SUPREME COURT OF QUEENSLAND

CITATION:	*Jensen v Legal Services Commissioner* [2017] QCA 189
PARTIES:	**CRAIG GRAHAM SELWYN LEE JENSEN** (appellant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO/S:	Appeal No 5206 of 2017 QCATA No 69 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2017] QCAT 148 (Thomas J, President, Horsley, Legal panel member, McKay, Lay panel member)
DELIVERED ON:	1 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2017
JUDGES:	Sofronoff P and Gotterson JA and Atkinson J
ORDER:	**1. The appellant be given leave to rely upon his affidavit sworn 24 May 2017 and his affidavit sworn 4 July 2017.** **2. Allow the appeal.** **3. Order:** **(1) The appellant be publicly sanctioned;** **(2) The appellant be suspended from practice from 22 May 2017 to 21 February 2018;** **(3) The appellant receive counselling from a senior counsellor nominated by the President of the Queensland Law Society until 21 February 2019.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – where the Queensland Civil and Administrative Tribunal determined that the appellant's name was to be removed from the roll of solicitors – where the charges against the appellant related to an email sent to the appellant's client by the client's son who was the other party to a property dispute – where the appellant claimed that email was defamatory of him and sought payment of $20,000 in settlement of the matter – where the son made a complaint to the respondent about the appellant – where the

appellant claimed that complaint republished the defamatory material and would increase the damages which would be awarded to him by the court – where the respondent claimed that the complaint was protected by s 487 of the *Legal Profession Act* 2007 (the Act) – where the respondent alleged that the appellant knew or ought to have known that the complaint was protected by s 487 of the Act and pursued the claim that had no reasonable prospects of success – whether the appellant's arguments in relation to defamation and s 487 of the Act were insupportable

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – where the Queensland Civil and Administrative Tribunal determined that the appellant's name was to be removed from the roll of solicitors – where the charges against the appellant related to an email sent to the appellant's client by the client's son who was the other party to a property dispute – where the appellant claimed that email was defamatory of him and sought payment of $20,000 in settlement of the matter – where the son made a complaint to respondent about the appellant – where the appellant also made a complaint to the respondent about the solicitor who acted for the son – where the appellant was charged with making a complaint that contained baseless allegations against the solicitor – whether the complaint made by the appellant contained baseless allegations against the solicitor

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – where the Queensland Civil and Administrative Tribunal determined that the appellant's name was to be removed from the roll of solicitors – where the charges against the appellant related to an email sent to the appellant's client by the client's son who was the other party to a property dispute – where the appellant claimed that email was defamatory of him and sought payment of $20,000 in settlement of the matter – where the son made a complaint to respondent about the appellant – where the solicitor sent correspondence to the respondent and to the son's solicitor from 11 October 2013 to 12 February 2014 – where the appellant was charged with breaching rules 4 and 5 of the *Australian Solicitors Conduct Rules* 2012 (the Rules) – whether the appellant's correspondence from 11 October to 12 February 2014 was in breach of the Rules

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – where the Queensland Civil and Administrative Tribunal determined that the appellant's name was to be removed from the roll of solicitors – where the appellant submitted an order recommending the removal of the appellant's name from the roll of practitioners

was not the proper penalty to impose in the circumstances – whether an order recommending the removal of the appellant's name from the roll of practitioners or some other order under s 456 of the Act is the proper penalty in the circumstances

Australian Solicitors Conduct Rules 2012, r 4, r 5, r 32, r 34
Defamation Act 2005 (Qld), s 24
Legal Profession Act 2007 (Qld), s 487

Council of the Queensland Law Society Incorporated v Whitman [2003] QCA 438, considered
Deatons Pty Ltd v Flew (1949) 79 CLR 370; [1949] HCA 60, cited
Legal Services Commission v Bradshaw [2009] LPT 21, considered
Legal Services Commissioner v Thomas [2009] LPT 13, considered
Morris v C W Martin & Sons Ltd [1966] 1 QB 716, cited
New South Wales v Lepore (2003) 212 CLR 511; [2003] HCA 4, considered
Prince Alfred College Incorporated v ADC (2016) 258 CLR 134; [2016] HCA 37, cited
Prothonotary of the Supreme Court of NSW v P [2003] NSWCA 320, considered
Queensland Law Society Inc v Priddle [2002] QCA 297, considered
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40, cited
Watts v Legal Services Commissioner [2016] QCA 224, considered

COUNSEL:	S J Keim SC for the appellant M D Nicholson for the respondent
SOLICITORS:	Michael Cooper Lawyer for the appellant Legal Services Commission for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Atkinson J and with the orders her Honour proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Atkinson J and with the reasons given by her Honour.

[3] **ATKINSON J:** On 22 May 2017 the Queensland Civil and Administrative Tribunal (QCAT) determined that the appellant's name was to be removed from the roll of solicitors. The decision is described as having followed an "on the papers hearing" but it appears clear from the record that in fact there was a hearing before QCAT on 21 August 2015, with written submissions both before and following that hearing. It appears that written submissions from the Legal Services Commissioner ("the Commissioner") were received on 8 July, 21 and 25 August 2014. Submissions were then received from the appellant on 29 August 2014 and August 2015. Final submissions in reply from the Commissioner were received on 25 September 2015.

[4] Dr Jensen appealed the decision of QCAT to this court pursuant to s 468 of the *Legal Profession Act* 2007 ("the Act"). Section 468(2) provides that the appeal is by way of rehearing on the evidence given in the matter before QCAT. Under s 468(3), this court may give leave to introduce further material evidence. The appellant relied on the appeal on two further affidavits; one sworn by him on 24 May 2017 and another sworn by him on 4 July 2017. This was not opposed and the appellant should be formally given leave to rely upon those affidavits.

[5] In order to understand whether the appeal against the order made by QCAT should be successful it is necessary first to set out in some detail the history of the circumstances that led to the making of complaints against the appellant, the particularised charges against the appellant, the circumstances of dealing with the complaints and the hearing and decision by QCAT.

Email by Mr Humphreys on 9 September 2013

[6] A legal dispute about property existed between Scott Humphreys and his mother, Lyn Humphreys. On 9 September 2013 at 11.05 pm Scott Humphreys sent an email from his work email address to his mother with the subject "I Can't Believe Where you are Going". The signature at the end of his email identifies Mr Humphreys as the Regional Business Manager, Southeast Queensland, Northern Territory for the company for which he worked.

[7] In that email Mr Humphreys expressed his frustration about the conduct of the legal dispute between him and his mother. It is perhaps only necessary to quote the first paragraph of the email to understand its tone and the matters subsequently complained of by the appellant, Dr Jensen.

> "I can't believe the position you are currently driving this through your solicitor. You are simply being greedy and determined to ensure that you dwindle all cash from myself and my family. We have made a very generous offer to you that I make nothing out of the property and all that you and your germy solicitor want is more. It is very easy for you to do this when someone else funds your solicitor costs, and what about me who has to continue the fight at my expense because of your sheer greed. If you had any common sense on the reality of the situation you would realise that your solicitor sending responses bit for bit is simply his way of ensuring he makes as much money out of the situation as possible."

In the body of the email Mr Humphreys referred to legal advice that he had received from his solicitor. Later in the email he repeated the phrase "germy solicitor". He ended the email by saying, "You are just a greedy person and I suggest you have a serious think about what you and your solicitor are playing at".

[8] At that time both Scott Humphreys and Lyn Humphreys were represented by solicitors. Lyn Humphreys was represented by the appellant who was in sole practice with offices at Calamvale and Jimboomba. Scott Humphreys was represented by McNamara & Associates Solicitors at Ipswich. The solicitor responsible for Scott Humphreys' matter at McNamara & Associates was a partner, Kevin Steed.

[9] On 10 September 2013 at 2.24 pm, Lyn Humphreys forwarded the email from Mr Humphreys to her solicitor, the appellant.

The appellant's letter of 13 September 2013

[10] On 13 September 2013 the appellant wrote to McNamara & Associates with the reference "K Steed". It enclosed a copy of the email sent to Lyn Humphreys from Scott Humphreys. The appellant asserted that it was "grossly defamatory" of him. He said, "I require Mr Humphreys to pay me $20,000 damages for defamation. Please advise whether you represent Mr Humphreys in this matter. If you do not, I shall write to him." He went on to assert that the email was sent on behalf of the company for whom Mr Humphreys worked and that the company would therefore also be vicariously liable for defamation. He said he had not yet sent any demand to the company as that would cause difficulties in his employment for Mr Humphreys and he would give him the opportunity to pay the appellant $20,000 to resolve the matter promptly.

