# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Legal Services Commissioner v Dempsey* [2010] QCA 197 |
| PARTIES: | **PAUL ANTHONY DEMPSEY**<br>(respondent/appellant)<br>**v**<br>**LEGAL SERVICES COMMISSIONER**<br>(applicant/respondent) |
| FILE NO/S: | Appeal No 13255 of 2009<br>SC No 9435 of 2008 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 30 July 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 19 May 2010 |
| JUDGES: | McMurdo P, Holmes and Muir JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The appellant be refused leave to adduce further evidence;**<br>**2. The appeal be dismissed with costs.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – MISLEADING THE COURT AND PERVERTING THE COURSE OF JUSTICE – Legal Practice Tribunal found appellant legal practitioner guilty of six charges brought under s 452 *Legal Profession Act* 2007 (Qld) – Tribunal found appellant gave false evidence that a meeting occurred with a client – appellant's evidence was uncorroborated – client gave evidence that no such meeting took place – whether Tribunal erred in finding appellant gave false evidence<br><br>PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – Tribunal found that appellant had perjured himself – appellant argued Tribunal had not put him on notice of the specific issue for which he was accused of perjury – appellant argued Tribunal did not give him an opportunity to answer the accusation of perjury – whether appellant denied procedural fairness |

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – appellant sought leave to adduce evidence regarding the alleged meeting – whether leave should be granted to adduce further evidence

*Legal Profession Act* 2007 (Qld), s 452, s 468

*Abalos v Australian Postal Commission* (1990) 171 CLR 167; [1990] HCA 47, cited
*Atlantic 3-Financial (Aust) Pty Ltd v Marler* [2004] 1 Qd R 579; [2003] QCA 529, cited
*Barwick v Council of the Law Society of New South Wales* [2004] Aust Torts Reports 81-730; [2004] NSWCA 32, cited
*Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, cited
*Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, cited
*Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134; [1991] HCA 61, cited
*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited
*Legal Services Commissioner v Voll* [2008] QCA 293, cited
*O'Reilly v Law Society (NSW)* (1988) 24 NSWLR 204, cited
*Smith v NSW Bar Association* (1992) 176 CLR 256; [1992] HCA 36, cited

COUNSEL: A J H Morris QC for the respondent/appellant
G P Long, with B I McMillan, for the applicant/respondent

SOLICITORS: Sciaccas Lawyers for the respondent/appellant
Legal Services Commission for the applicant/respondent

[1] **McMURDO P:** I agree with Muir JA's reasons for refusing the appellant leave to adduce further evidence and dismissing the appeal with costs.

[2] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[3] **MUIR JA: Introduction**
The Legal Services Commissioner brought a discipline application in respect of six charges pursuant to s 452 of the *Legal Profession Act* 2007 (Qld) against the appellant legal practitioner. Four of the charges related to a client of the appellant's, Ms Simmons, and two related to another client, Mrs Oats. The Legal Practice Tribunal, after hearing the matter over four days, found the appellant guilty of each of the six charges. The Tribunal's reasons explain:[1]

> "… The conduct in charge 1 showed a failure to reach and maintain the reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner and so represented unsatisfactory professional conduct pursuant to s 418(1)(a) of the 2007 Act. In the case of charge 5, that unsatisfactory professional conduct also

[1] *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [129].

> involved the charging of excessive legal costs contrary to s 420(b) of the 2007 Act. The conduct in charges 2, 3, 4 and 6 involved conduct of an Australian legal practitioner in connection with the practice of law that justifies a finding that he is not a fit and proper person to engage in legal practice, and so represented professional misconduct."

[4] After another hearing, the Tribunal: recommended that the name of the appellant be removed from the roll of legal practitioners in Queensland; ordered that the appellant pay compensation to Mrs Oats in the sum of $17,232.72 and ordered that the appellant pay the respondent's costs.

[5] The appellant appeals from the Tribunal's orders.

**The notice of appeal**

[6] The grounds in the notice of appeal in relation to each charge are that the Tribunal's findings are unreasonable and against the weight of evidence and that the Tribunal should not have found that the conduct charged amounted to "unsatisfactory professional conduct" or "professional misconduct" as the case may be. A further ground in respect of charges 2 and 3 is that the Tribunal should not have found that the appellant "acted dishonestly" (charge 2) or "was dishonest" (charge 3). The charges were that the appellant:[2]

> "**a.** Failed in a number of respects to reach or maintain a proper standard of competence and diligence in the conduct of Ms Simmons' matter when purporting to affect a change to their client agreement and the way Ms Simmons was billed for the matter **(Charge 1)**;
>
> **b.** Dishonestly or recklessly misled Simmons in various respects regarding the reasons for and changes to her billing arrangements and a litigation loan to fund her action **(Charge 2)**;
>
> **c.** Dishonestly or recklessly withdrew funds from his trust account on account of fees and disbursements in the Simmons matter when he knew or ought to have known he was not entitled to draw those funds **(Charge 3)**;
>
> **d.** Dishonestly or recklessly misled the Queensland Law Society by representing that certain invoices had been billed to Simmons when in fact they had not **(Charge 4)**;
>
> **e.** Charge (sic) excessive fees to Mrs Oats in breach of s.48IC of the *Queensland Law Society Act* 1952 ('the 50/50 Rule') **(Charge 5)**;
>
> **f.** Preferred his own interest to those of Mrs Oats in purporting to have her 'waive' the 50/50 rule so that he could charge more for her matter than he was entitled to charge pursuant to the rule **(Charge 6)**."

