutley* provided inaccurate or misleading information.

[65] The *practitioner* however elected not to cross examine *Nutley*[27] so as to give him an opportunity to deal with these contentions. Essentially I accept *Nutley's* account of events where it differs with the *practitioner's*.

[66] When *Nutley* met the *practitioner* he took with him a file containing copies of documents relating to the claim, although not his previous solicitor's complete file. This included the medical report obtained by the previous solicitor which had failed to support *Nutley's* claim.

[67] I accept that *Nutley* told the *practitioner* at the first meeting that his previous solicitors advised him that he could not win because they had been unable to obtain supporting expert evidence. He showed the *practitioner* the documents in his possession but could not say whether the *practitioner* read them in detail or recall any specific discussion of the report. It is probable that the *practitioner* read it at some early stage if he did not read them while *Nutley* was in his office.

[68] After the *practitioner* had made some telephone calls he said to the *Nutleys* that the other solicitors had let *Nutley* down and "we will be beat these bastards … it is an open and shut case". The *practitioner* was "very optimistic" about the prospects of *Nutley's* success.

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[27] Or *Nutley's* wife whose affidavit supported her husband's in a number of respects.

[69] *Nutley* asked the *practitioner* whether he would take the case on a no win/no fee basis, explaining that he was unemployed, a pensioner and had no money to pay costs if the action was unsuccessful.

[70] The *practitioner* said he was prepared to do that, he was "very confident we would win", save that *Nutley* would have to pay disbursements in any event. *Nutley* agreed and there was discussion about arrangements to obtain the complete file from his previous solicitors and payment of their fees.

[71] *Nutley* subsequently requested confirmation of the terms of the retainer in writing. The *practitioner* wrote on 4 September 1997[28] confirming a retainer on a speculative basis so far as professional costs were concerned with *Nutley* meeting outlays as and when they were incurred.

[72] The letter said the retainer was subject to *Nutley* "at all times providing us with accurate information/facts" and that he pay professional costs on a successful conclusion of the action. *Nutley* accepted the arrangements set out in the letter as reflecting the agreement.

[73] The *practitioner's* letter asked for a detailed statement without which *the firm* could not comment on whether or not the former solicitors had taken appropriate steps or whether the proceeding had been correctly commenced. There was a postscript that medical expenses would be of the order of $3,000 and counsel's fees $3,000-$4,000.

[74] In a letter of 14 October 1997 the *practitioner* told *Nutley* he did not want to become embroiled in correspondence with the previous solicitor acknowledging "they have already told you you don't have a viable case"[29].

[75] By way of summary *Nutley* told the *practitioner* on the first consultation that his previous solicitors had not obtained medical evidence to support his claim. By accepting the retainer the *practitioner* took the risk that none might become available. That risk was reduced to some extent by the term that *Nutley* pay disbursements as they fell due.

[76] A report was ultimately obtained from a specialist, Dr Needham. It failed to support *Nutley's* case and no other report was obtained which did.

[77] *Nutley's* action against Dr Sykes was set down for trial in March 2000 but was resolved at a pre trial conference involving *Nutley*, an employee of the *firm*, Percival (who apparently had the day to day conduct of the matter at that stage), and counsel. The action was discontinued on 14 March 2000 on the basis that each party pay its own costs.

[78] At that time Percival[30] told *Nutley* he would have to sign an acknowledgment of the terms of the settlement with an agreement that he was liable for the firm's professional costs and outlays.

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28 Doc 6; affidavit of Keith Athol Nutley; exhibit J

29 Doc 6; affidavit of Keith Athol Nutley; exhibit 2 Item 10

30 No affidavit by Percival was filed. He was apparently unco-operative because of unrelated differences with the *practitioner*. No conclusion adverse to the *practitioner* flows from this particular matter.

[79] The document[31] produced by Percival contained an acknowledgement that *Nutley* "will still be liable" to the firm for his legal costs and outlays. *Nutley* queried the inconsistency between the terms of the acknowledgment and the retainer and declined to sign it.

[80] Percival pressed him to sign and added to the document (at *Nutley's* insistence) that *Nutley* wished to have discussions with the *practitioner* concerning his liability for costs and outlays "or regarding negotiating payment". *Nutley* reluctantly signed when that was done.

[81] On 31 July 2000 *Nutley* received a letter[32] from the firm enclosing an account and suggesting that he should arrange an appointment to see the *practitioner* to discuss the matter further including a repayment scheme. The letter referred to the *firm's* letter of 17 March 2000 and advised that the *firm* had an assessment of costs and outlays.

[82] It went on to say:-

> "As you will recall we took this matter over from your previous solicitors … in good faith and on the basis of your instructions. We confirm that we will prepare to conduct this matter on a speculative basis on the assumption that your instructions at all times were correct and accurate and further that any medical evidence that we were able to obtain would be in support of your case.
>
> It is our view that the medical evidence whether that be from your GP's file notes obtained on discovery together with specialist reports obtained throughout the course of proceedings did not substantiate your allegations and instructions which was borne out at the settlement conference.
>
> As we have incurred considerable costs and outlays in investigating this matter on your behalf in accordance with your instructions we are entitled to seek reimbursement in respect of these costs and outlays".

[83] The *practitioner* denies writing or signing this letter or authorising *Percival* to send a final account or, as a shorter letter of 31 July 2000 did, to describe the document as a memorandum of account[33].

[84] In fact, as emerged in the course of the *practitioner's* cross examination, *Nutley's* file contained a draft of the 31 July letter in the terms in which it was sent with the *practitioner's* hand written endorsement "this is fine"[34]. That draft describes the document as a "memorandum of account".

[85] The fact is that it was never a term of *Nutley's* retainer that "any medical evidence that we were able to obtain would be in support of your case." As the *practitioner* well knew, *Nutley* came to the *firm* because *Nutley's* previous solicitors had not been

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31 The document is the acknowledgement.
32 Doc 6; affidavit of Keith Athol Nutley; exhibit Y item 12
33 Doc 26; affidavit of Michael Vincent Baker; para 64
34 Exhibits 3 and 4

able to obtain evidence to support his claim. The *firm* had not been able to obtain medical evidence which did.

[86] In that circumstance *Nutley's* case was bound to fail, the very risk that the *practitioner* had undertaken on the *firm's* behalf by accepting *Nutley's* instructions. There was no successful conclusion to give rise to an obligation for *Nutley* to pay professional costs.

[87] *Nutley* complained to the Law Society, the subsequent correspondence included a letter of 4 December 2000[35] from the *firm* apparently signed by the *practitioner*.

[88] That letter stated that the *firm's* file had been reviewed and that a number of internal management issues had been identified and would be dealt with "so as to hopefully avoid repetition". It noted *Nutley's* straightened financial circumstances and indicated that "in a spirit of reconciliation", the firm was prepared to reduce its professional costs.

[89] The letter went on to note that *Nutley's* instructions were taken on the basis that he would "provide accurate information/facts" and referred to the letter of 4 September 1997 which set out a retainer in those terms.

[90] The letter then went on:-

> "(Nutley's) instructions did not prove to be accurate. (Photocopy unintelligible) recollection of when he saw Dr Sykes and additionally when he passed on to Dr Sykes a letter of recommendation from his previous cancer specialist were not supported by subsequent investigation."

[91] The letter concluded by saying that the *firm* was prepared to consider any reasonable proposal for payment of outstanding costs and outlays over time and assumed that the proposal would resolve *Nutley's* complaint.

[92] *Nutley's* response to the Law Society in respect of this letter[36] led to a letter of 1 March 2001 from the *firm*[37] which included the statement:-

> "It is our Mr Baker's recollection that Mr Nutley indicated that there was medical expert evidence available that would support his version of events".

That claim is inconsistent with the circumstances of *Nutley* seeking a second opinion and the practitioner's letter to him of 14 October 1997 which referred to the previous solicitor's belief that *Nutley* did not have a viable claim with the medical evidence which was obtained by the *firm*.