Complaint to the Legal Services Commission

[11] On 18 September 2013, another partner of McNamara & Associates, David Millwater, wrote to the appellant confirming that the firm acted on behalf of Mr Humphreys in respect of the alleged defamation matter. In that letter McNamara & Associates said that their client denied that he had defamed the appellant in any way. It continued:

> "Further, we have today forwarded your correspondence to the Queensland Law Society and the Legal Services Commission in respect of the threat made to contact our client's employer failing payment of $20,000.00.
>
> Should you in the future make a claim for defamation our client will strenuously defend any such claim and upon successful defence our client will seek an Order of the Court that you pay his legal costs arising from the action on an indemnity basis.
>
> Should you contact our client's employer and that results in any loss to our client we will file proceedings for compensation and indemnity costs."

[12] On the same date Mr Millwater, as a partner of McNamara & Associates acting on behalf of Mr Humphreys, sent a complaint regarding the appellant to the Legal Services Commission ("the Commission"). The complaint was in the following terms:

> "We are the solicitors for Mr Scott Humphreys and have received on behalf of our client correspondence from Dr Craig Jensen of Dr Craig Jensen Lawyers.
>
> A copy of this correspondence and an email from our client to his mother are **enclosed** for your reference.
>
> We are of the opinion that the letter from Dr Craig Jensen could be perceived as a threat to our client.
>
> Our client requests that you investigate or consider if this letter would be perceived as a threat or otherwise contrary to professional standards."

[13] On 4 October 2013 the Commission wrote to Dr Jensen informing him that the Commission had received a complaint about his conduct from Scott Humphreys. A copy of the complaint was enclosed. The letter informed Dr Jensen that:

> "In essence, the complaint is that you breached your professional obligations pursuant to the [*Legal Profession Act* 2007] by engaging in communication with the intent to threaten and/or intimidate another person in the course of proceedings."

The letter noted that the Commissioner had taken no action in relation to the complaint or formed any view as to its merits. The letter asked for cooperation from Dr Jensen and asked him to forward a full explanation of his conduct subject to the complaint by no later than 22 October 2013.

[14] On 11 October 2013 the appellant wrote to Nicole Ingram who, as Principal Legal Officer of the Commission, had written on behalf of the Commissioner to the appellant about the complaint a week earlier. He repeated that Mr Humphreys had defamed him in the letter of 10 September 2013 and that Mr Humphreys' "vicious attack" on the appellant alleging that he was deliberately prolonging the dispute was "totally unfounded, grossly defamatory and actionable". He asserted there was nothing intimidatory in the victim of a tort advising Mr Humphreys that if he did not settle promptly the victim would also address his claim to the concurrent tortfeasor, in this case his employer. The appellant asserted that the figure of $20,000 was a genuine estimate of damages likely to be awarded to him by a Queensland court for malicious defamation in writing from the office of the public company alleging professional misconduct by him and that, in the proceedings he intended to commence, he would claim significantly more than that amount. He asserted that the figure was not an inflated one designed to extort money from Mr Humphreys. The appellant said that the complaint should be dismissed and expressed his disappointment that it was being investigated.

[15] On the same day the appellant wrote to Mr Millwater of McNamara & Associates. His letter to Mr Millwater dealt with three matters. It commenced by dealing with the question of the related matters of the complaint to the Commission and the Law Society and the asserted defamation of him; secondly, it dealt with the dispute between Scott Humphreys and his mother; and thirdly, it set out what he said were the defamatory imputations made about him by Mr Humphreys in his email to his mother of "10 September 2013".[1]

[16] With regard to the alleged defamation and the complaint to the Commission, the appellant said that Mr Millwater's conduct in reporting the appellant to the Legal Services Commission and the Queensland Law Society and re-publishing the defamatory email to those bodies had been deeply distressing to him and would ultimately increase the damages which would be awarded to him by the court.

[17] He asserted the proceedings would be issued in due course and that the statement of claim would specifically refer to Mr Millwater's conduct as a ground to award aggravated damages. He said that it followed that:

> "In these circumstances there is a conflict of interest between those of your firm and Mr Humphreys' interests. He would be entitled to make a contribution claim against you. Accordingly I **require** you to pass this matter to another firm." (emphasis added)

[18] With regard to the role of McNamara & Associates in the dispute between Scott Humphreys and his mother, the appellant said:

---

1 This is the date when Lyn Humphreys sent a copy of the email of 9 September 2013 to the appellant.

> "I do not object to your firm (Mr Steed) continuing to act for Mr Humphreys in the land dispute. I note that he has made no complaint of professional misconduct against me in that dispute. I have not made a final decision of whether I will continue to act therein – if I decide that I should withdraw because of the defamation, I will claim loss of income against Mr Humphreys as well as general damages."

[19] With regard to the alleged defamation by Mr Humphreys, the appellant then provided a "concerns notice" under s 14 of the *Defamation Act* 2005, saying that the email of 10 September 2013 carried the following defamatory imputations about him:

> "1. I am a disreputable and immoral person;
>
> 2. I have exploited my client Lyn Humphreys for my personal gain;
>
> 3. I have conducted the dispute between her and Mr Humphreys in an unprofessional manner;
>
> 4. I have deliberately prolonged the dispute to earn greater professional fees;
>
> 5. I have been playing a game rather than dealing with the dispute in good faith;
>
> 6. I have been guilty of professional misconduct and/or unprofessional conduct in the dispute."

Investigation by the Commission

[20] On 23 October 2013 Mr Millwater forwarded a copy of the correspondence from the appellant dated 11 October 2013 to the Commission. The letter on McNamara & Associates letterhead was in the following brief terms:

> "We refer to previous correspondence dated 4 October 2013.
>
> We now enclose further correspondence we have received from Dr Craig Jensen Lawyers dated 11 October 2013."

[21] On 4 November 2013 Ms Ingram, as Principal Legal Officer of the Commission, wrote to the appellant informing him that the Commissioner had decided to start an investigation into his conduct, in particular his conduct in sending his letter of 11 October 2013 to McNamara & Associates. Ms Ingram informed the appellant that this was a separate matter from the original complaint made by Scott Humphreys. Ms Ingram informed the appellant that his correspondence of 11 October 2013, "purports to be in breach of the [*Legal Profession Act*] and the Australian Solicitors' Conduct Rules 2011". She referred him in particular to s 487 of the Act which provides protection from liability for making a complaint or giving information to the Commissioner or the relevant professional body.

[22] Ms Ingram informed the appellant that the Commissioner had taken no action in relation to the matter, nor formed any view about his conduct other than that on its face and on the evidence available, it appeared to warrant investigation to establish the full facts. She asked for his cooperation and to provide a full explanation of his conduct by no later than 18 November 2013.

[23] The appellant replied to the Commission's letter on 15 November 2013. The reply covered a number of matters. Firstly, it queried what conduct rule or section of the

Act was breached by him since neither was mentioned, he said, by the Commission. He further said that he ceased acting for Mrs Humphreys on 15 October 2013. He asserted that he was puzzled by the mention of s 487 of the Act. As it created no rule of conduct he had no idea, he said, why it was cited.

[24] The appellant asserted that Ms Ingram appeared to have no sympathy for his position as the "victim of gross defamation by Mr Humphreys" and that she appeared to be trying to pressure him into not suing Mr Humphreys and asked that Mr Humphreys' complaints be dismissed.

[25] With regard to the "second letter" Dr Jensen asserted "I hereby make a **formal complaint against David Millwater of McNamara and Associates**." (emphasis in original) The appellant said that Mr Millwater had no proper basis to refer to his letter of 11 October 2013 to McNamara & Associates to the Commission for investigation and asked for Mr Millwater's conduct to be investigated.

[26] This led to a reply from Ms Ingram of the Commission on 20 November 2013 noting for his information that there were currently two matters with the Commission. They were, firstly, a complaint made against the appellant by Scott Humphreys, file number 71011126 ("the first complaint"); and secondly, an investigation matter commenced by the Commission into the appellant's subsequent conduct following receipt of Mr Humphreys' complaint, file number 71011275 ("the investigation"). The letter of 20 November 2013 from the Commission related to the second matter, the investigation.

[27] Ms Ingram referred again to s 487 of the Act as well as to s 420 of the Act, which states that conduct consisting of a contravention of a law, which would include the Act, was capable of constituting unsatisfactory professional conduct or professional misconduct. She also referred, as the appellant had, to rule 34 of the *Australian Solicitors' Conduct Rules* ("ASCR"). She also asserted that the Commission was investigating his conduct in writing to Mr Millwater in correspondence dated 11 October 2013, asserting a position that he should have known was exceeding his legitimate rights or entitlements given the immunity encapsulated in s 487 of the Act. Such behaviour, she opined, could be considered as an attempt to intimidate, threaten, embarrass or frustrate another person.