[7] In written and oral submissions, counsel for the appellant confined his argument, almost exclusively, to two matters: a challenge to the Tribunal's finding that the

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2 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [4].

appellant gave false evidence concerning a meeting which he alleged that he had had with Ms Simmons on 28 September 2006 (the Meeting), which meeting was denied by Ms Simmons; and an allegation that the Tribunal had denied the appellant procedural fairness by not putting him on notice of the specific issue in respect of which he was accused of perjury and giving him an appropriate opportunity to answer that accusation.

[8] It was submitted that if these arguments succeed, the proceedings at first instance would have entirely miscarried and the other findings of the Tribunal would be seen to be so tainted that they should be set aside.

**The Tribunal's findings**

[9] The critical findings of the Tribunal are as follows:[3]

> "[49] Ms Simmons said that her matter progressed with Ms Sinclair[4] and she did not have any further contact with Mr Dempsey until she received a further letter from him dated 2 October 2006 regarding what he said was an administrative change that he wanted to make to her client agreement. That letter provided as follows:
>
> > 'Just a note in relation to an administrative charge I would like to make.
> >
> > On your file we have a Client Agreement, and of recent times I have discovered it is to my advantage to change that Client Agreement without in any way impacting on you.
> >
> > With Client Agreements a solicitor can do two things, he can either do an itemised bill along the way as we are doing and at the end of the day the total of those bills is what the bill is, or he can quote.
> >
> > He can quote a figure.
> >
> > What I propose to do on your file is to change the Client Agreement to a 'quote' quoting my professional fees at $30,000, but as part of the administration of your file I will continue to send you monthly bills/reports for the work that is actually done and at the end of the case, what I am paid will be only what the total of those bills are.
> >
> > If the bills come to more than the quote, then anything more than the quote I will not be paid.
> >
> > If the bills come to less than the quote, then I will only be paid what the bills total.
> >
> > That way you are no in any way disadvantaged.
> >
> > So that you can monitor the work being done, I will continue to send the bills so that you can read them and

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3 *Legal Services Commissioner v Dempsey* [2009] LPT 20.

4 A solicitor employed by the appellant.

> you can see what work is being done. If you think I am doing unnecessary work then, as part of the client agreement, you just have to report it to the Law Society and they will discipline me.
>
> I don’t 'pad' my fees, I never have and I never will. I am only doing this because there is advantage to me in it income tax wise, and there is no disadvantage to you at all.
>
> The client agreement can only be varied by agreement, so if I don't hear from you within 7 days disagreeing with this proposal, then we will take it that the client agreement is varied on this basis.
>
> If you have got any questions please do not hesitate to contact me or come in and see me. I have been trying to get you in to discuss this with you, but we have been missing each other.'

Mr Dempsey said in a letter to QLS on 16 March 2007 that he wrote that letter only after taking advice from a number of practitioners and thinking about that carefully. It is, however, abundantly clear and it must have been obvious to any competent legal practitioner that an agreement which specifically provided that any amendments must be in writing could not be amended in the way set out in the second last paragraph.

[50] Ms Simmons said she did not respond to this letter as she thought that everything was going smoothly with her matter under Ms Sinclair and it was only an administrative change.

[51] Mr Dempsey's evidence was inconsistent with that of Ms Simmons. He gave evidence that he met with Ms Simmons on 28 September 2006 at his Thuringowa office where he told her that it would be to his advantage to give a quote for his fees and she said she had no difficulties with that. Unfortunately it appears that he was being untruthful. None of the independent evidence supports his version. There was an appointment in his electronic diary for 10-11am on 28 September 2006 where Jaymie Anderson sent the message 'Left message on Roma Simmons phone. Has not phoned me back.' Mr Dempsey asserted to QLS in a letter dated 5 April 2007 that he overlooked the clause in the client agreement that any amendment must be in writing. 'However, I explained the process fully to her, and she agreed. I have a diary entry for 10am on 28 September 2006, where I met with her.' He must have known that his diary entry did not support his assertion that he met with her.

[52] Ms Simmons' evidence was that no such meeting had taken place. Mr Dempsey's letter of 2 October 2006 is entirely inconsistent with the meeting's having taken place. He said

he believed he dictated that letter on the afternoon of 28 September. Not only does it not refer to a meeting which on Mr Dempsey's version had occurred only hours earlier on the day it was dictated, it concludes with the words, 'If you have got any questions please do not hesitate to contact me or come in and see me. I have been trying to get you in to discuss this with you, but we have been missing each other.' Given the difficulty this placed him in, he then posited that perhaps he drafted the letter before he saw her and signed a letter which said they had not seen each other without really reading it. This was an adventitious explanation. This contemporaneous document under Mr Dempsey's hand reveals the truth. There was no such meeting and Mr Dempsey's protestations in evidence that he clearly remembers such a meeting were false.

[53] His evidence reveals why he said there was a meeting when there was not. He agreed that the letter did not inform Ms Simmons that he would be immediately charging her a lump sum for the fee he had quoted. He said that he told her that and she agreed to that orally when he met her on 28 September. He could not possibly justify taking the $30,000 unless he had told her about it and she had agreed to it. The letter of 2 October 2006 did not even mention any such agreement made at any such meeting. He falsely told first the Queensland Law Society ('QLS'), then the Commission and then the Tribunal that he had a meeting with Ms Simmons where such an agreement was made to justify his subsequent behaviour in transferring the money to his general account, not because such a meeting had actually taken place.