[93] It ought to have been apparent to the *practitioner* from the time he became involved in the case of the potential credibility issue between *Nutley's* accounts of his consultations with Dr Sykes and Dr Sykes' version. Insofar as it is suggested that *Nutley's* evidence may have been said to be inaccurate or unreliable as to whether Dr Sykes had received a letter from Dr Gould (a skin specialist) is supported by Dr

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35 Doc 6; affidavit of Keith Athol Nutley; Exhibit AA

36 Doc 6; affidavit of Keith Athol Nutley; exhibit BB

37 CC to Nutley.

Gould's letter to *Nutley* where he says he had sent a copy of his letter to *Nutley* to Dr Sykes[38].

[94] The position may be summarised as follows. *Nutley's* case was problematic from the time the *practitioner* accepted his instructions and failed for lack of evidence. The risk of that happening was apparent from the beginning.

[95] The *practitioner* approved the letter of 31 July 2000 demanding payment. It was never a term of the retainer that further medical evidence supporting the case be found and the *practitioner* must have known that.

[96] The issue of inaccurate instructions as a justification for charging was raised when *Nutley* complained to the Law Society although the *practitioner* would have it that this had emerged before the action was resolved. It is not surprising that *Nutley* and the defendant in his action had different versions of events. In any event given that supporting evidence was not found the claim was bound to fail, the very contingency underlying the retainer.

[97] *Nutley* was never cross examined about these contentions. They are brought up at a later stage to justify the recovery of fees which were not recoverable and in all probability are specious. These considerations notwithstanding the *firm* persisted in the claim against *Nutley*.

[98] Charge 1 had been made out. In the circumstances it constitutes professional misconduct.

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38 Doc 6; affidavit of Keith Athol Nutley; exhibit B

Charges 2, 3, 6 and 7 – Narelle Karen Jorgensen (*Jorgensen*)

[99] These charges arise from the circumstances that on or about 6 August 1997 *Jorgensen* retained *the firm* to act on her behalf in relation to workplace injuries suffered in June 1995.

[100] The claim was settled on 6 March 2000 on terms that the insurer refunded $9,324.23 to WorkCover for benefits paid to *Jorgensen* and paid her $10,000. The payments were in full satisfaction of the claim including interest and Health Commission refund, professional fees and disbursements.

[101] The $10,000 was inclusive of fees and disbursements. The *firm* delivered a bill for $19,699.65 for professional fees and disbursements. When *Jorgensen* declined to pay, the *firm* sued her in the Magistrates Court for the balance after bringing the balance of the $10,000 after reimbursements into account.

[102] Against that background Charge 2 is that the *practitioner* wrongfully charged *Jorgensen* professional fees and disbursements in circumstances in which no fees or disbursements which were in excess of the sum recovered were properly chargeable.

[103] The particulars of Charge 2 may be summarised by saying that it was a term of the retainer that *Jorgensen's* action would be conducted on a no win/no fee basis with fees and disbursements payable by *Jorgensen* from moneys recovered but not otherwise.

[104] Charge 3 is that the respondent dishonestly asserted a right for payment in the amount of $18,616.65 on the basis of an authority to act providing for fees chargeable by a partner at $200, a solicitor $175 and a managing clerk at $150. It was further alleged that all items on the bill of costs were charged at $200 an hour notwithstanding but included items carried out by employed solicitors who were not partners and clerical staff who were not professionally qualified. It is admitted that the bill included work carried out by an employed solicitor and clerical staff[39].

[105] Charge 6 was originally alternative to the withdrawn Charge 5 and is that the *practitioner* failed to adequately supervise the drafting of a letter of 15 May 2000[40]. That letter forwarded a bill of costs to *Jorgensen* and is alleged to have:-

> "… falsely asserted that 'pursuant to your instructions and against our advice and recommendations, your action was settled in the sum of $10,000.00 clear of the WorkCover refund but inclusive of legal costs and outlays" when, in fact:-
>
> (a) Counsel had assessed Jorgensen's damages within the range of $9,000.00-$16,000.00;
> (b) Baker Johnson, by its employed solicitor Bruce da Costa had advised Jorgensen that if the matter proceeded to trial, then Jorgensen might not received any compensation because negligence on the part of the defendant might not be established.
> (c) By letter dated 9 March 2000, Baker Johnson endorsed Jorgensen's decision to settle as 'an appropriate decision'.

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39 Exhibit 4 para 23

40 Doc 8; affidavit of Narelle Karen Jorgensen; exhibit G

> The assertion that the settlement was contrary to Baker Johnson's advice and recommendations were made for the purpose of endeavouring to justify Baker Johnson's wrongful demand for payment of professional fees and disbursements as set out in the letter of 15 May 2000."

[106] The letter of 15 May, relevantly said:

> "We note that pursuant to your instructions and against our advice and recommendations, your action was settled in the sum of $10,000.00 clear of the Workcover refund but inclusive of legal costs and outlays.
>
> We therefore set forth hereunder the final disbursement figures in order to finalise this action:-

General and special damages clear of the Workcover Refund but inclusive of legal costs and outlays	$10,000.00
Less refund payable to the Health Insurance Commission	$334.40
	$9,665.60
Less our account for costs and disbursements As per **enclosed** Bill of Costs in Taxable Form	$18,616.65
	($8,951.05)
Less costs associated with preparation of the Bill of Costs in Taxable Form (calculated on Items 390, 391 and 392 of the bill)	($1,083.00)
Amount due and owing by you	**$10,034.05**".

[107] Charge 7 is an alternative to the withdrawn Charge 4 and to Charge 6 and is that the *respondent* failed to maintain reasonable standards of competence and diligence in that he permitted the proceedings to be instituted and pursued against *Jorgensen*.

[108] *Jorgensen* was not required to give evidence and was not cross-examined. She deposes to having retained a solicitor (not the *firm*) in respect of a claim arising out of a workplace injury. That solicitor's practice was taken over by the *firm* who notified her of that. After a number of phone calls from the *firm*, *Jorgensen* and her husband saw a Mr Goodwin Poole (*Poole*), a solicitor employed at the *firm's* Springwood office.

[109] *Jorgensen* by that time was not keen to pursue the claim for reasons explained in her affidavit. She explained her attitude but *Poole* pressed her to proceed. After a number of questions had been asked and answered, *Poole* told her to the effect that *the firm* was prepared to act on her behalf on a "no win/no fee" basis.

[110] Ultimately *Jorgensen* told *Poole* that if he really wanted to do it to go ahead but at no cost to her and he responded "It's a no win/no fee costs involved". She was agreeable to proceeding on that basis but no client agreement was signed.

[111] The *firm* arranged a medical examination for *Jorgensen*. On 5 December 1997[41] the *firm* wrote to *Jorgensen* enclosing her statement. To the best of *Jorgensen's* recollection the letter was handed to her by *Poole* at a conference on 6 December 1997 attended by her and her husband.

[112] The letter stated that further investigation of the liability aspects of her claim was necessary and went on to deal with various aspects of the quantum. A client care brochure and an authority to act were enclosed**.**

[113] The letter stated "as advised to you in the course of our discussions" in addition to her claim, party and party costs would be recovered covering specified outlays and would "also include a substantial portion of our overall costs".

[114] The authority to act provided that all costs were to be charged on the hourly rates mentioned above in [104]. It required *Jorgensen* to acknowledge that costs and outlays would be carried by the *firm* so long as they acted and would be paid "at the conclusion of the action or when we terminate your retainer". There was an authorisation to deduct the costs and outlays from any monies held in trust.

[115] When *Jorgensen* saw the hourly rates she raised them with *Poole*. She ultimately said she didn't want to sign the document because she didn't want to incur costs and her understanding was the claim was being brought at no cost to her on a no win/no fee basis.