[28] Ms Ingram recommended that he consider seeking legal advice and informed him that the Queensland Law Society provided free legal advice to members who had received an official notification asking that they provide information to the Commissioner as a result of an investigation. She gave him until 4 December 2013 to make his response.

[29] Ms Ingram also enclosed a complaint form for him to complete and return, for the purpose of making a formal complaint against Mr Millwater, if he decided to do so.

[30] Dr Jensen replied to the letter from the Commission on 2 December 2013. With regard to the first complaint, he again asserted that he was the victim of a "vicious defamation" by Mr Humphreys on 9 September 2013 and "made an offer to settle my claim without reference to the second tortfeasor, his employer, against whom I also have rights in defamation". He asserted there was "nothing extortionate" in that and that the damages he would be awarded would "exceed the amount of [his] offer".

[31] Dr Jensen then went on to examine his interpretation of s 487 of the Act which he said created no rule of conduct nor did it say that it was an offence or misconduct for a person to assert a civil cause of action prohibited by its terms. Moreover, he

asserted, it did not say that a court was precluded from awarding aggravated damages for a pre-existing cause of action for "distress and humiliation inflicted by the conduct of Mr Humphreys' solicitors in complaining to you". He referred to the fact that in defamation law subsequent conduct by a defendant, even conduct during a trial by the defendant's counsel, which would itself not be actionable against the counsel, could increase the damages awarded against a defendant. He asserted that if there were any ambiguity in s 487 of the Act, the Court of Appeal would not interpret it as extinguishing the common law principle to which he referred. He concluded by saying he was within his rights to claim aggravated damages (as opposed to a second cause of action) and did nothing wrong. He told the Commission that "both complaints" should be dismissed and enclosed a complaint against Mr Millwater.

Dr Jensen's complaint against Mr Millwater

[32] The complaint by Dr Jensen against Mr Millwater is on a standard multi-page form, presumably the one provided to him by the Commission. It was signed by the appellant on 2 December 2013. The complaint is about David Millwater who was described in the form filled out by the appellant as acting on behalf of Scott Humphreys. In answer to the question "When did the conduct you are reporting occur?" he answered "18/9/13". In the section of the complaint form which deals with the purpose of the complaint when he was asked "Why are you making this complaint?" he ticked "to have the respondent disciplined". He summarised the details of his complaint as follows:

> "On 18/9/13 the respondent made a baseless complaint about me to the LSC, in breach of conduct rule 32."

[33] When asked to provide full details of the complaint he inserted "see your file no. 71011275".

[34] On 4 December 2013 Robert Brittan, Director of Investigations at the Commission, sent a letter to Dr Jensen with reference to his complaint which was received by the Commission on 4 December 2013 which had been allocated file no. 71011356. Amongst other things, it said that the Commission would assess his complaint and aimed to let him know within 28 days what they proposed to do about it.

[35] On 13 January 2014 John Briton, the Commissioner, provided his response to Dr Jensen's complaint against Mr Millwater. He summarised Dr Jensen's complaint as being, in essence, that Mr Millwater had breached rule 32 of the ASCR by making a complaint about Dr Jensen's conduct to the Commission. Dr Jensen's claim was that the complaint by Mr Millwater breached rule 32 as the complaint was baseless. The Commissioner set out rule 32 which provides:

> "A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it."

[36] The Commissioner then made some observations. Mr Briton pointed out that the complaint which had been made to the Commission in relation to Dr Jensen's conduct in matter no. 71011275 was a complaint that had been made by Mr Humphreys, not Mr Millwater. Mr Millwater was Mr Humphreys' legal representative. Secondly, he

observed that Mr Millwater did not assert that Dr Jensen had engaged in conduct covered by rule 32. In submitting the complaint on behalf of his client, Mr Millwater had stated that the correspondence from Dr Jensen *could* be perceived as a threat against Mr Humphreys and that his client requested that the Commission investigate or consider whether the letter would be perceived as a threat or otherwise contrary to professional standards.

[37] The Commissioner observed that even if Mr Millwater were to have submitted the complaint himself and in doing so had asserted that Dr Jensen's conduct was a breach of professional standards, it would need to be established that Mr Millwater had no basis upon which to make that complaint. The Commissioner said that on the material before him he had formed the view that if Mr Millwater had expressed such an opinion he would have had a reasonable basis to do so. He also expressed the view that Mr Millwater's conduct in providing the material to the Commission on behalf of his client and his reasons for doing so did not enliven rule 32 of the ASCR.

[38] The letter from the Commissioner then dealt with a consequence of Dr Jensen's making the complaint against Mr Millwater. With regard to that, he said:

> "I as Commissioner have the power to either summarily dismiss complaints or commence an investigation into the complaint if I believe that complaint should be investigated. It was my decision that the complaint made by Mr Humphreys was supported by the material available and that your conduct should be investigated.
>
> You were advised of this and yet you still proceeded to submit a complaint against Mr Millwater. Therefore, despite being aware that I had made a decision the available material supported that your conduct should be investigated, you still went ahead to make what was in my opinion a baseless complaint against Mr Millwater.
>
> Your actions in doing so in my opinion enliven rule 32. Your conduct in making this complaint will be considered as part of the Commission's ongoing investigation pursuant to matter no. 71011275."

[39] On 14 January 2014 Dr Jensen wrote to Mr Briton saying that there seemed to be an "important misunderstanding" about his complaint against Mr Millwater. He said it appeared from Mr Briton's letter that he was referring to Mr Millwater's "first complaint" about Dr Jensen on 18 September 2013. Dr Jensen said that was not the subject of his complaint about Mr Millwater. He said the last two paragraphs of his letter of 15 November 2013 made it "absolutely clear" that the scope of his complaint about Mr Millwater was not his letter of 18 September but rather his referring Dr Jensen's letter of 11 October to the Commissioner. He concluded:

> "I note that you have rejected my complaint anyway but your intimation that you will somehow use my complaint against Mr Millwater against me in his complaints against me is of grave concern. I ask you to confirm that you will not do so."

Investigation Report

[40] A draft investigation report was prepared by Ms Ingram for the Commission. It dealt with three matters:

- the complaint by Mr Humphreys, matter no. 71011126,
- the Commission investigation matter, matter no. 71011275; and
- the complaint by Dr Jensen against Mr Millwater, matter no. 71011356.

The report shows that at a case evaluation meeting on 16 January 2014, the Commissioner decided that a draft investigation report was to be published to the complainants and the respondents for comment. It was published to them on 21 January 2014.

[41] On 21 January 2014 the Commissioner, Mr Briton, wrote to Dr Jensen telling him that the Commission had completed its investigation on 16 January 2014. He informed Dr Jensen that there were three decisions that he had to make before determining whether or not to commence disciplinary proceedings. The first was whether the evidence obtained during the course of the investigation was sufficient to pass the statutory test. The Commissioner enclosed draft particulars of charges outlining the alleged conduct. The second matter was whether it was in the public interest to proceed with the discipline application before the relevant disciplinary body; and thirdly, which disciplinary body should hear and determine any discipline application. The Commissioner invited any further submissions that Dr Jensen wished to make. The Commissioner enclosed a copy of the draft report written by Ms Ingram.

[42] Dr Jensen's response was dated 12 February 2014. First it took issue with a statement in the draft report that he acted for Mrs Humphrey. He had told the Commission in his letter of 15 November 2013 that he ceased acting for her on 15 October 2013. That was corrected by a footnote in the final report. The response was deeply critical of the draft report and of Ms Ingram's treatment of him.

[43] The final report was dated 27 February 2014. In that report, in addition to the matters referred to in the draft report, Ms Ingram said that the matters raised by Dr Jensen in his correspondence of 12 February 2014 were a repeat of earlier arguments, failed to take into account matters raised by the investigation report and the tone was aggressive and intimidating towards the regulatory authority. Referring to the case of *LSC v Thomas* [2009] LPT 13, Ms Ingram observed that the correspondence from Dr Jensen might be considered to be "aggressive, offensive, intimidating and inappropriate for a legal practitioner" and that it might be arguable that the communication by Dr Jensen with the regulatory body and other parties demonstrated "a lack of professionalism and insight on the part of [Dr Jensen] that is indicative of unfitness". She said that he appeared to demonstrate a clear lack of understanding in making legal arguments and failed to understand his professional obligations "in not progressing with legal arguments and cases that have no basis at law or are fundamentally flawed".

[44] Ms Ingram said that Dr Jensen's comments and all the investigation materials were considered by the Commissioner at a case evaluation meeting of 27 February 2014. The Commissioner decided that an additional charge be added to encapsulate the correspondence Dr Jensen had sent to the Commission in that his communications were inappropriate, and that the alleged conduct was such that it arguably rose to the level of professional misconduct; and that a disciplinary action be filed with QCAT, given the seriousness of the alleged conduct.