[54] That he did not tell the truth to the Tribunal was not of course part of the charge against him. It is relevant at this stage only to determining the truth of what actually occurred where there is a conflict in this evidence between himself and Ms Simmons. It will also be relevant to subsequent findings regarding penalty if the charges presently laid against him are proved.

[55] Notwithstanding the letter of 2 October 2006, Mr Dempsey had no agreement whether orally or in writing as required, to vary his client agreement with Ms Simmons. The letter was not apt to achieve that outcome unless it was countersigned by her. There was no provision in the document for her to do so and she was not asked to. Rather she was, inappropriately, just given seven days to disagree with his proposal or be taken to have agreed to it.

[56] Mr Dempsey said at the time he wrote the letter he instructed Ms Anderson to send Ms Simmons an invoice for $30,000. This is at odds with the terms of the letter which he had just sent to her which refers to monthly bills for the work

> actually done so she could monitor them. The Tribunal does not accept Mr Dempsey's evidence about what he instructed Ms Anderson to do.
>
> [57] On 4 October 2006, a further $27,490.99 was drawn by Dempseys on the Impact loan without Ms Simmons' knowledge. Ms Anderson emailed Mrs Dempsey to let her know this was to happen on the following day. It was made up of $25,000 for Dempseys and $2,490.99 fees, charges and interest on the loan. The evidence shows that Ms Anderson was instructed to draw down the $25,000 by Mr Dempsey. This instruction was given even before the seven days referred to in the letter of 2 October 2006 had elapsed. At this time, Ms Simmons had not received any accounts since 22 August 2006. Mr Dempsey said that the bills were supposed to be sent and blamed Ms Anderson for not sending them out but it was his law firm and therefore his responsibility to ensure that procedures were followed.
>
> …
>
> [61] On the same day $27,867.85 was transferred from Dempseys' trust account to the general account for Ms Simmons' matter. Ms Anderson said that this was on Mr Dempsey's instructions. I accept that this is what happened. Mr Dempsey in an email to Mrs Dempsey on 6 October 2006 referred to a debt that required immediate payment saying 'I know we are broke but is there any way we can pay him.' He referred to taking 'the $25 from Impact for Simmons.' Referring to the debt he said, 'He has been quite good I guess, as the bill, though very high, is about 6 months old – I just have an aversion to him as a dirty-----! But, we do owe him.' It appears that it was the need to pay that debt rather than fees generated on Ms Simmons' file that led to the transfer of $25,000 to Dempseys trust account from Ms Simmons' Impact loan and then out of the trust account to his personal bank account. It must be inferred that his behaviour in having those moneys to which he was not entitled drawn from Impact and then transferred from his trust account was dishonest by the standards of ordinary decent people and he must have known that it was."

**Counsel for the appellant's submissions in relation to the 28 September meeting**

[10] The two grounds given by the Tribunal for rejecting the appellant's evidence reveal faulty reasoning on the Tribunal's part. The first ground was the assertion by the Tribunal in paragraph [52] of its reasons that the appellant's explanation for an apparent inconsistency between his evidence and the letter of 2 October (the Letter) was "adventitious". Counsel for the appellant submitted:

> "That the explanation was 'adventitious' was not a rational reason for rejecting it. Indeed, any explanation for an apparent inconsistency between a witness's sworn testimony and a contemporaneous document must, by definition, be *adventitious* - in the sense of being something added or extrinsic - to the document in question.

> Significantly, the Tribunal did not express any finding that the explanation was unlikely, or inherently improbable, or implausible, let alone impossible."

[11] The second ground was that the appellant "had a motive for being untruthful, to conceal his own wrong-doing". The appellant's counsel submitted that this ground:

> "… is, … utterly irrational: a text-book example of the logical fallacy known as *petitio principii*, or 'begging the question'. To conclude that [the appellant] had a motive for lying, one must first assume that he was guilty as charged; and he was only guilty as charged if, indeed, he was lying.
>
> The Tribunal's narrative regarding the central conflict between the testimony of Mr Dempsey and that of the relevant client (Simmons) also makes the point … [in para [51]] that:
>
> > [The appellant] … gave evidence that he met with Ms Simmons on 28 September 2006 at his Thuringowa office where he told her that it would be to his advantage to give a quote for his fees and she said she had no difficulties with that … None of the independent evidence supports his version. There was an appointment in his electronic diary for 10-11am on 28 September 2006 where Jaymie Anderson sent the message 'Left message on Roma Simmons phone. Has not phoned me back.'
>
> It seems the Tribunal must have assumed that, because Simmons 'Has not phoned me back', the meeting was cancelled. There is no other explanation for the Tribunal's remark that 'None of the independent evidence supports his version'.
>
> But this is a palpable misunderstanding of the evidence. The only sensible understanding is that:
>
> - A meeting was, indeed, scheduled for 10-11am on 28 September 2006 – as corroborated by the appointment in the electronic diary.
> - Anderson telephoned Simmons to confirm the appointment.
> - Anderson left a message for Simmons, confirming the appointment.
> - Simmons did not telephone back, in response to the message from Anderson, to cancel or postpone the meeting.
> - Nor did Simmons, at any subsequent time, contact [the appellant's] office to re-schedule the meeting which was booked for 10-11am on 28 September 2006.
>
> Properly understood – and far from the Tribunal's assertion that 'None of the independent evidence supports his version' – this evidence strongly supports [the appellant's] testimony. He was telling the truth; there was such a meeting; and it is Simmons, rather than [the appellant], who is in error."