[116] *Poole* told *Jorgensen* that if she didn't sign the authority to act she'd be liable to the *firm* for the costs already incurred and as a result of questions by her he outlined what had been done by the *firm*.

[117] *Jorgensen* objected on the basis that the *firm* had pursued and persuaded her to sue, as was the case. Now the *firm* was going to send her an account if she didn't sign. She asked for an account of the costs to date but did not receive one. Ultimately she felt she had no choice but to sign and did so.

[118] *Jorgensen* and her husband attended a conference with counsel and Bruce da Costa (*da Costa*)[42] who was employed by the *firm*, in early 2000 at which counsel advised that the damages would be in the range of $9,000 to $16,000. *Jorgensen* told the barrister and *da Costa* that another employee of the *firm* (Morgan Cash) had previously told her that she could expect to recover a substantially higher amount.

[119] A diary note by Morgan Cash (11 January 2000) records a telephone call to *Jorgensen* on 6 January 2000. They "briefly discussed" the compensation she was likely to receive and he read an advice from counsel which spoke of a range of $21,500 to $38,500, a consequence of which she was "likely to receive high 20's or low 30's in the pocket". The memo goes on that "as the defendants have only offered $10,000 they obviously think they're going to get off on liability and that it was unlikely that there would be a decent settlement without going to trial".

[120] A diary note by *da Costa* of 2 March 2004 records he advised *Jorgensen* that the best offer he could get was the one ultimately accepted. He drew her attention to differences in the medical reports and other matters.

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41 Doc 8; affidavit of Narelle Karen Jorgensen; exhibit C

42 No affidavit by *da Costa* was filed, he was not called. The *practitioner* said he no longer worked for the *firm* and was no longer a solicitor.

[121] *Da Costa* records that *Jorgensen* "fairly went ballistic". She made comments about having met personally with the *practitioner* after the file was transferred and being assured that it would not cost her anything and was fuming that the only people who were going to benefit out of her claim were Baker Johnson. *Da Costa* records that he said he was not even prepared to say that the $10,000 would cover all her legal costs to date "which made her even more ballistic". He told the client that the *firm* stood to lose as well because the $10,000 would not even cover their costs.

[122] *Jorgensen* and *da Costa* spoke the next day by phone. He described her as still very angry and that she made it quite clear that she wasn't going lose two days' wages to go to court when there was no guarantee that she'd be any better off. He records "regrettably I don't believe that we've heard the last of this matter".

[123] The action was set down for trial on 7 and 8 March 2000. It settled on 6 March 2000 after a conference with counsel, *da Costa* and *Jorgensen.* I accept that *Jorgensen* settled on the basis of advice from *da Costa* given at a conference on 2 March 2000. *Da Costa* said nothing about the cost implications of the settlement.

[124] A letter of 9 March 2000 to *Jorgensen* apparently written by *da Costa* said:

> "…
>
> We will now proceed to prepare an assessment of our costs and outlays which we will submit to you in due course.
>
> We are disappointed that you would think so little of this firm and that you have accused us of simply running this action 'to line our pockets'. We would remind you that we have met the cost of the outlays including filing fees, counsel's fees and the costs of medical reports during the conduct of the action and have undertaken all possible steps to achieve the best possible result for you in the circumstances.
>
> We inherited this file from Ian Shepherd and confirmed to you that we were prepared to continue with this matter on a 'no win no fee basis' without requiring one dollar of contribution from you to the process of the preparation of this matter for trial. All expenses required have been met by this firm on your behalf.
>
> As the matter progressed the evidence in your favour was offset by the evidence against your case at the end of the day the decision taken by you to accept the only offer that had ever been made in this matter was, in our view an appropriate decision. The fact that you perceive that the only people who have benefited by this action and your decision is this office is regrettable and out of place because we have at all material times acted in your best interests and your case was simply beaten by the evidence that was gathered together both by this office and the Defendant.
>
> …".

[125] A note of 17 April 2000[43] by *Briggs* reads "MVB (the *practitioner*) says prep bill in taxable form at authority rate of $200 per hour". By a letter of 17 April 2000 the *firm* instructed its costs assessors to prepare a bill in taxable form "… in accordance with the hourly rates as contained in our Trust Account Authority executed by our client". The letter enclosed a copy of a document headed "Authority to Act – Trust Authority Personal Injuries". This provided for fees to be charged at the rate of $200 per hour for a partner, $175 for a solicitor and managing clerk $150. The bill sent to *Jorgensen* adopted a uniform hourly rate of $200.

[126] A bill in taxable form was forwarded under cover of a letter of 15 May 2000 for $19,699.65 made up as follows:-

"Professional fees	$11,073.95
Disbursements	$7,542.70
Costs of Preparation of Bill in Taxable Form	$1,083.00
TOTAL	$19,699.65"

[127] *Jorgensen* declined to pay the bill and on 2 November 2000 the *firm* sued her in the Magistrates Court[44] for $8,961.05 (plus interest and costs). This was the difference between the itemised bill of costs of $18,616.65 and $9,655.60 which the *firm* had received from the defendant in the action and applied to its claimed entitlement for professional fees and disbursements.

[128] The action was dismissed and the *firm* appealed to the District Court. In his reasons McGill DCJ records that cross examination of *Jorgensen* in the Magistrates Court was "at times vigorous and aggressive".

[129] The magistrate had found the original retainer was on a "no win/no fee" basis. McGill DCJ concluded that the magistrate was correct in construing the terms of the retainer and that an outcome could not be properly characterised as a win unless the respondent actually received something for herself. He concluded that the authority to act was not a variation of the original contract and was inconsistent with the "no win/no fee retainer".

[130] McGill DCJ stated that the *firm* did not give *Jorgensen* any advice as to her liability for costs and advised her to the effect that her only choice was to take the matter to trial where the financial outcome was likely to be worse.

[131] He went on to point out that if the *firm's* argument was right, that it was bad advice and involved putting its interests ahead of its clients. The practical reason for this advice not being given, he stated, was that the possibility of such an outcome did not occur to *da Costa* because he correctly appreciated the effect of a "no win/no fee" retainer to be that *Jorgensen* was not liable to pay more than the amount recovered from WorkCover[45].

[132] In refusing to make an order that the *firm* pay *Jorgensen* indemnity costs on the basis that the appeal was tantamount to an abuse of process McGill DCJ said that the *firm's* contention about the effect of the retainer was "not inarguable" and that the precise

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43 Exhibit 13

44 *Jorgensen* appeared before the Magistrates Court at Brisbane without legal representation.

45 That view is reflected in *da Costa's* dairy note of 2 March.

meaning of a "no win/no fee" retainer had not been the subject of authoritative disposition. He pointed out that there was no collateral purpose or suggestion of a test case. He concluded that it was unfortunate that *Jorgensen* "who has done nothing wrong should be vexed with litigation of this nature" but did not consider the circumstances justified ordering indemnity costs.

[133] McGill DCJ's conclusions were reached after careful consideration and are well founded. In the circumstances of these proceedings there is no comfort for the *practitioner* in his remarks about the fact that there was no authority for the construction of a "no win/no fee" basis in the context of an indemnity costs application.. In any event for present purposes it is to be construed in the interests of the client rather than the *firm* if there was any uncertainty.

[134] There is some conflict on the evidence as to the extent to which the *practitioner* otherwise had dealings with the file. He accepted he was the partner "ultimately responsible" for the matter. It is conceded that he dealt with it as evidenced by bring up notations on the file. He either did work on or reviewed the file. Those events seem to have been some time before the bill was prepared. *Briggs* maintains that the *practitioner* told him to send a bill to *Jorgensen* and that it was the *practitioner's* decision to institute proceedings against her. The *practitioner* maintains that he was not involved in either the initiation of proceedings or the appeal.