[45] Accordingly the following charges were recommended to be laid against the appellant.

The charges

"**CHARGE 1**

1. **On or about 11 October 2013 [Dr Jensen] forwarded a letter to David Millwater ('Millwater') of McNamara & Associates which was discourteous, offensive or provocative and contained false statements.**

Particulars

1.1 At all material times [Dr Jensen]:

(a) was an Australian Legal Practitioner; and

(b) was the Legal Practitioner Director of the incorporated legal practice of Arglen Pty Ltd trading as Dr Craig Jensen Lawyers.

1.2 On or about 9 September 2013 Scott Humphries [*sic*] ('Humphries') wrote an electronic communication to Lyn Humphries, his mother. Lyn Humphries [*sic*] was at that time a client of [Dr Jensen].

1.3 …

1.4 On 13 September 2013 [Dr Jensen] forwarded a letter to Millwater stating that the contents of the electronic communication of 9 September 2013 had defamed him. The respondent required Millwater's client, Humphries, to pay him $20,000 or he would commence proceedings and inform Humphries' employer of the communication.

1.5 …

1.6 On 18 September 2013 Millwater forwarded [Dr Jensen's] communication of 13 September 2013 to the Legal Services Commission on behalf of his client.

1.7 On 4 October 2013 [the Commission] forwarded a letter to [Dr Jensen] seeking an explanation of his correspondence dated 13 September 2013.

1.8 On 11 October 2013 [Dr Jensen] forwarded a letter to Millwater containing false statements in relation to [Dr Jensen's] position at law.

1.9 …

1.10 [Dr Jensen] had no legal grounds to assert Millwater had caused him damage that would award him aggravated damages.

1.11 [Dr Jensen] had no legal grounds to assert Millwater was acting in a conflict of interest situation.

1.12 The actions of [Dr Jensen] at [1.10] and [1.11][2] were in breach of his duty as a solicitor, as the letter instigated legal proceedings against Millwater in circumstances where [Dr Jensen] had no legitimate entitlement to do so."

"**CHARGE 2**

2. **[Dr Jensen] pursued a claim that had no reasonable prospect of success.**

Particulars

2.1 The [Commission] repeats and relies on 1.1 to 1.9 above.

2.2 The letter dated 11 October 2013 was said to be a 'concerns notice' within the meaning of the *Defamation Act* 2005.

2.3 The claim of defamation outlined in the letter was a claim which had no reasonable prospects of success, as the provision of information to the Legal Services Commission by Millwater and Humphries were made on an occasion within the meaning of section 24 of the *Defamation Act* 2005; namely that information provided to the Legal Services Commission is protected by section 487 of the *Legal Profession Act* 2007.

[2.4] [Dr Jensen] knew, or ought to have known that the publication of information to the Legal Services Commission was protected by the operation of section 487 of the *Legal Profession Act* 2007."

"**CHARGE 3**

3. **On or about 4 December 2013 [Dr Jensen] made an allegation of unsatisfactory professional conduct or professional misconduct against Millwater in breach of Rules 32 and 34 of the Australian Solicitors Conduct Rules 2012.**

Particulars

3.1 The [Commission] repeats and relies on 1.1 to 1.9 above.

3.2 On or about 4 December 2013 the Legal Services Commission received a complaint from [Dr Jensen] alleging Millwater had breached Rule 32 of the ASCR on the basis he had provided information to the Legal Services Commission.

3.3 [Dr Jensen] knew, or ought to have known, the complaint against Millwater was baseless in that the information provided to the Legal Services Commission was in connection with an ongoing investigation and protected pursuant to section 487 of the *Legal Profession Act* 2007.

---

[2] The change referred to at 1.11 and 1.12 but it is clear on reading it that it meant to refer to 1.10 and 1.11.

3.4 [Dr Jensen] knew or ought to have known that Millwater had not made a complainant against [Dr Jensen] given that:

(a) The first complainant was Humphries; and

(b) The investigation matter was commenced by the Legal Services Commissioner.

3.5 [Dr Jensen] knew or ought to have known that the Legal Services Commissioner in exercising his power pursuant to section 435 of the *Legal Profession Act* 2007 had already determined the information provided was of concern and did not contain baseless allegations."

"**CHARGE 4**

4. **That by his correspondence to the Legal Services Commission and David Millwater ('Millwater'), [Dr Jensen] engaged in conduct that would justify a finding that he is not a fit and proper person to engage in legal practice.**

Particulars

4.1 The [Commission] repeats and relies on 1.1 to 1.9 above.

4.2 In correspondence dated 11 October 2013, 15 November 2013, 2 December 2013 and 12 February 2014, [Dr Jensen] sent communications to the [Commission] that:

(a) were in breach of [Dr Jensen's] duty as set out in Rule 4 of the Australian Solicitor's Conduct Rules;

(b) were in breach of [Dr Jensen's] duty as set out in Rule 5 of the Australian Solicitor's Conduct Rules;

(c) amounts to unsatisfactory professional conduct or professional misconduct pursuant to the Legal Profession Act 2007 (Qld).

4.3 In correspondence dated 11 October 201[3][3] [Dr Jensen] sent communications to Millwater that:

(a) were in breach of [Dr Jensen's] duty as set out in Rule 4 of the Australian Solicitor's Conduct Rules;

(b) were in breach of [Dr Jensen's] duty as set out in Rule 5 of the Australian Solicitor's Conduct Rule;

(c) amounts to unsatisfactory professional conduct or professional misconduct pursuant to the *Legal Profession Act* 2007 (Qld)."

[46] On 27 February 2014, Dr Jensen was informed by the Commissioner of his intention to commence disciplinary proceedings against him in QCAT and a copy of the final investigation report was sent to him. The Commissioner told Dr Jensen that the conduct of the matter would be transferred to one of the Commission's litigation lawyers, Martin Kelly.

---

3 The date in the charge is 11 October 2014 but it was accepted that this was a typographical error.

[47] On 4 April 2014, the Commissioner's application was lodged with QCAT. The application was made under s 452 of the Act and alleged that on the particulars of the charges the appellant was guilty of professional misconduct and/or unsatisfactory professional conduct. The Commissioner requested that, upon a finding that the respondent was guilty of professional misconduct and/or unsatisfactory professional conduct, disciplinary orders pursuant to s 456 of the Act be made.

[48] On 28 May 2014 the appellant filed a response seeking that QCAT dismiss the application made by the Commissioner. He also provided a detailed response to the charges.

[49] On 1 July 2014 the appellant applied to QCAT for the Commissioner's application to be struck out. He filed an affidavit in support of that application. The Commissioner filed submissions in response to that application on 8 July 2014. Further submissions were filed by the Commissioner on 21 August 2014. Those submissions were also in regard to the application to strike out as a result of a directions hearing held on 14 July 2014 where the appellant, Dr Jensen, complained that the Commissioner had not addressed all the matters raised in an affidavit dated 26 June 2014 filed by Dr Jensen on 1 July 2014.

[50] On 25 August 2014 the Commissioner filed submissions in support of his discipline application. On 29 August 2014 Dr Jensen filed submissions in response. Further submissions in response were filed in August 2015.

[51] Evidence was taken before QCAT on 21 August 2015. Two witnesses were called to be cross-examined: Nicole Ingram and Dr Jensen. Ms Ingram was cross-examined by Dr Jensen about whether she would agree that her interpretation of s 487 was not the only possible interpretation. She stood by what was in her report. The cross-examination concluded with the following:

> "I'm asking you as a lawyer to concede that your view of what section 482 means may not be the only reasonable interpretation of that section. Do you concede that?--- I concede that other people may have a different view to mine."[4]

[52] On 25 September 2015 the Commissioner filed final written submissions.

[53] As mentioned at the beginning of these reasons, on 22 May 2017, QCAT decided that Dr Jensen's name was to be removed from the roll of solicitors. It appears that the complaints to the Commission were dealt with promptly but that there was undue delay between the commencement of disciplinary proceedings in QCAT on 4 April 2014 and QCAT's decision on 22 May 2017, some 20 months after the last submissions were filed. Such a delay, which was not the fault of either party, is not in the public interest. During that time, the appellant was able to continue in his practice, unimpeded by any of the complaints made against him or findings made against him. However, during that time no further complaints were made against him which does operate to his benefit as this court reconsiders the penalty to be imposed on him.

[54] With regard to charges 1 and 2, QCAT, implicitly finding him guilty of these charges, held:[5]

---

4 The transcript may be in error. Presumably the question was meant to refer to s 487 of the Act.

5 *Legal Services Commissioner v Jensen* [2017] QCAT 148 at [26].