[12] In oral submissions it was pointed out that one possibility was that Ms Simmons had been contacted after Ms Anderson had left her electronic message and that the diary note had not been updated. Counsel for the appellant also submitted orally that there was nothing particularly remarkable about the possibility adverted to by the appellant that the Letter had been dictated before the Meeting and sent after it without being checked: mistakes frequently occur in legal offices and slipshod practices are engaged in.

**The appellant's evidence concerning the Meeting**

[13] In an affidavit sworn by him, which was before the Tribunal, the appellant swore to having met Ms Simmons on 28 September 2006 at his Thuringowa office. His evidence in this regard was detailed. He professed a recollection of: walking from his office "to the adjacent interview room" where Ms Simmons was seated at a table; greeting her and saying words to the effect that he wanted to discuss arrangements for payment and that it was to his advantage to give a quote in respect of costs and receive the money then, and not receive it as fees were incurred; Ms Simmons saying that she didn't have a problem with that; his explaining that "she was probably headed for trial, and if that occurred her fees and outlays would likely amount to $50,000 plus"; explaining that he would "like to quote an amount of $30,000 for costs and receive that sum in full now rather than be paid along the way"; if his fees exceeded $30,000 she did not owe him any more money but if his fees were less he would refund the difference; he would send monthly bills so she could see what work was done; Ms Simmons saying she was happy with the quoted fee of $30,000; his saying that he would send her a letter and if she had any questions she should get back to him and also that she should feel free to seek independent legal advice. The conference took about five to 10 minutes.

[14] He could not recall when the Letter was dictated and "cannot explain its terms". He believed that he dictated the Letter after the Meeting but cannot be certain about that. On or around 28 September 2006 he instructed his book-keeper, Jaymie Anderson, to issue a bill to Ms Simmons in the sum of $30,000.

[15] The following exchange occurred in the course of the appellant's cross examination:

> "Now, as I understand it, you obviously looked to see what supporting evidence you might have in relation to such a meeting; is that right?-- Yes.
>
> And am I right in understanding that the only thing you can put forward is the document which is at attachment 8 to your affidavit, which is PAD8? PAD8, have a look at that?-- Yes.
>
> And that is this, isn't it, that's an extract from an electronic diary for the 28th of September 2006?-- That's true."

[16] It was suggested to the appellant that the diary entry was "put in early in the morning of the 28th of September to inform [the appellant] that that message had been left on Mrs Simmons' phone and she hadn't phoned back". The appellant responded:

> "The diary entry was for me - was that I would have had an appointment to see Roma Simmons at 10 a.m. and Jaymie has gone in and put that message there."

[17] This exchange then took place:

> "Well, if we can come back to PAD8 and we look very carefully at it, we see the same words, don't we, at 10 a.m., 'Left message on Roma Simmons' phone and has not phoned me back'?-- That's right.
>
> So it amounts to no more than this, does it, that you had obviously given an instruction to someone to contact Miss Simmons with a view to her coming in at 10 a.m. to see you; that would be right, wouldn't it?-- That's right.
>
> And the only record that you're able to produce is the one that says that a phone message was left but she hadn't phoned back?-- That's right."

[18] The text of the electronic record appears in paragraph [51] of the Tribunal's reasons. In response to the assertion that Ms Simmons didn't come to the branch office at Thuringowa to see him at 10 am he responded, "She did. Unfortunately I have [a] very clear recollection of the meeting". He confirmed that: the meeting was short; that he told Ms Simmons he would send her a letter and if she had any questions she should get back to him and that she should feel free to get independent legal advice. He said he had a specific recollection of saying that she should feel free to get independent legal advice.

[19] Asked by the Tribunal whether he had taken notes of the meeting, the appellant replied, "No, … [that] wasn't necessary". The appellant confirmed his recollection that the letter was dictated by him following the meeting and added:

> "… It could have been dictated - it could have been - it could have been that she is not turning up; dictate the letter; suddenly she's turned up; okay, I'll go out. But my best recollection is that I went and saw her, drove back to my office and I dictated the letter, told Jaymie Anderson to do the bill and-----
>
> On that day?-- On that day, yes."

[20] He said that he was sure that the only reason he went to his branch office at Thuringowa for the meeting was to see Ms Simmons. A little later in the cross-examination, after it was put to him that he had no agreement in writing with Ms Simmons about the changed fee arrangement, he said:

> "… She said to me, 'Mr Dempsey, what you want is what you get.' That's what she did, she went like that. And she was very friendly to me."

[21] A little later he said, "… this letter - it may have been dictated thinking that she was not going to turn up at ten o'clock, and then I was notified she … was there, so I went out".

[22] He again confirmed that he had "this unfortunate memory of a meeting which actually took place at Thuringowa …". He said that after the Meeting he went back to his office and told Jaymie Anderson to prepare the bill and send it on the 28th. He said, "I told her what to put in the bill, and then my recollection is that I dictated the letter. But it doesn't fit". He reaffirmed that he had a "clear recollection" of the Meeting.