[135] I find it extraordinary that the applicant, the partner designated in respect of the file and who dealt with it as is evidenced by the bring up notations, would not know that the *firm* was going to sue to recover fees from its former client much less that it had been unsuccessful in doing so in the Magistrates Court, proposed to appeal to the District Court and did so. I do not accept his evidence that he had nothing to do with the file and did not see it. I think it is highly probable that neither decision was made without at least his knowledge or endorsement. These considerations support *Brigg's* evidence that the *practitioner* said to prepare the bill at $200 per hour.

[136] In a letter written by his solicitors, presumably on his instructions, of 26 November 2003 to the Law Society it was maintained that there was no misconduct "only a proper legal debate with the client about the meaning of the retainer on the *firm's bona fide* understanding of it".

[137] The evidence founds a conclusion that *Jorgensen* was charged fees and disbursements in circumstances where none were properly chargeable. I am satisfied that the evidence of the *practitioner's* connection with the rendering of the account claiming them founds a conclusion he charged them in circumstances when the terms of the retainer did not permit it.

[138] Charge 3 relates to the rates charged. The evidence does not sufficiently establish the applicant knew that the *firm* was charging rates not provided for by the authority and ignored them at the relevant time and dishonestly asserted a right payment. Charge 3 is therefore not made out.

[139] The letter of 15 May was apparently prepared and sent by *da Costa*. It is self serving and untrue in a number of respects. I am not however prepared to conclude that the *practitioner's* undisputed overall obligation to supervise in the circumstances extended to supervision of the writing of the letter. Charge 6 is therefore not made out.

[140] Charge 7 relates to the *practitioner* permitting proceedings to be instituted and pursued against *Jorgensen*. I have earlier concluded that the *practitioner* either instructed or endorsed the unmeritorious proceeding against the *firm's* former client who, as McGill DCJ said had done nothing wrong. That course goes beyond unprofessional conduct or practice and constitutes professional misconduct.

Charges 9 and 10 Nicole Helen Robertson *(Robertson)*

[141] Charge 9 is that the *practitioner* wrongfully charged professional costs and disbursements to *Robertson* in circumstances where none were chargeable.

[142] Charge 10 is that the *practitioner* dishonestly rendered to Robertson an account of his firm's professional fees which was not in accordance with the retainer entered into with *Robertson* in that:

(i) The Client Agreement provided for partners and solicitors to charge at the hourly rate of $280.00;

(ii) The bill of costs in taxable form referred to in subparagraph 5(f) included items of work carried out by employees of Baker Johnson who were not professionally qualified, including Shane Alexander;

(iii) The bill of costs charged all fees at the hourly rate of $280.00;

(iv) The sum of $516.63 claimed in respect of the property damage claim was calculated by reference to the Magistrates Court scale rather than by reference to time spent at the hourly rates provided for in the retainer.

The account was not in accord with the retainer agreement in each of these respects[46].

[143] *Robertson* retained the *firm* on 26 July 1999 to act on her behalf in a claim for damages in property and personal injury claims arising out of a motor vehicle accident which had occurred on 22 July. She was injured and her vehicle damaged.

[144] On 29 July 1999 *Robertson* signed a client service agreement. It was headed "Spec Matter-Fees and Costs paid on a successful outcome. Clause 3(2) provided:-

> "(a) subject to clause 11(iv) in respect of all professional work one by the firm the client agrees to pay the fees calculated in accordance with clause 3(i) together with all outlays and other charges upon the successful conclusion of the work undertaken in accordance with clause 1 (including a verdict, judgment or order in the client's favour or a settlement)."

[145] Clause 11 provided for termination of the agreement. The client could terminate the agreement and withdraw instructions at any time for any reason. Clause 11(ii) provided that the *firm* could terminate the agreement and cease to act for the client for lawful cause or if the client:-

> "(a) breaches the agreement,
> (b) requires the firm to act unlawfully or unethically,
> (c) fails to give the firm adequate instructions,
> (d) indicates that the client has lost confidence in the firm,
> (e) fails to pay for any accounts pursuant to clause 7 or to provide money to be paid into trust as may be required by clause 5(ii),
> (f) loses legal capacity."

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46 Exhibit 1 para 44

[146] The client agreement provided the *practitioner* was the partner to perform the work, fees were to be calculated on a time basis with charge out rates for a partner or solicitor of $280 an hour (including secretarial and word processing services, research services etc) on the basis of 10 minute units. There was a file opening and a file administration fee of $150 and $125 respectively. Accounts were to be issued on completion of the matter at judgment or settlement.

[147] The *firm* undertook searches and inquiries to establish the identity of the other parties to the accident and arranged an appointment with an orthopaedic specialist for the plaintiff. On 13 October 1999 it discovered it was acting for another party involved in the same accident and quite properly explained the position to *Robertson* and terminated the retainer of each party.

[148] In the circumstances the *firm* had no option to act as it did. There can be basis for suggesting that *Robertson* breached the retainer, required the *firm* to act unlawfully or unethically or was in any way responsible for the termination of the retainer. The *practitioner* must have known that.

[149] Although a practitioner who terminates a retainer for good cause, as occurred here, is not precluded from seeking payment of a fee the client should not be disadvantaged. The charge should only be made in respect of items of work which will not need to be duplicated by the new solicitor[47]. This simply reflects the paramountcy of the client's interests.

[150] *Robertson* retained other solicitors. Under cover of a letter of 23 February 2000 the *firm* forwarded an account in respect of the personal injury claim in an amount of $496.95 for costs and outlays and sought payment. *Robertson* deposes that, although the 23 February letter refers to a 21 February letter and account, she did not receive any such documents.

[151] A letter of 30 March 2000 from the *firm* pressed for payment, it was not made and on 10 May 2000 the *firm*, under the *practitioner's* signature wrote to *Robertson* noting that she had failed to pay the account of 29 February (it seems to be that forwarded under cover of the letter of 23 February).

[152] The letter stated that the account had been re-drawn in taxable form and was "delivered herewith … for your attention." If the account was not disputed within a calendar month *Robertson* would be sued. It went on to note that an account for $181.50 had been delivered in respect of the property damage claim and remained outstanding[48].

[153] The account accompanying the letter of 10 May 2000 (it is dated 11 May) charged $692 for professional costs for instructions to sue on the Magistrates Court Scale and outlays of $160.95 including doctors' fees.

[154] A memo dated 24 June 2001[49] by a cost assessor retained by the *firm* to prepare the bill addressed to the *practitioner* said:-

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47 Dal Pont, G E *Lawyers Professional Responsibility in Australia and New Zealand* 2nd ed LBC Information Services, Pyrmont (NSW) 2001, p 54

48 There does not appear to be any basis for treating this as a separate claim, it arose out of the same events and had the same liability issues. The amount was simply a separate head of damage.

49 Exhibit 6

> "Could you please look at the two files prior to issuing proceedings on them – half the correspondence is missing in the property damage file and I don't know whether we will get away with the client agreement or half the work was done if she decides to engage a lawyer to look at the bill".

[155] In an internal memo addressed to the *practitioner* dated 11 July 2001[50], Alexander, a solicitor employed by the *firm* comments on the costs assessor's concerns saying: "She's probably right on the property damage file. We will get screwed if we attempt to get that sort of money out of our client. We have no client agreement. There is also very little by way of correspondence except telling her to go somewhere else."

[156] The memos are directed to the *practitioner*. He says he cannot recall seeing them. Given the interest he took in the matter there is every reason to conclude that he did, certainly there is no creditable explanation for them not coming to his attention.

[157] Under cover of a letter of 23 July 2001 the *firm* sent "by way of service" a bill in taxable form and demanded payment within 14 days or proceedings would be instituted. The bill was for professional charges of $1,197.92 and disbursements of $132.65 totalling $1,312.57. It included a charge of $46.66 for a letter to the client noting that fresh solicitors had been instructed and the *firm* was to take no further action in dealing with *Robertson's* new solicitor's letter in relation to the *firm's* account.