> "The actions of Dr Jensen fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. They constitute professional misconduct."

[55] This finding is based on a finding that the Commissioner's interpretation of s 487 of the Act was correct and Dr Jensen's view was "insupportable" and therefore his allegations against Mr Millwater had no reasonable basis and should have been withdrawn when Dr Jensen's attention was drawn to s 487 of the Act of which he had been unaware. QCAT also found that Dr Jensen made unsustainable claims on points of law, an example being his repeated assertion that Mr Humphreys' employer was vicariously liable for his private letter to his mother (the email of 9 September 2013) despite its contents having nothing to do with company business.

[56] QCAT found that Dr Jensen did not show any remorse for writing his letter of 11 October 2013 to Mr Millwater. QCAT found that if Dr Jensen did not know that his aggravated damages and conflict claims were unsound, it was satisfied that he made them recklessly, not caring whether they were true or false. QCAT found that a practitioner of Dr Jensen's experience should have been mindful of the possibility that a section like s 487 might be in legislation like the Act and should have checked the Act before making the allegations and demands contained in his letter of 11 October 2013.

[57] Further, in the letter where Dr Jensen affirmed his demand of $20,000 from Mr Humphreys, QCAT found that this was a figure apparently chosen "without logic and basis" taking no reasonable or proportionate account of the personal nature of the offending email and its very limited publication. The same letter, it was found, threatened proceedings against Mr Millwater, accused him of defamation and an actual or imminent conflict of interest, regardless of s 487 of the Act and the Commissioner's letter drawing his attention to that provision. QCAT found that the allegations made against Mr Millwater, if not consciously false, were made without caring whether they were true or false.

[58] Similar findings were made with regard to charge 3:[6]

> "Dr Jensen's conduct fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. Dr Jensen's conduct amounted to professional misconduct."

[59] QCAT found that there were several indications that Dr Jensen's complaint of 4 December 2013 against Mr Millwater was not *bona fide* and well-founded. Mr Millwater had referred Dr Jensen's letter to Mr Millwater's firm dated 13 September 2013 to the Commissioner. That letter had demanded that Mr Humphreys pay $20,000 to Dr Jensen personally for Mr Humphreys' private comments to his mother. There were several problems with that. Firstly, the comments were in part vulgar abuse rather than a "vicious defamation" and "appalling slander" of an "innocent victim". Secondly, the quantum of damages claimed was not able to be justified. Thirdly and most importantly, there was the thinly veiled threat to cause difficulties with Mr Humphreys' employer if the demand for $20,000 was not met, which Dr Jensen said in cross-examination would have been a "bit of an incentive"

---

6 At [39].

for Mr Humphreys to negotiate the settlement. Dr Jensen knew at the time of his complaint against Mr Millwater that the Commissioner was taking Mr Humphreys' complaint seriously and in all those circumstances Dr Jensen's allegation of misconduct on the part of Mr Millwater was a breach of rule 32 of the ASCR.

[60] QCAT held that it is a serious matter to report a solicitor to the Commissioner for professional misconduct or unsatisfactory professional conduct. Before such a complaint is made by a practitioner, the practitioner must carefully consider whether there is a reasonable and substantial basis for doing so. QCAT found that there was no such basis for Dr Jensen's complaint against Mr Millwater.

[61] With regard to charge 4, QCAT held:[7]

> "The conduct referred to in charge 4 fell below the standard of professional conduct observed and approved by members of the profession of good repute and competency."

There was no explicit finding of professional misconduct on charge 4, although that finding appears to be implicit. With regard to Dr Jensen's letters to the Commissioner and Mr Millwater on 11 October 2013 and his letters to the Commission on 15 November 2013, 2 December 2013 and 12 February 2014, QCAT held that it considered that substantial parts of the letters in question, particularly those addressed to the Commissioner, might quite properly be described as aggressive, intimidatory, offensive and professionally improper. QCAT found that the letters were inappropriate and consistently uncooperative with the Commissioner in his duty to conduct an enquiry. The Commissioner referred to several decisions in the Court of Appeal[8] which emphasise a practitioner's professional duty is to cooperate with the Commissioner. QCAT held that the refusal to cooperate is *per se* misconduct.

[62] With regard to penalty, QCAT was satisfied that the sanction of recommendation that the lawyer be removed from the solicitors' roll was appropriate in a case such as the present where there was intransigent defiance of the Commissioner, repeated professional discourtesy and repeated and reckless assertions of indefensible legal propositions. It considered other sanctions such as a reprimand, fine, suspension or an order to complete a course of legal ethics or practice management but found that in view of the consistency of the conduct and the lack of appreciation of the inappropriateness of this conduct and the lack of remorse or willingness to take steps to correct his conduct, the appellant was not a fit and proper person to practice as a solicitor.

Grounds of Appeal

[63] Dr Jensen relied on extensive grounds of appeal as follows:

> "**Charges 1 and 2:**
>
> a) The Tribunal erred in finding that the Appellant had threatened defamation proceedings against Mr Millwater. The Appellant's letter of 11 October 2013 stated that aggravated damages would be claimed against Mr Humphreys because of Mr Millwater's action, as Humphreys' agent, in republishing the defamatory email

---

7 At [53].

8 *Queensland Law Society Inc v Carberry* [2000] QCA 450 at [7]; *Attorney General v Bax* [1999] 2 Qd R 9 at 22; *Council for Queensland Law Society Incorporate v Whitman* [2003] QCA 439 at [36].

of 10 September 2013. The notice at the foot of the letter under s 14 of the *Defamation Act* 2005 made it clear that the proposed defendant was Mr Humphreys and not Mr Millwater.

b) The Tribunal ignored the Appellant's submissions that s 487(2) of the *Legal Profession Act* 2007 was not engaged so as to bar a claim for aggravated damages when the original email by Mr Humphreys was not directed to the Legal Services Commission. The Appellant made extensive submissions that in defamation, aggravated damages can be awarded for further conduct by the tortfeasor which is not itself actionable. Examples of that rule were given with references to authority. The Tribunal also ignored the concession of Ms Ingram under cross-examination that the Appellant was 'entitled to [his] opinion' as to the effect of s 487(2) of the *Legal Profession Act* 2007 – that concession alone should have defeated the charges.

c) In any event the Tribunal should have found that as there is no binding authority in Queensland as to the argument under (b) above, the Appellant was entitled to hold the opinion that he did. The finding that the Appellant's view of the law was unreasonable and insupportable is unfounded and unreasonable.

d) The Tribunal erred in finding that it was improper to suggest a conflict of interest demanded that Mr Millwater should hand the file to another firm. On the contrary, if Mr Millwater's actions in republishing a seriously defamatory email had arguably increased the damages that his client Mr Humphreys might have to pay, there would be a conflict of interest, and Mr Humphreys might wish to serve a contribution notice on Mr Millwater, as the letter of 11 October 2013 noted.

e) The findings and conclusions of the Tribunal are unreasonable, contrary to the written evidence and misconceived the issues before the Tribunal.

Charge 3:

a) The Tribunal's finding that the Appellant's complaint against Mr Millwater was not *bona fide* and well founded is unreasonable and affected by the errors noted above.

b) In any event, it was not for the Tribunal to decide the merits of a defamation claim in advance when damages for defamation are at large.

c) The Tribunal erred in finding that a 'thinly veiled threat' was made by the Appellant. A victim of a tort by apparently two concurrent tortfeasors is entitled to address the claim to either. The Appellant was not charged with extortion

and could not have been. Damages are always at large in a claim for defamation.

d) In any case the findings of the Tribunal of improper conduct by the Appellant are directly prohibited by s 487(3) of the *Legal Profession Act* 2007. The Appellant relied on that defence and the Tribunal ignored it. The findings must be set aside.

Charge 4:

a) The findings of the Tribunal are unreasonable and affected by the errors noted above;

b) The Appellant's communications with the Respondent are constitutionally protected as the Respondent is an elector of the State of Queensland and he is entitled to criticize a State instrumentality without fear of that instrumentality using its statutory powers to silence its critic;

c) The appellant made extensive submissions about the constitutional immunity which were not contested by the Respondent, and were wholly ignored by the Tribunal;

d) The order of the Tribunal, in so far as it relies on Charge 4 and the Appellant's criticism of the Respondent, breaches the constitutional protection; and

e) The findings of the Tribunal also ignore the fact that it is a prima facie contempt of Court for a statutory body to use its powers to pressure a citizen who is a lawyer from bringing proceedings against a non-client such as Mr Humphreys, unless such proceedings would be a clear abuse of process. That was not the case here. The Courts are the proper place to determine such legal issues, not a regulator.