[23] In re-examination, the appellant said that he didn't keep notes of his conversations with clients when discussing costs for two reasons. The first was that the client

could not be charged for the time taken in discussing costs and if a note was taken of the discussion, the client might think that he or she was being charged for the time taken in discussion. The other matter was that if an electronic note was not to result in a charge, a particular code had to be entered in the computer, but that sometimes when the appropriate entry was made, the computer would "revert to a charge".

[24] At the end of the appellant's re-examination, the Tribunal asked why no file notes were made of the meeting. The appellant replied that he didn't need to: he dictated the letter. Asked if it was his practice to make file notes of information given to him during the course of an appointment with a client, he said he made notes all the time. He then reaffirmed his recollection that he had dictated the Letter when he returned to his office from the branch office after the Meeting.

**Ms Simmons' evidence**

[25] In her affidavit filed in the proceedings, Ms Simmons swore to the following matters. She saw the appellant in his city office on 29 August 2006. They discussed a loan which he said she should take out to fund her legal representation. He said that the loan would be for $30,000 and she didn't notice whether the documents she signed referred to $30,000 or $40,000. On 31 August, in response to a telephone call from Jaymie Anderson, she attended at the appellant's city office and signed documents relating to the proposed loan. She did not have any further contact with the appellant until she received the Letter. She did not respond to it as she thought things were proceeding smoothly with her matter, which was being handled by Ms Sinclair.

[26] After Ms Sinclair left the appellant's firm she took employment with Ruddy, Tomlins & Baxter Solicitors. Ms Simmons terminated the appellant's instructions and instructed Ruddy, Tomlins & Baxter. On Ms Sinclair's advice, she requested her lender to transfer her loan to her new solicitors. On about 12 January 2007, Ms Sinclair informed her that the appellant had drawn down $33,000 from her loan account for professional fees. She was shocked.

[27] Ms Simmons was adamant that she had no meeting with the appellant shortly before receiving the Letter, although she remembered receiving it. She said it came as a surprise and that she mentioned it to Ms Sinclair when she saw her. Ms Sinclair told her that she knew nothing about any of the costs involved. Ms Sinclair, who gave evidence before Ms Simmons, was not questioned about this evidence.

**Ground 1 - The finding that the appellant deliberately gave false evidence on oath is unsustainable - Consideration**

[28] Against this factual background I turn to a consideration of the merits of ground 1. There is some substance in the submission that the diary entry is not entirely neutral in its effect and offers support for the appellant's claim that a meeting took place. It establishes that a telephone message about a meeting between 10 and 11 am on 28 September 2006 was left on Ms Simmons' answering machine at about 7.04 am on that date. She said nothing about the message in her oral or written evidence and was not cross-examined on it. The fact that the diary does not record a response to the answering machine message from Ms Simmons does not establish either that she did not call back or that she did not respond to the message by attending the Meeting. The likelihood of the latter is difficult to assess without knowing the substance of the message left by Ms Anderson and she gave no evidence about it.

[29] The appellant was criticised implicitly[5] for changing his account from one in which he recalled writing the Letter after the Meeting to one in which he posited that the Letter may have been dictated before the Meeting. I do not consider that the criticism, which implies a change in the substance of the appellant's evidence, was warranted.

[30] The substance of what the appellant swore in his principal affidavit appears in paragraph [14] above. He professed no recollection of when the Letter was dictated but a belief that it was dictated after the Meeting. He said he was uncertain about that. The first mention by the appellant of the possibility that the Letter may have been dictated before the Meeting came in response to a question by the Tribunal. But although he speculated then and subsequently that the Letter may have been dictated prior to the Meeting, that never became his primary position.

[31] The thrust of the appellant's evidence in relation to the date on which the Letter was dictated thus remained essentially unchanged throughout, except that in cross-examination he spoke of his "recollection" and "best recollection" about when the Letter was dictated. In his affidavit he had sworn to having no recollection, only a belief. This shift in position does nothing to enhance the appellant's credibility but it does not appear to have been a matter which weighed with the Tribunal.

[32] The main obstacle to the acceptance of the appellant's evidence of the Meeting was the wording of the Letter. Its content was plainly inconsistent with there being a meeting on 28 September between the appellant and Ms Simmons as alleged. Counsel for the appellant accepted that, but as appears from the earlier summary of his argument, he attacked the Tribunal's reasoning. Apart, perhaps, from the criticism of the "adventitious explanation" and my earlier observations about the implied finding of a change of position by the appellant, I do not find the criticisms justified.

[33] It is relevant to an assessment of a witness's credit that he or she has a motive to be untruthful. The existence of such a motive cannot provide evidence of untruthfulness in itself, but it is a matter against which the witness's evidence ought to be assessed. The Tribunal did not reason that the appellant was lying on oath because he had a motive for lying. From paragraphs [51] and [52] of the Reasons, it may be seen that the Tribunal concluded that the appellant was untruthful because of: the conflict between his evidence and that of Ms Simmons; the lack of corroboration for the appellant's account, and the contents of the Letter. It was said of the Letter, "[t]his contemporaneous document under Mr Dempsey's hand reveals the truth". The reasons, in paragraph [53] then proceed to explain why it was so important for the appellant to assert the existence of an agreement authorising him to take his client's money for work he had not done.