[158] An internal memorandum from the practitioner to an employed solicitor dated 29 October 2001 by the *practitioner* instructed a summons to be drawn to recover the fees but "to speak to him first"[51].

[159] On 16 November 2001 the *firm* sued *Robertson* in the Southport Magistrate's Court for $1,829.20 being $1,312.57 professional fees and disbursements for the personal injury claim and $516.63 for fees and disbursement in the property damages claim. The *practitioner* claims[52] "he knew nothing about the figures". They are on Ex 8 in handwritten form.

[160] From November 2001 to July 2002 at the *practitioner's* instigation, steps were taken to locate *Robertson* to serve her. He instructed his secretary to phone the Gold Coast Hospital, where it was believed *Robertson* worked, to obtain her residential address by saying that the firm acted for her but had lost contact. The hospital declined to do so.

[161] The *practitioner* acknowledged he was not acting for *Robertson* when he instructed his secretary to ring. He[53] "can't say what was in his mind when telling the secretary to ring".

[162] Throughout these events the *practitioner* ignored his obligations to his client in favour of the *firm's* interests.

[163] The *practitioner's* attempts in evidence[54] to rely on Clause (ii)(b) as a basis for terminating the agreement are at best for him evasive and duplicitous. He took an

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50 Exhibit 7
51 Exhibit 8
52 T 61
53 T 56.32

active role in the file, see the "speak to me first" notation and his instructions to his secretary. I do not accept he was unaware of the file notes of 24 June and 11 July. In my view it is highly likely that he was aware of the concerns raised but chose to ignore them.

[164] The *practitioner* instructed his secretary to misrepresent the *firm's* relationship with *Robertson* to her employer to obtain her address to serve a summons on her. He could not say what was on his mind because to do otherwise would involve acknowledging the impropriety of his actions.

[165] Charge 9 is made out. Given the findings made in the preceding paragraphs it constitutes professional misconduct.

[166] So far as Charge 10 is concerned the issue is whether the *practitioner* acted dishonestly. The *practitioner* was probably aware of the reservations raised by the costs assessor and Alexander and ignored them. In the circumstances he caused the memorandum of fees to be rendered and did so dishonestly. This is professional misconduct.

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[54] T 56 and 55

Charges 13 and 14 – Daniela Maria Hajistamoulis (*Hajistamoulis*)

[167] Charge 13 was originally in the alternative to Charge 12 which is now withdrawn. Charge 13 is that the *practitioner* failed to adequately supervise the conduct of a solicitor employed by the *firm* of the *Hajistamoulis* matter in that he permitted:

(a) the account under cover of a letter of 16 October 2001 by which the *firm* forwarded an account to *Hajistamoulis*,

(b)

Professional fees	$1,225.70
Disbursements	$2,347.86
GST	$122.60
TOTAL	**$3,723.16**

(c) The *firm* sued *Hajistamoulis* in the Magistrates Court, Brisbane for $3,723.16 with interest in costs in circumstances where *Hajistamoulis* retained the *firm* on a no win/no fee basis and no fees or disbursements were properly chargeable.

[168] Charge 14 is a new charge that the *practitioner* failed to adequately supervise the conduct by solicitors employed by the *firm* in the *Hajistamoulis* matter in that he failed to adequately supervise the drafting and sending of a letter of 30 May 2001[55] to the Queensland Law Society.

[169] The letter of 30 May 2001 was in response to a letter dated 24 May 2001 from the Queensland Law Society seeking an explanation in relation to complaints by *Hajistamoulis*. The *practitioner* responded by letter dated 30 May 2001 and provided information alleged to be false or misleading.

[170] The charge was particularised:

(a) The letter dated 30 May 2001 advised that:

(i) "A diary note on our file of 6 July 2000 indicates that Mr Da Costa attended upon Mrs Hajistamoulis, instructions from her, prepared a Statement of the circumstances of her accident and noted that we would be seeking Counsel's advise (sic). Mrs Hajistamoulis was advised that we would need to investigate her claim before we could make a decision as to whether we would act on a no win/no fee basis. Further, she was advised that there would be costs involved in investigating her claim which she would need to pay as part of the action."

(ii) Mr Da Costa informed her (on 9 May 2001) that at no time between when Mrs Hajistamoulis first attended our Springwood office on 6 July 2000 and 9 May 2001 had there been any discussion with Mrs Hajistamoulis regarding whether this firm was to handle her claim on a no win/no fee basis, a

[55] Doc 11; affidavit of Daniela Maria Hajistamoulis, exhibit K

speculative basis or any other basis. On 9 May 2001, Mrs Hajistamoulis still had not signed the Client Agreement.

At no material time prior to 9 May 2001 had our firm agreed to conduct this matter on a no win/no fee basis. If it was an assumption that Mrs Hajistamoulis made, that is unfortunate as our file contains no reference to Mr Da Costa advising Mrs Hajistamoulis at any material time that we were in fact acting on a no win/no fee basis. She was not advised that we would undertake the claim on this basis and the initial Client agreement also does not reflect this. The advertisement clearly indicates that any no win/no fee is subject to conditions and it was only until Mr Da Costa saw Mrs Hajistamoulis on 9 May and the investigations completed that the basis by which our firm would act for her was explained. We deny that Mrs Hajistamoulis' suggestion that the agreement was therefore changed from a 'no win/no fee' to one where she would be 'paying for everything'.

(b) In fact

(i) Hajistamoulis retained Baker Johnson as a result of Baker Johnson's advertising that it was prepared to undertake personal injury litigation on a 'no win no fee' basis;

(ii) When making the initial appointment to meet with Da Costa on 3 July 2000, Hajistamoulis informed Baker Johnson's employee (Deidre) that she was responding to the advertisement and Deidre so informed Mr Da Costa.

(iii) At the initial conference on 6 July 2000, Da Costa did not advise Hajistamoulis that there were any conditions on Baker Johnson's willingness to act on a 'no win no fee' basis;

(iv) Hajistamoulis was not advised that Baker Johnson was not prepared to act on a 'no win no fee' basis until receipt of Baker Johnson's letter dated 10 April 2001;

(v) In the premises, Baker Johnson's retainer was on a 'no win no fee' basis.

(c) The matters referred to in subparagraph (b) were recorded on Baker Johnson's file in:

(i) Deidre's memo to Da Costa dated 3 July 2000;
(ii) Baker Johnson's letter to Hajistamoulis dated 7 July 2000;
(iii) Da Costa's file note dated 9 May 2002".

[171] I accept *Hajistamoulis'* account. She was not called nor cross-examined, nor was her husband who supported her account of meetings he attended in April 2001 and about a month later.

[172] *Hajistamoulis* contacted the *firm* as a result of a newspaper advertisement that it would undertake "no win/no fee" litigation in respect of various categories of accidents including slip and falls. When making the appointment she told the secretary that she had seen the advertisement and wanted to consult on a "no win/no fee" basis.

[173] When she saw *da Costa* a solicitor employed at the Springwood office (on 6 July) at the Springwood office she said that she had no money to pay legal cost expenses and was consulting the *firm* on account of the advertisement which she showed to *da Costa*. *Da Costa* took a statement at that interview and made no mention of any conditions. The advertisement had referred to conditions.

[174] The *firm* (*da Costa*) wrote to *Hajistamoulis* on 7 July 2001 enclosing her statement for signature. It went on that once the *firm* had received the signed statement they would brief a barrister. If the barrister considered that *Hajistamoulis* had good prospects of success the *firm* would proceed to act for her on a "no win/no fee" basis if the barrister had doubts about the prospects of success she would be advised accordingly and should she wish to take no action the *firm* would close its file and no further action would be taken.