5. The order that the Appellant's name be 'removed from the Roll of Solicitors' is an illegal order as s 456(2)(a) of the *Legal Profession Act* 2007 only permits a recommendation that the name of the practitioner be removed from the local roll.

7. The order for striking off is disproportionate and manifestly unreasonable.

8. The findings that the Appellant showed no remorse or insight ignores the fact that if the Appellant holds a different view as to the impact of s 487(2) on derivative claims for aggravated damages, no remorse is called for.

9. The findings of the Tribunal fail to accord any weight to the circumstances that the conduct of the Appellant has nothing to do with a client and raises no issue about the need to protect the public from the Appellant. The case is simply about a vigorous disagreement between the parties about the effect of s 487(2) on derivative claims for damages and should have been dismissed.

10. In all the circumstances, the decision is wrong in law and should be reversed."

The appellant's submissions

[64] The appellant submitted that the finding with regard to charges 1 and 2 must be set aside as based either on legal error or a misunderstanding of the factual position as it emerged from the evidence.

[65] The appellant submitted that the crux of the decision of QCAT was a finding that he showed neither remorse nor insight when he should have done so. This was based on a finding that the legal proposition relied upon by the appellant was so unarguable that reliance upon it constituted a form of unprofessional conduct or professional misconduct. The appellant submitted that his legal proposition was arguable and that, while there were issues of robustness of language and questions of courtesy outside that central issue, they paled in importance compared to the central issue. The appellant submitted that his interpretation of s 487 of the Act – that is that it should be construed so as not to prevent the awarding of aggravated damages for an earlier defamation – was at least arguable and therefore not insupportable. Once that finding was removed from charges 1 and 2, the appellant submitted that QCAT was acting without jurisdiction when they made findings about the contents of his letter of 13 September 2013 as it was not the basis of the application brought to QCAT. QCAT incorrectly found that the appellant had accused Mr Millwater of defamation. To the extent that QCAT found that the appellant's assertion that McNamara & Associates had a conflict of interest was professional misconduct because of the appellant's reliance on an unarguable legal proposition, the basis for the finding also fell.

[66] With regard to charge 3, the appellant submitted that his complaint should have been understood only to be a complaint about Mr Millwater's letter of 23 October 2013. To the extent that QCAT made adverse findings on the basis of a complaint by the appellant concerning Mr Millwater's letter of 18 September 2013, such findings concerned a complaint by the appellant that, on a proper construction, he never made and which he never intended to make. Apart from any criticism for being imprecise with his dates, no finding of unprofessional conduct or professional misconduct could be made in those circumstances. Further, the appellant said he was protected from civil or criminal liability and from liability under an administrative process because of s 487 of the Act.

[67] With regard to the five letters relied upon in QCAT's finding against the appellant on charge 4, he submitted that, even ignoring the legal preclusion provided by s 487(2) and (3), the appellant's conduct was not the way he normally engaged with lawyers and authorities. The appellant submitted his conduct was explicable in terms of the upset and exasperation he felt with regard to the way he was being treated by the Commissioner. In his written outline of submissions, the appellant also argued in relation to charge 4 that he was protected by an implied right of free speech in matters affecting government. This was an argument he also relied upon before QCAT. This argument and these submissions were wisely formally abandoned at the hearing of the appeal.

The respondent's submissions

[68] The respondent submitted that QCAT reached the correct decision in charge 1 in that the claim made by the appellant in the letter of 11 October 2013 was discourteous,

offensive or provocative and contained false statements. The false statements were alleged to be ones for which the appellant had no legal grounds to assert: that Mr Millwater was acting in a conflict of interest situation; that he accused Mr Millwater of defamation; and that his claim as the interpretation of s 487 of the Act was unsupportable. With regard to charge 2, the respondent submitted that the appellant ought to have known that the publication of information by Mr Millwater on behalf of Mr Humphreys to the Commission was protected by s 487 of the Act.

[69] With regard to charge 3, the respondent submitted that the appellant knew or ought to have known that Mr Millwater had not made a complaint against him but that rather the complaint was made by Mr Humphreys to the respondent. There could be no confusion or misunderstanding in identifying the charge the appellant had to meet and the respondent submitted that QCAT reached the correct decision in charge 3 in that the appellant made an allegation of unsatisfactory professional conduct or misconduct against Mr Millwater in breach of rules 32 and 34 of the ASCR.

[70] With regard to charge 4, the respondent submitted that the reading of the letters identified in the particulars of the charge would satisfy the court that the appellant engaged in conduct which would justify a finding that he was not a fit and proper person to engage in legal practice.

Consideration

The statutory regime

***The Legal Profession Act* 2007**

[71] Chapter 7 of the Act creates the office of the Legal Services Commissioner with functions conferred on or imposed under the Act. It also establishes a Legal Services Commission.

[72] Chapter 4 of the Act deals with complaints against, and the discipline of, the legal profession. Its main purposes are set out in s 416 which relevantly provides that the main purposes are:

> "(a) to provide for the discipline of the legal profession;
>
> (b) to promote and enforce the professional standards, competence and honesty of the legal profession;
>
> (c) to provide a means of redress for complaints about lawyers;
>
> …"

[73] Under chapter 4, a legal practitioner may be investigated and subject to discipline for unsatisfactory professional conduct or professional misconduct. Unsatisfactory professional conduct is defined in s 418 to include conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. Professional misconduct is defined in s 419(1) to include:

> "(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent

failure to reach or keep a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice."

[74] Part 4.4 of the Act provides that a complaint may be made about the conduct of an Australian legal practitioner, including by the relevant regulatory authority itself. Complaints are made to the Commissioner under s 429 of the Act. An "investigation matter" may be commenced where the Commissioner believes an investigation should be started into the conduct of a legal practitioner.[9] In the usual course, written notice of the complaint will be given to the legal practitioner of the making of the complaint or the investigation into an investigation matter, the nature of the complaint or investigation matter, the identity of a complainant and action taken in relation to the complaint or investigation matter before giving the notice.[10]

[75] The respondent to whom such a notice is given is entitled to make written submissions about the complaint or investigation matter.[11] Under s 443(1)(a) an entity[12] carrying out an investigation into an Australian legal practitioner about a complaint or an investigation matter may require the practitioner who is the subject of the investigation to give the entity, in writing or personally, a full explanation of the matter being investigated within a stated reasonable time, to appear before the entity at a stated reasonable time and place, or to produce to the entity within a stated reasonable time any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce. An Australian legal practitioner must comply with each requirement, with limited exceptions, and a failure to comply after written notice may mean that the practitioner may be dealt with for professional misconduct.[13]

[76] Under s 447 of the Act, the Commissioner may start a proceeding with regard to the complaint or investigation matter before a disciplinary body. A discipline application in Queensland is made before QCAT. Section 456 sets out the orders one or more of which may be made by QCAT after it has completed the hearing of a discipline application and is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct. They include:

- an order recommending the name of the Australian legal practitioner be removed from the local roll or from an interstate roll (s 456(1), (2)(a), (3)(a));
- an order that the practitioner's local or interstate practising certificate be cancelled (s 456(1), (2)(b), (3)(b));
- an order that the practitioner's local or interstate practising certificate be suspended for a stated period (s 456(1), (2)(b), (3)(b));
- an order that a local or interstate practising certificate not be granted to the practitioner before the end of a stated period (s 456(1), (2)(c), (3)(c));

---

9 Section 435(1)(c)(i).
10 Section 437(1).
11 Section 438.
12 An investigation may be carried out by the Commissioner or, on referral from the Commissioner, the relevant professional association.
13 Section 443(3) and (4).

- an order imposing stated conditions on a practising certificate for a stated period and specifying the time, if any, after which the practitioner may apply to QCAT for the conditions to be amended or removed (s 456(1), (2)(d));
- an order recommending that stated conditions be imposed on a practitioner's interstate practising certificate for a stated period and a stated time, if any, after which the practitioner may apply to QCAT for conditions to be amended or removed (s 456(1), (3)(d));
- an order publicly reprimanding or, in special circumstances, privately reprimanding the practitioner (s 456(1), (2)(e));
- an order that no law practice in this jurisdiction may, for a period stated in the order of not more than five years, employ or continue to employ the practitioner in a law practice in this jurisdiction or employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order (s 456(1), (2)(f));
- an order that the legal practitioner pay a penalty of a stated amount not more than $100,000 (s 456(1), (4)(a));
- a compensation order (s 456(1), (4)(b), Part 4.10);
- an order that the practitioner undertake and complete a stated course of further legal education (s 456(1), (4)(c));
- an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order (s 456(1), (4)(d));
- an order that the practitioner do or refrain from doing something in connection with the practitioner's engaging in legal practice (s 456(1), (4)(e));
- an order that the practitioner stop accepting instructions as a public notary in relation to notarial services (s 456(1), (4)(f));
- an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions (s 456(1), (4)(g));
- an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period (s 456(1), (4)(h));
- an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice (s 456(1), (4)(i)); and
- an order that the practitioner must not apply for a local practising certificate for a stated period (s 456(1), (4)(j)).