[34] Were the foregoing matters sufficient to justify the finding that the appellant lied under oath? The Tribunal accepted the evidence of Ms Simmons in preference to that of the appellant. The Tribunal found, contrary to the appellant's evidence, that when Ms Simmons saw the appellant in his office on 29 August 2006, the appellant told her untruthfully that the Government had changed the way solicitors could claim their money in family law matters. She said, "… he mentioned something about previously a client was not expected to pay money to the law firm until the

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5 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [52].

case had been finalised or settled".[6] The Tribunal said of Ms Simmons' evidence in this regard, that it "… accept[ed] her evidence which was given clearly, carefully and without embellishment, making concessions when required. Any inconsistencies in her evidence were such as might be expected of a truthful la[y] witness".[7] Although these observations related to a specific part of Ms Simmons' evidence, there is no indication in the reasons that they should not be regarded as generally applicable to the whole of Ms Simmons' evidence.

[35] The Tribunal made no express reference to the appellant's demeanour or credibility but it does not follow from that, that demeanour or credibility played no role in the findings under consideration.[8] The Tribunal made it plain enough that Ms Simmons was accepted as a witness of credit. Where there was any significant area of conflict between her evidence and the appellant's, her evidence was accepted.

[36] In *Abalos v Australian Postal Commission*,[9] McHugh J, with whose reasons the other members of the Court agreed, remarked:

> "As I pointed out in *Jones v Hyde*,[10] when a trial judge resolves a conflict of evidence between witnesses, the subtle influence of demeanour on his or her determination cannot be overlooked."

[37] What is under consideration here is not so much the reasons for accepting one witness's evidence over another's, but the finding that the witness whose evidence was not accepted was deliberately untruthful. But it is tolerably plain that demeanour and credibility played a role in this finding and it has not been shown that the Tribunal "failed to use or palpably misused the advantage which [the Tribunal] had of seeing and hearing the witnesses".[11]

[38] In the Letter the appellant gave no hint of his motive for wanting to change the existing client agreement: so that he could draw down the bulk of his quoted fee of $30,000 immediately. Nothing in the Letter alerted the client to the possibility that the appellant might obtain payment for his work before doing it. It should be acknowledged, however, that Ms Simmons' own evidence was that in August 2006 the appellant had "told her that there had to be a change to her client agreement and she would now have to pay his fees up front because he had ongoing costs".[12]

[39] The Letter informed the client that if the appellant didn't hear from her within seven days, disagreeing with the proposal "we will take it that the client agreement is varied on this basis". That proposal was, of course, impossible to reconcile with the appellant's evidence that he and Ms Simmons had agreed to the change in the Client Agreement at the Meeting.

[40] In cross-examination, the appellant accepted that he knew when he wrote the Letter that the Client Agreement could only be varied by writing. He accepted also that it was "completely inappropriate" for him to have sought to change the Client Agreement in the way he did. He explained his conduct by stating that he "was

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6 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [29].
7 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [28].
8 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179 per McHugh J.
9 (1990) 171 CLR 167 at 179.
10 (1989) 63 ALJR 349 at 351.
11 *Abalos* (supra) at 179.
12 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [26].

trying to put some sort of certainty into it … to put a – 'sunset,' I think the term is, into it". He denied that there was any need for urgency in bringing about the change in the Client Agreement and denied that he had any need for money at the time.

[41] The evidence strongly suggested that the appellant was in financial difficulties and in urgent need of Ms Simmons' $30,000. For example, the appellant wrote in an email to his wife, "I know we are broke" and went on to discuss money which had been or could be obtained, including $25,000 from Ms Simmons' lender. The appellant's haste to drawdown Ms Simmons' money was reflected in his instructions to his bookkeeper on 4 October, two days after the Letter was sent, to take out of trust the balance of Ms Simmons' $30,000. Ms Sinclair, who was regarded by the Tribunal as a truthful witness, also gave evidence of the appellant's financial stress.[13]

[42] The appellant's evidence about the Meeting, summarised in paragraph [13] hereof, was so detailed as to be improbable. Without the aid of a diary note of any kind, the appellant, a busy practitioner who regarded Ms Simmons' matter as "just another matter", purported to remember in great detail what was said in the course of a five to 10 minute meeting.

[43] Consequently, apart from the contents of the Letter, there were good reasons for viewing the appellant's evidence concerning the Letter with considerable scepticism.

[44] As mentioned earlier, the contents of the Letter were irreconcilable with the appellant's account of an agreement to change the Client Agreement, whether it was dictated before or after the alleged Meeting. Counsel for the appellant submitted, accurately enough, that mistakes are often made in legal offices. However, the Letter could not have been worded in the way that it was as the result of a mistake. Moreover, the appellant swore, in effect, that he didn't need to make a diary note of the Meeting as he had written the Letter and neither the appellant's counsel at first instance nor his counsel on appeal were able to advance a reasoned explanation of how, consistently with the appellant's evidence, the Letter came to be worded as it was.

[45] It would have been preferable for the Tribunal to have articulated more fully the reasons for its conclusion that the appellant was deliberately untruthful in his sworn evidence: an obviously grave finding to make against a legal practitioner and one to which the test in *Briginshaw v Briginshaw*[14] was applicable.[15] I also consider that it was a finding that some other tribunals may have declined to make, having regard to the fact, which is discussed later, that the appellant was not cross-examined on the basis that he had knowingly given false evidence about the Meeting and the Letter. Despite these concerns, however, I have concluded that it was open to the Tribunal on the evidence discussed above, to conclude that the appellant knowingly gave false evidence.