[175] These arrangements were in accordance with *Hajistamoulis'* understanding of what had been said at the meeting the previous day. She signed the statement and returned it to the *firm.*

[176] A letter of 10 August 2000 advised that preliminary advice from counsel had indicated there were reasonable prospects of success subject to some further investigation.

[177] There were further conversations with *da Costa* including one where he mentioned that he was thinking of involving an investigator to take photographs and video of the vessel. *Hajistamoulis* expressed concern that she couldn't afford to pay for that. *Da Costa* told her not to worry, they would pay first and she would pay at the end. She sought confirmation of it being a "no win/no fee" retainer and that if she didn't win she didn't pay and he agreed.

[178] A letter of 21 November 2000 included a client agreement, a notice to client, a trust account authority, general authority and client care procedures were sent to the client. *Hajistamoulis* refused to sign the client agreement, justifiably, because she did not consider it reflected the "no win/no fee" agreement which she had entered into with *da Costa*.

[179] By a letter in April 2001 the *firm* advised *Hajistamoulis* that it was prepared to continue to act on the basis of the client agreement and requested its return together with $500. She complained to the Law Society contending that the document was different from what had been previously agreed and refused to sign it.

[180] Under cover of a letter of 10 October 2001 the *firm* forwarded to solicitors then acting for *Hajistamoulis* a bill of costs in taxable form for $3,723.16 being $1,225.70

for professional fees, $2,374.86 for disbursement and $122.60 GST. She signed an acknowledgement but did not pay.

[181] On 26 November 2001 the *firm* sued *Hajistamoulis* in the Magistrates Court for $3,723.16. On 26 November she signed an agreement settling the *firm's* claim and subsequently paid it out of funds received on the settlement of her claim.

[182] The *practitioner's* evidence is that he had no involvement whatsoever in this matter and the evidence otherwise does not provide a basis for concluding that he did hence the amended charge of raising failure to supervise and the re-drafted charge 14.

[183] The relevant portions of the letter of 30 May 2001 are as follows:-

> "We acknowledge receipt of your letter dated 24 May 2001.
>
> We reply specifically to the letter dated 16 May 2001, from Daniella Hajistamoulis to the Society. Dealing with each matter raised by Mrs Hajistamoulis in her letter, as you will observe, the advertisement to which she responded has an asterisk on no win/no fee "Conditions Apply".
>
> A diary note on our file of 6 July 2000 indicates that Mr Da Costa attended upon Mrs Hajistamoulis, took initial instructions from her, prepared a Statement of the circumstances of her accident and noted that we would be seeking Counsel's advice. Mrs Hajistamoulis was advised that we would need to investigate her claim before we could make a decision as to whether we would ct on a no win/no fee basis. Further, she was advised that there would be costs involved in investigating her claim which she would need to pay as part of the action. A letter sent by us to Mrs Hajistamoulis of 7 July 2000 sets out the basis by which we were acting for her at that time. We **enclose** a copy of that letter which Mrs Hajistamoulis has, and we won't speculate why, failed to provide to you in her recent letter.
>
> Mr Da Costa proceeded to obtain Counsel's opinion and submitted to Mrs Hajistamoulis a Client Agreement which has not yet been signed.
>
> Subsequently, our firm conducted an internal review of Mrs Hajistamoulis' claim (as we do with a significant number of personal injuries claims) and it was our Liability Committee's view that we could not act for Mrs Hajistamoulis on a no win/no fee basis but that we required her to place money into trust for outlays that would need to be incurred during the conduct of the matter.
>
> This was advised to Mrs Hajistamoulis by a letter to her dated 10 April 2001.
>
> Our file then notes that Mrs Hajistamoulis attended upon Bruce Da Costa on 12 April 2001 when there were discussions between the parties as to how this firm viewed the circumstances of her accident, that Mr Da Costa advised Mrs Hajistamoulis that it was by no means

an open and shut case and that she was required to place into our trust account the sum of $500.00.

Mr Da Costa noted that the Client Agreement would need to be amended to reflect that, again bearing in mind that on 12 April 2001 the client still had not signed the Client Agreement.

Subsequently, on 9 May 2001, Mrs Hajistamoulis attended upon our office apparently with her $500.00 and further discussions ensued regarding whether our retainer would be on a no win/no fee and/or speculative basis.

Mr Da Costa informed her that at no time between when Mrs Hajistamoulis first attended our Springwood office on 6 July 2000 and 9 May 2001 had there been any discussion with Mrs Hajistamoulis regarding whether this firm was to handle her claim on a no win/no fee basis, a speculative basis or any other basis. On 9 May 2001, Mrs Hajistamoulis still had not signed the Client Agreement.

At no material time prior to 9 May 2001 had our firm agreed to conduct this matter on a no win/no fee basis. If it was an assumption that Mrs Hajistamoulis made, that is unfortunate as our file contains no reference to Mr Da Costa advising Mrs Hajistamoulis at any material time that we were in fact acting on a no win/no fee basis. She was not advised that we would undertake the claim on this basis and the initial Client Agreement also does not reflect this. The advertisement clearly indicates that any no win/no fee is subject to conditions and it was only until Mr Da Costa saw Mrs Hajistamoulis on 9 May and the investigations completed that the basis by which our firm would act for her was explained. We deny that Mrs Hajistamoulis' suggestion that the agreement was therefore changed from a "no win/no fee" to one where she would be "paying for everything".

Mr Da Costa denies saying to Mrs Hajistamoulis's husband that if we spelt out the conditions in the advertisement no one would go in and see them. There were discussions with Mrs Hajistamoulis as to the conditions applying to no win/no fee, there were discussions as to whether the conditions should have been presented to Mrs Hajistamoulis at the time she first came to see us, but at no time has this firm changed the basis by which it would act for Mrs Hajistamoulis. Up until Mrs Hajistamoulis was advised by letter dated 10 April 2001 that she would be expected to contribute to outlays, this firm had not advised her in any way, shape or form that we were acting for her on a no win/no fee basis.

We note that it was necessary for us to incur outlays against Mrs Hajistamoulis if she does not wish us to act on her behalf and to execute the Client Agreement previously submitted with the amendments as discussed by Mr Da Costa on 9 May 2001.

We trust this letter addresses your correspondence of 24 May 2001."

[184] The *practitioner's* evidence of those charges on supervision is that he had no involvement whatsoever in relation to this matter**.** *Briggs* was responsible for the Springwood office and relevantly for present purposes the *practitioner* had no reason to consider other than that he was capable of doing so and did so.

[185] These events are matters of grave concern about the conduct of the practice. *Da Costa's* version of the events is not available. The Tribunal is not dealing with *Brigg's* supervision. *Brigg's* description of his role at Springwood has already been referred to, it seems to have been more directed to the *firm* than to the client's interests and may generally speaking have left a lot to be desired.

[186] It may be unlikely that proceedings were instituted without the *practitioner's* knowledge but that consideration cannot be dismissed. I am not prepared to conclude that the *practitioner* failed to adequately supervise *da Costa's* conduct the subject of Charge 13.

[187] So far as Charge 14 is concerned the letter of 30 May 2001 the subject of Charge 14 was in response to a letter from the Law Society taking up *Hajistamoulis'* complaint that the *firm* had departed from the "no win/no fee" arrangement which had already been agreed on. The letter is an explanation of a matter being investigated by the Council of the Law Society[56]. It required a responsible and considered response on the *firm's* behalf. It is patently incorrect in a number of respects.

[188] Insofar as it suggests to the contrary there is no doubt that on her first meeting with *da Costa*, *Hajistamoulis* sought to retain the *firm* on a "no win/no fee" basis and that was accepted subject to the term about counsel's advice. The advice indicated reasonable prospects in the terms that I have mentioned. Insofar as the client agreement sought to vary this arrangement. *Hajistamoulis* was entitled to refuse to accept the variation which would have been involved in signing the client agreement[57].