[77] QCAT may also make orders for costs under s 462 and, under s 456(6), for payment of expenses associated with orders under s 456(4).

[78] Part 4.13 sets out various miscellaneous provisions relevant to complaints and discipline. Particularly relevant to this matter is s 487 which provides for protection from liability for a notification of conduct or making a complaint. It provides:

> "**Protection from liability for notification of conduct or making a complaint**
>
> (1) This section applies if a person makes a complaint or otherwise gives information to the commissioner, the law society or the bar association about conduct that is –

(a) conduct of an Australian lawyer or a law practice employee; or

(b) a possible contravention of section 24 or 25.

(2) The person is not liable, civilly (including in an action for defamation), criminally or under an administrative process for making the complaint, giving the notice or otherwise giving information to the commissioner, the law society or the bar association relating to the complaint or notice, including, for example, giving further information under section 431.

(3) Also, merely because the person makes the complaint, gives the notice or otherwise gives information as mentioned in subsection (2), the person can not be held to have –

(a) breached any code of professional etiquette or ethics; or

(b) departed from accepted standards of professional conduct."

[79] The proceedings before QCAT are governed by Part 7.4A of the Act and the *Queensland Civil and Administrative Tribunal Act* 2009 ("the QCAT Act"). Under s 656C of the Act, the applicable standard of proof is satisfaction on the balance of probabilities. The degree of satisfaction depends on the consequences for the practitioner of finding the allegation to be true.[14] As the proceedings before this court are by way of rehearing, the onus and standard of proof are the same.

The Australian Solicitors Conduct Rules 2012

[80] Rule 4.1.5 of the ASCR provides that a solicitor must comply with the ASCR and the law. Rule 4 provides generally that the solicitor's ethical duties restate and reinforce the solicitor's fiduciary and common law duties to the client and their professional duties to the administration of justice.[15] Rule 4.1.2 requires a solicitor to "be honest and courteous in all dealings in the course of legal practice".

[81] Rule 5.1 of the ASCR provides that a solicitor must not engage in conduct which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

"5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute."

[82] Also relevant to this matter are rules 32 and 34, as charge 3 alleged breaches of those rules.

[83] Rule 32 provides:

"**32. Unfounded allegations**

32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional

---

14 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 360-361; *Refjek v McElroy* (1965) 113 CLR 517 at 521.

15 Queensland Law Society, *Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, (2014) 1st edition.

conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it."

[84] Rule 34.1 provides:

> "**34 Dealing with other persons**
>
> 34.1 A solicitor must not in any action or communication associated with representing a client:
>
> 34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;
>
> 34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or
>
> 34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person."

Charges 1 and 2

[85] **1. On or about 11 October 2013 [Dr Jensen] forwarded a letter to David Millwater ('Millwater') of McNamara & Associates which was discourteous, offensive or provocative and contained false statements.**

2. [Dr Jensen] pursued a claim that had no reasonable prospect of success.

[86] It is convenient to refer to these two charges together as they concern related correspondence and have related particulars.

[87] There was no dispute that the appellant was acting for Lyn Humphreys when her son, Scott Humphreys, sent her an email on 9 September 2013. It is also true Mr Humphreys used his work email address and that his electronic signature block at the end of the email showed his position with his employer.

[88] Mr Humphreys' email criticised the conduct of his mother and of her legal representative, the appellant. The criticism of the appellant as a "germy solicitor" seems to have been somewhat abusive rather than descriptive language, arising from Mr Humphreys' frustration at the length and expense of the dispute that was continuing between himself and his mother. Of more concern was Mr Humphreys' assertions that the appellant was ensuring he made as much money out of the situation as possible by sending responses "bit for bit" and that his mother should have "a serious think about what [she] and [her] solicitor were playing at". These allegations could well be considered to be defamatory and to have some or all of the imputations contained in the appellant's concerns notice set out in his letter to McNamara & Associates on 11 October 2013. Whether defences available under the *Defamation Act* 2005, such as triviality, justification or qualified privilege, might have been raised in answer to the alleged defamation is not known as no litigation was commenced by the appellant.

[89] On 10 September 2013, Mrs Humphreys forwarded a copy of the email sent to her by the son to the appellant without any comment.

[90] The appellant then wrote to McNamara & Associates on 13 September 2013 about the email. He asserted the email was "grossly defamatory" of him. He did not set out why he described the email as "grossly defamatory" rather than "defamatory" but unfortunately there appears to be a pattern of excessive or emotional language used by the appellant of which this is the first example in the material before the court.

[91] The appellant then said he **required** Mr Humphreys to pay him $20,000 damages for defamation. He also said that the company for whom Mr Humphreys worked would be vicariously liable for the defamation; but that he had not yet sent a demand to the company as that could cause Mr Humphreys difficulty with his employment; and that he would give Mr Humphreys an opportunity to pay him $20,000 to resolve the matter promptly.

[92] In his letter to the Commission on 11 October 2013, the appellant attempted to justify his assertion of vicarious liability of the employer, and asserted that there was nothing intimidatory in his telling Mr Humphreys that if he did not settle promptly he would also make a claim against his employer. The appellant also asserted that $20,000 was a genuine estimate of the damage that would be likely to be awarded by a Queensland court; he would claim significantly more than that in the litigation he intended commencing; and that his claim for $20,000 was reasonable and "not an inflated one designed to extort money from Mr Humphreys". This raised a number of issues which are relevant to charges 1 and 2 and are also relevant to the appellant's credibility.

[93] The appellant attempted to justify his claim for $20,000 in cross-examination before QCAT. He had difficulty in doing so. He admitted that his client, Mrs Humphreys, did not terminate his retainer nor did he suggest that she had formed any adverse view of him as a result of receiving the email sent only to her. He suggested that perhaps other people might have seen it although there was nothing to suggest that they had. She was the only known recipient of the email. Dr Jensen could not articulate any basis for asserting that $20,000 was a genuine pre-estimate of the damages that might be awarded against him. The best he could do was to speculate that the email could have been shown to or read by someone other than the only recipient. Eventually Dr Jensen conceded under cross-examination that if Mrs Humphreys was the only person who received the email, then he "probably would not have got $20,000 from a Magistrate".

[94] I have concluded that Dr Jensen had no reasonable basis to require Mr Humphreys to pay him $20,000 promptly for defamation, particularly when combined with the statement that his employer "would also be" vicariously liable for defamation but that Dr Jensen had not yet sent any demand to the employer because Dr Jensen expected that could cause difficulties for Mr Humphreys in his employment. It is clearly implied that if Mr Humphreys did not pay $20,000 promptly, his employer would also be sent a demand with the expected difficulties in his employment caused to Mr Humphreys. Indeed, Dr Jensen admitted under cross-examination in QCAT that it was "a bit of an incentive" for Mr Humphreys to negotiate a settlement.

[95] So far as the claim for vicarious liability of the employer is concerned, it is difficult to accept that that claim was made honestly or reasonably. The email, albeit from his work email address, was sent very late at night about an entirely personal matter

between Mr Humphreys and his mother and sent only to her. It had nothing at all to do with his work or professional duties. Neither of the parties were able to point to any authority to support a finding that an employer might be vicariously liable for such an email. My researches have been unable to turn up any such case.

[96] The usual rule as to vicarious liability applies to this case, that is an employer is vicariously liable for any wrongful act of an employee that is committed within the scope or course of employment.[16] Traditionally, a distinction has been drawn between authorised and unauthorised acts.[17] If the employer expressly authorises the wrongful act, the employer will be vicariously liable. In certain circumstances the employer will also be held vicariously liable for the unauthorised acts of an employee. An employer is vicariously liable for unauthorised acts of an employee if the unauthorised acts are so connected with authorised acts of employment that they may be regarded as modes, although improper modes, of performing those acts.[18]

[97] In *Morris v C W Martin & Sons Ltd*[19] the plaintiff sent a mink fur to be cleaned by a furrier. The furrier, with the plaintiff's consent, sent it on to some cleaners. The employee who was given the task of cleaning the fur, stole it. The employers were held vicariously liable for the theft. It was held that the employee stole the fur within the scope or course of his employment.