[46] After making "due allowance for the advantages available to the"[16] Tribunal, I am not persuaded that the appellant has demonstrated that the Tribunal erred in making the subject findings. Accordingly, this ground of appeal has not been made out.

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13 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [25].

14 (1938) 60 CLR 336.

15 *O'Reilly v Law Society (NSW)* (1988) 24 NSWLR 204 at 230 and *Legal Services Commissioner v Voll* [2008] QCA 293 at [41].

16 *Fox v Percy* (2003) 214 CLR 118 at 128.

**Ground 2 - denial of procedural fairness - counsel for the appellant's submissions**

[47] Counsel for the appellant accepted that the Tribunal was entitled to accept or reject the appellant's evidence as to whether or not the 28 September meeting took place. He also accepted that whether or not the 28 September meeting took place was central to the determination of charge 3 as particularised.

[48] However, counsel for the appellant argued as follows. The findings that the appellant lied to both the Queensland Law Society and the Legal Services Commission[17] formed no part of the charges before the Tribunal and were "utterly gratuitous". The finding that the appellant perjured himself before the Tribunal may have been relevant and permissible in accordance with the principles discussed in *Smith v New South Wales Bar Association*[18] and *Legal Services Commissioner v Voll*[19] had the appellant been put on notice of the specific issue in respect of which he was accused of perjury and given an appropriate opportunity to answer the accusation. That did not happen.

[49] It was apparent during the hearing that the Tribunal was already contemplating the possibility that the appellant's evidence would not merely be rejected but found to be deliberately untruthful. Despite that "strong intimation", neither the respondent's counsel nor the Tribunal put the appellant on notice of the specific matter or matters in respect of which he was suspected of perjuring himself, or gave him an opportunity to address those matters. The Tribunal went on to make the explicit finding that the appellant had perjured himself when delivering its finding on the charges and also placed that matter at the forefront of the considerations which it took into account in determining the appropriate sanction.

[50] It was submitted that had this been done, the appellant could, and would have taken steps to adduce further evidence to shore up his credibility. In this regard, it was submitted that it is one thing to make a finding against a party on credit but quite another to find that the party, particularly a legal practitioner, lied about a matter.

**Ground 2 - Consideration**

[51] The convenient starting point for a consideration of the denial of procedural fairness argument is the acknowledgement by counsel for the appellant that the Tribunal was entitled to accept or reject the appellant's evidence as to whether or not the 28 September meeting took place. The appellant claimed there was a meeting with Ms Simmons. She claimed there was no meeting. It was thus apparent from the outset that there was a credibility issue on an important point giving rise to the possibility that the evidence of Ms Simmons would be preferred over that of the appellant.

[52] When the hearing resumed after lunch on the third day, the Tribunal specifically raised the question of the use it could make of a finding that a legal practitioner was "not being truthful in his or her evidence during the course of the hearing". The matter was debated at some length. In the discussion the Tribunal observed that "not telling the truth on oath in Court is extremely serious conduct". Counsel for the appellant responded, "But he's not charged with that". The Tribunal rejoined, "No, no, how could he be … A person can't be charged with something you haven't yet

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17 *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [53].

18 (1992) 176 CLR 256.

19 [2008] QCA 293 at para [41].

done … But if they do it in the course of hearing about charges … what is the Tribunal to make of that?".

[53] The following exchange then took place:

> "MR DAVIS: The only way it can be used is to say at the time of the – at the time of the commission of the acts or omissions that the Tribunal is looking at, the person was unfit, and because of the conduct within the Tribunal now the person remains unfit.
>
> HER HONOUR: And what would then [be] the appropriate thing to do? To refer that to the Legal Services Commission?
>
> MR DAVIS: Well, you'd hardly need to refer it because they're a party to these proceedings.
>
> …
>
> HER HONOUR: But it's not subject of a charge, but if a Court were of the view that a legal practitioner were lying on oath to the Court in Court in a tribunal hearing, then that would be a matter that would have to be the subject of a separate charge if that were to lead to findings itself.
>
> MR DAVIS: Disciplinary proceedings, yes, yes. The … only use that can be made of it otherwise that I'm aware of is the one I've described."

[54] Counsel for the respondent said that he wished to reserve his position on the proposition advanced by the appellant's counsel to which the appellant's counsel responded:

> "… I must say any suggestion that – any suggestion that my client could be disciplined as a result purely on what occurred in the Tribunal would be resisted."

[55] The following exchange ensued:

> "HER HONOUR: By the Tribunal itself on this occasion.
>
> MR DAVIS: On this occasion.
>
> MR LONG: I'm not suggesting that.
>
> MR DAVIS: … It might very well be that - something that happens in a tribunal could then with the subject of proceedings in another tribunal.
>
> HER HONOUR: Yes.
>
> …
>
> HER HONOUR: And indeed – sorry, Mr Davis to interrupt, but that's conventionally how it would be dealt with. The reason why I raise it is because unusually this is the Legal-----
>
> …
>
> -----Practice Tribunal, so."