[189] It is true that the advertisement which led *Hajistamoulis* to the *firm* provided that conditions apply and the condition as to counsel's opinion was agreed to by *Hajistamoulis* but no other condition was put forward at that meeting. *Hajistamoulis* never departed from her position that the terms of the retainer were set at the first meeting and confirmed by the letter of 7 April.

[190] The *practitioner* may have had no involvement in the matter and maintains that he may not necessarily have seen the letter before it was sent**.** However he acknowledged he would expect the partner (i.e. him) to see such a letter.

[191] The letter raised serious concerns about *Hajistamoulis'* treatment by the *firm* and *da Costa's* conduct of her case. Given the considerations canvassed it was irresponsible for the *practitioner* to permit the letter to be sent without satisfying himself if was accurate and well founded. Had that been done it is to say the least improbable that he would have allowed the letter to go forward in the form which it did.

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56 *Queensland Law Society Act* 1952 s 5G(a)

57 The agreement is in the letter of 7 July.

[192] Charge 14 has been made out and in the circumstances constitutes unprofessional conduct.

Charge 16 – Geoffrey Neil Allan-Lowther (*Allan-Lowther*)

[193] Charge 16 was originally an alternative to a withdrawn Charge 15. Charge 15 had alleged that the *practitioner* had charged professional fees and disbursements to *Allan-Lowther* in circumstances where none were properly payable.

[194] Charge 16 is that the *practitioner* failed to adequately supervise the conduct of *Allan-Lowther's* matter to ensure that he was not billed in circumstances in which no fees or disbursements were properly chargeable.

[195] On 30 June 2002 *Allan-Lowther* consulted *da Costa* at the firm's Springwood office. The purpose of the consultation was to see whether *Allan-Lowther* had a claim for compensation as a result of contracting an infection after the removal of his spleen and being treated in the Logan and Princess Alexandra Hospitals. There is no evidence from *da Costa* about his role in these events.

[196] Once again the matter was dealt with on the basis of *Allan-Lowther's* affidavit, he was not required to be called or cross examined. Notwithstanding a suggestion that *Allan-Lowther's* capacity to recall accurately his conversation might be under something of a cloud because of his ill health this seems no basis for not accepting his account.

[197] At the first consultation *Allan-Lowther* told *da Costa* that he was on a pension and couldn't afford to pay legal costs and was told that the *firm* would act on a "no win/no fee" basis and that if the matter went to court their fees would be deducted from the damages recovered.

[198] When asked what would happen if no damages were recovered *da Costa* replied to the effect that "If we don't win, we don't get any money". *Da Costa* also told *Allan-Lowther* that he would be required to pay a fee "a few hundred dollars" for an advice from counsel as to prospects.

[199] Under cover of a letter of 21 August 2000[58] the *firm* forwarded a form of client agreement to *Allan-Lowther*. The letter stated that, as indicated to *Allan-Lowther* previously, if the evidence did not support the claim the matter could go no further and the *firm* would close its file.

[200] The letter went on to the effect that if the advice obtained from counsel was encouraging and other material had to be prepared the *firm* "would proceed accordingly". If however counsel was not of the view that there were reasonable prospects the *firm* was not prepared to continue with the matter.

[201] The *firm* sent *Allan-Lowther* a client agreement under cover of a letter of 21 August 2000, he signed and returned it. It provided that the firm's professional fees be:

> "Paid on conclusion of the work undertaken or if you do not take our advice in relation to settlement of the matter for a specified sum, immediately on settlement. If your claim is successful, fees will be paid out of any settlement moneys, damages, compensation or costs recovered on your behalf."

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58 Doc 14; affidavit of Jeffrey Neil Allan-Lowther; exhibit B

Disbursements were to be:

> "paid during the course of the matter if demanded and on conclusion of your claim".

[202] The letter had the *practitioner's* initial on it followed by those of *da Costa* and the costs agreement designated the *practitioner* as the partner and *da Costa* as the professional staff to perform the work. The terms of the client agreement were inconsistent with the oral retainer, it was not a no win/no fee arrangement**.** *Allan-Lowther's* attention was not directed to the departure from the oral arrangement, he did not appreciate that it occurred and signed the agreement. This is indefensible, it completely ignored the client's interest.

[203] Counsel's advice was not encouraging and the firm in a letter of 19 February 2001 advised to the effect that the *firm* was not prepared to proceed unless $2,500 was paid "urgently" into its trust account to enable further investigations to be carried out. It asked for payment of counsel's fee in the amount of $600. That letter and those I am about to refer to carried the *practitioner's* initials. *Allan-Lowther* paid counsel's fees as he had agreed but not the additional money.

[204] In a letter dated 6 June 2001 the *firm* (apparently *Briggs*) referred to the fact there had been no further instructions following the letter of 19 February and enclosed an estimate of professional costs and disbursements to date. It referred to the fact that the limitation period expired on 26 February 2003 and asked for a cheque for $1,649.05 being the "estimate of professional fees and costs including GST" less the $660 paid for counsel's fees.

[205] *Allan-Lowther* responded[59] that he was told that it would be a no win/no pay situation and that the only part of the money that he would have to pay would be for counsel's advice. He went on to say that if he had to pay he could pay $17.50 a fortnight.

[206] *Allan-Lowther* deposes that when he received the letter and account of 6 June he telephoned the firm and spoke to *Briggs* and complained that there had been a no win/no fee arrangement and that he had honoured his obligations to pay counsel's fee.

[207] *Briggs* told him to "stop mucking around" and advised *Allan-Lowther* that he would write and tell him details of his financial position which he did and made an offer of payment.

[208] By a letter of 19 October the *firm* purported to accept the offer and *Allan-Lowther* began to make payments. As a result of press publicity *Allan-Lowther* made a complaint to the Law Society and ultimately the money he had paid under the instalment arrangement was refunded by the *firm*.

[209] The *practitioner* deposes that he had no contact with *Allan-Lowther* and the evidence does not support a conclusion that he did. *Allan-Lowther* was wrongly billed for fees and disbursements but it is not proven the *practitioner* should have supervised the particular matter to the extent necessary to establish Charge 16.

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[59] Doc 14; affidavit of Jeffrey Neil Allan-Lowther; exhibit E

Offensive Language - Charges 17 and 18

[210] Charges 17 and 18 can be dealt with together. They arose out of the *practitioner's* use of offensive language to or in the presence of a client (Charge 17) and of members of the *firm's* staff (Charge 18).

[211] Charge 17 was particularised and the particulars may be summarised as follows:

(a) In the course of dictating a note to his secretary in the presence of Sheppard, the respondent said words to the secretary: *"I can't deal with ### morons. Get out of my office."* He later said to the client: "*You're an absolute moron to have signed the contract without knowing what you were doing.*"

(b) Later in the course of a telephone conversation with Sheppard, the respondent said: "*the whole thing has got out of hand. A lot of bullshit is going in with this contract.*"

(c) On or about 7 August 2002 the client attended at the firm's offices at the Gold Coast. While he was sitting in the reception area the respondent approached him and said: "*what the #### are you doing here?*" Sheppard: "*I am here to see Julie Sommerville".* Baker*: "You don't have the right to waste our ####ing time. I have spent enough ####ing time on the ####ing file. You are a ####ing moron. If you had signed the ####ing contract properly in the first place, we wouldn't be in the ####ing mess. #### off out of my reception area.*

[212] Charge 18 is that between April 2001 and April 2002 the *practitioner* frequently used insulting and offensive language in communication with or in the presence of employees. This is particularised as having been done in direct verbal communication, on dictation tapes, verbal communications with clients and others in the presence or hearing of employees. It is unnecessary to repeat the particulars of the language used, the particulars of Charge 17 give the flavour, it is sufficient to say that it was vulgar, abusive, derogatory and demeaning of the staff member.