[56] Later, the Tribunal said that it didn't raise the matter lightly. After further discussion, the use that could be made of a finding that a practitioner had given false evidence on oath was left unresolved. The Tribunal, however, gave the following explanation:

> "HER HONOUR: The reason I raised it is because when things – you know, when I am of a serious view about something-----
>
> …
>
> -----which is seriously open, I think everyone should know where the – you know, what – where the land lies."

[57] The above exchange took place during the appellant's cross-examination and after he had been cross-examined at length about the 28 September meeting and the 2 October letter. The appellant had maintained adamantly that a meeting had occurred. He had provided detail of what had been discussed in the course of it and it had been put to him more than once that no such meeting had occurred. That topic had been the primary focus of an attack on the appellant's credibility by the respondent's counsel.

[58] In his address to the Tribunal, counsel for the appellant commenced with submissions on the use that could be made of "any finding of dishonesty in the witness-box". He did not submit that no such finding was permissible. Nor did he request identification of any matters which might be the subject of any such finding. Counsel for the appellant conceded that the area the appellant "struggled with the most was the letter of the 2nd October" and remarked that "it was immediately after that cross-examination that the comment [about the consequences of false evidence] was made". He said he assumed that it was the Letter "which causes the difficulty". The Tribunal responded that it was "the evidence that he remembers a meeting".

[59] The discussion continued:

> "HER HONOUR: Was it in your re-examination that you asked him, or it might have been a question by me but I had to take credit for it, but perhaps you'd rather I did in the circumstances, about why didn't he take any notes of the meeting? He didn't need to because he immediately after it dictated that letter. Well, anyway - well, obviously not. You're not going to have a meeting and immediately after dictate a letter where you say you haven't had a meeting.
>
> MR DAVIS: The problem with the letter is that the letter clearly speaks prospectively about an agreement, where he says that obviously he had one. But to find him lying about that is a very, very serious step to take."

[60] It does not seem to me that the above exchanges reveal any misunderstanding about what it was that had caused the Tribunal to raise the issue of lies during cross-examination and counsel for the appellant did not submit that there had been a misunderstanding. The primary significance of the Letter, for present purposes, lay in the light it shed on whether the appellant's evidence about the Meeting was credible and could have been believed by the appellant.

[61] Counsel for the respondent put to the appellant in cross-examination on several occasions that there had been no meeting and questioned him around the

inconsistency between the 2 October letter and his evidence in relation to the Meeting. However, neither before nor after the raising by the Tribunal of a possible finding that the appellant had lied on oath did the respondent's counsel put to the appellant that he was being deliberately untruthful. That, as I mentioned earlier, is a matter of concern but it did not deprive the Tribunal of the right to make the subject finding. Before making any such finding, however, it was necessary for the Tribunal to alert the appellant to the possibility of such a finding so as to give him the opportunity of addressing the matter.[20] As appears from the above discussion, that was done. Counsel for the appellant at first instance, a senior counsel with extensive criminal and civil experience, chose to deal with the matter in address. He did not request an adjournment to further consider the matter. Nor did he seek to lead further evidence. I am not suggesting that either of those courses would have been beneficial. It was not as if the Tribunal's difficulties with the appellant's evidence concerning the Meeting would have come as a surprise to the appellant or his counsel.

[62] On the hearing of the appeal, counsel for the appellant sought leave to adduce further evidence under s 468 of the *Legal Profession Act* 2007 (Qld) which provides that the appeal to this Court is by way of rehearing on the evidence before the Tribunal and empowers the Court to give leave "to introduce further evidence, whether fresh, additional or substituted, if the court considers the further evidence may be material to the appeal". The further evidence was an affidavit by a woman who deposed to being employed as a receptionist in the appellant's offices in 2006. She said that she spent most of her time in 2006 in the Thuringowa office. She said that in the latter half of that year she recalled calling the appellant "for an appointment with a client" and that the appellant rushed to the office for the appointment. She described the physical appearance of the client and said that her recollection was that the client was Ms Simmons.

[63] There was no explanation of why this evidence could not have been given on the hearing before the Tribunal despite the appellant's admitting in cross-examination that he had looked for evidence to support his evidence about the Meeting. There was a further opportunity to address the issue provided by the hearing in relation to sanctions on 28 October 2009. The deponent did not state when she was first asked to recall the somewhat mundane event in 2006 which she swore to in February 2010. Apart from these considerations, the proffered evidence is rather general in nature and not calculated to shed much, if any, light on whether the Meeting actually took place.

[64] The affidavit falls far short of meeting the requirements for the admission of such evidence expressed in authorities such as *Clarke v Japan Machines (Australia) Pty Ltd;*[21]*Atlantic 3-Financial (Aust) Pty Ltd v Marler;*[22] and *Commonwealth Bank of Australia v Quade;*[23] and I would refuse leave.

[65] For the above reasons, it does not appear to me that the appellant has succeeded in showing a failure to afford procedural fairness. Complaint was also made about the Tribunal's findings that the appellant had lied to the Legal Services Commission and the Queensland Law Society. Those findings flowed inevitably from the findings

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20 *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32, para 109.

21 [1984] 1 Qd R 404 at 408.

22 [2004] 1 Qd R 579 at [36].

23 (1991) 178 CLR 134 at 140.

about the Meeting. It was not submitted that the Tribunal made any inappropriate use of these findings.

**Conclusion**

[66] I would order that the appellant be refused leave to adduce further evidence and that the appeal be dismissed with costs.