[213] There is no doubt that this conduct occurred. It is inconceivable that the behaviour the subject of Charges 17 and 18 could ever be regarded as acceptable behaviour by a solicitor towards a client or an employee. It is bound to bring the profession into disrepute. The *practitioner* has been slow to recognise that and apparently does not accept it.

[214] In his affidavit of 29 March 2005 the *practitioner* deposed of his attitude to these charges in these terms:-

> "5. I also accept that some of my personal conduct (that is, in the use of vulgar speech) caused offence to some staff and clients. I accept that conduct of that kind did not exhibit the highest standards of professional conduct. I accept that some practitioners (including, obviously, those on the Council who resolved to bring that charge) regard conduct of that kind as unprofessional conduct, which might be sufficiently serious to justify the attention of this Tribunal. Although I do not share that view, I understand it."

[215] Charge 18 deals with staff as did Charge 17(a). These are more serious charges, a client has the option of taking their business elsewhere. An employee is in a much more difficult position. Moreover the workplace environment reflected by such conduct is not conducive of an atmosphere of effective supervision or reflect an environment in which staff could feel confident they would be supported and guided in their work; it is in fact antipathetical to that situation.

[216] In 2002 a former legal secretary at the Gold Coast Office of the *firm* brought proceedings before the Industrial Relations Commission for reinstatement. The *practitioner* accepted some of the incidents referred to in evidence but rejected others. Those incidents related to conduct of the kind canvassed by Charges 17(a) and 18. The *practitioner* sought to justify his position by saying that he had made it clear to employees not to take the job if swearing was going to offend them.

[217] The letter to the Law Society of 20 November 2003[60] on the *practitioner's* behalf acknowledged that this use of language was unacceptable and unprofessional and stated that employees were warned that he swore and had a heavy workload and referred to the language as "thoughtless" and "unintentionally offensive".

[218] It went on to set out steps taken by the *practitioner* to address his behaviour in terms of consulting a psychologist about anger management issues, having a senior solicitor give lectures to staff about workplace behaviour and inviting intimidation, harassment, discrimination and other unacceptable behaviour be reported to him. Following these efforts there was said to be a noticeable reduction in his language.

[219] The letter went on to say that if the charge in respect of staff was pursued, staff would be called to give evidence that the *practitioner* was a "passionate and colourful person", a man of "basic tastes … given frequently to coarse behaviour". He was nevertheless held "in great affection" by staff. No such evidence was called.

[220] The letter submitted that the matter "could be left" or not taken any further by seeking to justify the conduct. It was for example said that staff were instructed not to enter the *practitioner*'s office when the door was closed. The client referred to in Charge 17 was said "not critically" to be "rather persistent in his approaches to the firm" who "had arrived unannounced seeking legal advice".

[221] In his affidavit sworn on 22 March 2005 in relation to language to a particular member of staff "by way of explanation, not as an excuse" the *practitioner* referred to the employee's unsatisfactory behaviour, non-observance of office processes, abrasive manner, occasional insolence and disruption which "probably contributed to" his use of vulgar language when speaking to her. This is a feeble attempt at self justification and is unacceptable.

[222] The invitation by his counsel to administer a reprimand has to be read in the light of these considerations. The *practitioner's* acknowledgement of the inappropriateness of the conduct and the putting in place of steps to deal with it was simply facing up to the inevitable and dealing with a situation which should never have arisen had the *practitioner* acted properly by not engaging in the conduct in the first place or by addressing it primarily when it came to his attention rather than seeking to explain it away or justify it.

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[60] Doc 26; affidavit of Michael Vincent Baker; exhibited p 17

[223] The submission by counsel for the *Commissioner* that the *practitioner* seemed to lack any sort of real insight as to how inappropriate it was to treat his staff in the way in which he did is justified and there is occasion for concern that that might still be the position is well made.

[224] Each of Charges 17 and 18 is made out. The conduct, particularly in relation to staff, given the vulnerable position of staff, the potential effect on the conduct of the practice from the perspective of support and supervision, the *practitioner's* persistence and reluctance to accept the implications of his behaviour constitutes a high degree of unprofessional conduct.

[225] **Summary of Outcomes – Charge by Charge**

Nutley

1. The respondent ~~wrongfully~~ dishonestly charged professional fees ~~and disbursements~~ to Keith Athol Nutley ("*Nutley*") in circumstances in which no fees ~~or disbursements~~ were properly chargeable.

This charge is made out. It constitutes professional misconduct.

Jorgensen

2. The practitioner wrongfully charged professional fees and disbursements to Narelle Karen Jorgensen ("*Jorgensen*") in circumstances in which no fees or disbursements in excess of the sum recovered were properly chargeable.

This charge is made out. It constitutes professional misconduct.

3. The respondent ~~falsely~~ dishonestly asserted a right to payment of the sum of $18,616.65 in reliance upon a document headed 'Authority to Act – Trust Authority Personal Injuries' ('The Authority to Act') signed by Jorgensen in circumstances in which the bill of costs in taxable form charged at rates in excess of those provided for the Authority to Act."

This charge is not made out.

6. In the alternative to charge 5, the respondent failed to adequately supervise the drafting of the letter dated 15 May 2000 to ensure that the letter was accurate.

This charge is not made out.

7. In the further alternative to charges 4 and 6, the respondent failed to maintain reasonable standards of competence and diligence in that he:

(a) …

(b) permitted the proceedings to be instituted and pursued against Jorgensen.

This charge is made out. It constitutes professional misconduct.

Robertson

9. The respondent wrongfully charged professional fees and disbursements to Nicole Helen Robertson ("*Robertson*") in circumstances in which no fees or disbursements were properly chargeable.

This charge is made out. It constitutes professional misconduct.

10. The respondent dishonestly rendered to Robertson an account of his firm's professional fees which was not in accordance with the retainer agreement entered into with Robertson in that:

(i) The Client Agreement provided for partners and solicitors to charge at the hourly rate of $280.00;
(ii) The bill of costs in taxable form referred to in subparagraph 5(f) included items of work carried out by employees of Baker Johnson who were not professionally qualified, including Shane Alexander;
(iii) The bill of costs charged all fees at the hourly rate of $280.00;
(iv) The sum of $516.63 claimed in respect of the property damage claim was calculated by reference to the Magistrates Court scale rather than by reference to time spent at the hourly rates provided for in the retainer.

This charge is made out. It constitutes professional misconduct.

Hajistamoulis

13. ……the respondent failed to adequately supervise the conduct by solicitor employment by Baker Johnson (*sic*) of the Hajistamoulis matter in that he permitted:

(a) the account referred to in subparagraph 12(1) to be sent;

(b) the proceedings referred to in subparagraph 12(j) to be instituted, in circumstances where Hajistamoulis retained Baker Johnson on a no win no fee basis and no fees or disbursements were properly chargeable.

This charge is not made out.

14. Withdrawn – New Charge

The respondent failed to adequately supervise the conduct by solicitors employed by Baker Johnson in the Hajistamoulis matter in that he failed to adequately supervise the drafting and sending of a letter of the 30th May 2001 to the Queensland Law Society.

This charge is made out. It is unprofessional conduct.

Allan-Lowther

16. …..The respondent failed to adequately supervise the conduct of the matter Referred to in charge 15 to ensure that Allan-Lowther was not billed in circumstances In which no fees or disbursements were properly chargeable.

This charge is not made out.

Offensive Language

17. The respondent used crude, insulting and offensive language in communications with and in the presence of Russell Sheppard ("Sheppard"), a client of Baker Johnson.

    This charge is made out. It constitutes unprofessional conduct.

18. Between about 2001 and April 2002, the respondent frequently used insulting and offensive language in communication with and/or in the presence of employees of Baker Johnson.

    This charge is made out. It constitutes unprofessional conduct.

[226] There is leave to amend charges 1, 3, 10 and 14. Charges 3, 6, 13 and 16 are dismissed.

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