[98] In *Deatons Pty Ltd v Flew*,[20] a bartender threw a glass at a patron when he asked to speak to the licensee. The High Court held that the bartender could not be said to have acted within the course of employment when she assaulted the victim. The act was described by Dixon J as an act of "passion and resentment",[21] not done in furtherance of the employer's interests, without the employer's express or implied authority or as an incident to or in consequence of anything the bartender was employed to do. Further, Dixon J held that this was not a case where an employer is liable because the acts "to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as representative of his master."[22]

[99] The distinction between those two cases was explained by Gleeson CJ in *New South Wales v Lepore*[23]:

> "The defendants in *Morris v C W Martin & Sons Ltd* were sub-bailees for reward of the article stolen by their employee, and had a duty to protect it from theft. The employee was the person in charge of the article … Although the hotel proprietor in *Deatons Pty Ltd v Flew* owed a duty of care to customers at its premises, the barmaid's responsibilities were not protective. Stealing a fur stole is not an improper method of cleaning it, but as the employer was a bailee, with custodial responsibility, and it put the goods in charge of a particular employee, then it was proper to regard that responsibility as devolving

---

16 *Prince Alfred College Incorporated v ADC* [2016] HCA 37, 40.
17 Salmond, *Law of Torts*, (1907) 1st edition at 83-84; *Brown v Citizens' Life Assurance Co* (1902) 2 SR (NSW) 202.
18 Ibid.
19 [1966] 1 QB 716.
20 (1949) 79 CLR 370.
21 Ibid 381.
22 Ibid.
23 (2003) 212 CLR 511 at [52].

> upon the employee. The theft was so connected with the custodial responsibilities of the employee as to be regarded as in the course of employment; not because it was in furtherance of the employee's responsibilities, but because the nature of his responsibilities extended to custody of the fur as well as cleaning it."

[100] This may be contrasted with the bartender's responsibilities in *Deatons Pty Ltd v Flew*. As Gleeson CJ said[24]

> "If, on the facts, it had been possible to treat maintaining order in the bar as one of the barmaid's responsibilities, and if, on the facts, it had been open to regard her conduct as an inappropriate response to disorder, then the jury could properly have held the employer liable in trespass. However, the barmaid's only responsibility was to serve drinks, and throwing a glass of beer at a customer could not be regarded as an improper method of doing that."

[101] More recently, the extent to which an employer is liable for the wrongful act of an employee has been considered in a number of cases relating to institutional sexual abuse. In *New South Wales v Lepore; Samin v Queensland; Rich v Queensland*,[25] the High Court heard three appeals from New South Wales and Queensland involving sexual assault at State schools. The High Court considered whether the schools were vicariously liable for the teachers' conduct. Dr Jensen asserted that in this case "the High Court made educational authorities vicariously liable for unauthorised torts by teachers". Ultimately, the case was determined on the basis of consideration of the non-delegable duty of care owed by schools to their students. Different approaches to vicarious liability were taken by the High Court and no majority view emerged on this point. Dr Jensen's assertion that in this case the High Court made educational authorities vicariously liable for unauthorised torts by teachers is not a correct statement of the law.

[102] In *Prince Alfred College Incorporated v ADC*[26], the High Court discussed the decision in *NSW v Lepore* and clarified the "relevant approach"[27] to determining vicarious liability. *Prince Alfred College v ADC* was an application for an extension of time by ADC in relation to sexual abuse by a housemaster at Prince Alfred College. Ultimately, the court determined that the extension should not be granted. In reaching this decision the court considered the issue of vicarious liability of an employer for the wrongful acts of an employee.

[103] In a joint judgment, the court considered the development of the case law in Australia, Canada and the United Kingdom, noting that developments have been made overseas since the decision in *NSW v Lepore*. The Court noted that an employer may be liable for the wrongful act of an employee where the apparent performance of the employment provides the occasion for the wrongful act. However, "the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability."[28]

---

24 At [51].
25 (2003) 212 CLR 511.
26 [2016] HCA 37.
27 Ibid [80].
28 Ibid.

[104] The court found that it is necessary to consider "the role given to the employee and the nature of the employee's responsibilities"[29] to determine whether the employment provided the opportunity for and was the occasion of the wrongful act. As an example, the Court explained that "it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee took advantage of the position in which the employment placed the employee vis-à-vis the victim".[30]

[105] An employer's vicarious liability extends to defamation, as to any other tort, where the defamation occurs within the course or scope of employment.[31] Where an employee sends an email using a work email address for personal matters, entirely unrelated to the employee's responsibilities, in the employee's personal time, there is not sufficient connection between sending an allegedly defamatory email and the employment so that the act could be said to have occurred within the course of employment. The employment did not provide the opportunity for the act of sending the email, nor was the act so closely connected with authorised acts of the employee that it must be regarded as within the scope of employment.

[106] In those circumstances, a recipient of Dr Jensen's letter of 13 September 2013 would be entitled to regard it as a threat that, unless Mr Humphreys promptly paid Dr Jensen the sum of $20,000, Dr Jensen would inform Mr Humphreys' employer and thereby threaten his employment. That is not consistent with an honest and rational response by a legal practitioner to the contents of the email Mr Humphreys sent to his mother.

[107] On 11 October 2013 the appellant sent a letter to Mr Millwater. The contents of this letter form the gravamen of charges 1 and 2. The Commissioner alleged in charge 1 that the appellant had no legal grounds to assert that Mr Millwater had caused him damage that would lead to his being awarded aggravated damages and that he had no legal grounds to assert that Mr Millwater was acting in a conflict of interest situation. Accordingly, his action in sending the letter containing those assertions was in breach of his duty as a solicitor as it instigated legal proceedings against Mr Millwater in circumstances where he had no legitimate entitlement to do so. In charge 2, the respondent alleged that the appellant knew, or ought to have known, that the publication of information to the Commission was protected by operation of s 487 of the Act and by the combined operation of the *Defamation Act* 2005 and s 487 of the Act, the claim of defamation set out in the letter of 11 October 2013 had no reasonable prospects of success.

[108] Whether or not these charges are made out depend on an interpretation of s 487 and whether or not the appellant's stated position that s 487 did not apply to prevent an award of aggravated damages by a court was reasonably arguable.

[109] There can be no doubt that Mr Millwater's action in sending a complaint on behalf of his client on 18 September 2013, even if it was otherwise actionable, was protected by s 24 of the *Defamation Act* and s 487(2) of the Act. It is necessary to examine the impugned statements made by Dr Jensen in his letter to McNamara & Associates on 11 October 2013 to see whether there was any reasonable legal grounds for making the statements contained in it.

---

29 Ibid.

30 Ibid.

31 Gatley on Libel and Slander, (1998) 9th edition, 194-195.

[110] First, Dr Jensen refers to Mr Millwater's conduct in "reporting me to the Legal Services Commission and the Queensland Law Society **and** republishing the defamatory email to those bodies" (emphasis added) and goes on to assert that this "will ultimately increase the damages which will be awarded to me by the Court."

[111] At common law, any republication of defamatory material is itself a publication and the republisher may be liable in defamation notwithstanding that the publication did not originally emanate from that person.[32] Accordingly, Mr Millwater may well have thought from reading the first paragraph that Dr Jensen was expressing an intention to sue him.

[112] However, the original publisher of defamatory material may also be liable for the republication of that material where the original publisher authorised that republication.[33] In this case, the republication of the material to the Commission by McNamara & Associates was on the face of their letter to the Commission of 18 September 2013, on instructions from their client, Mr Humphreys.

[113] Since Dr Jensen's 11 October letter to McNamara & Associates refers to that republication as conduct by Mr Millwater which would be a ground for Dr Jensen to be awarded "aggravated damages" in proceedings he intended to issue, one presumes that he was intending to take proceedings only against Mr Humphreys both for the publication of the email of 9 September 2013 to his mother and for its republication in the complaint to the Commission. To the extent that QCAT found that the letter of 11 October 2013 threatened legal proceedings against Mr Millwater, I am satisfied that that finding was wrong and ought not have been made. QCAT also incorrectly referred to Dr Jensen claiming that "an (unspecified) alternative interpretation supported his 'aggravated damages' claim." Dr Jensen's alternative interpretation, while wrong, was not unspecified.

[114] However QCAT also found, correctly, that Dr Jensen's threat of action against Mr Humphreys for aggravated damages had no reasonable prospect of success.

[115] Aggravated damages for defamation can be awarded if a defendant repeats a defamation.[34] Such damages are available under s 35(2) of the *Defamation Act*. Aggravated damages are compensatory damages awarded for the tort of defamation.[35]

[116] However, s 487(2) of the Act completely protects a person from civil liability, specifically including in an action for defamation, for making a complaint or giving information to the Commissioner. As Fryberg J held in *Legal Services Commission v Bradshaw*[36] "the protection which is provided by the section is absolute". It was necessary to include the email from Mr Humphreys to his mother in order to understand and give context to the letter sent by Dr Jensen to McNamara & Associates attaching the email and complaining of the material in it. In publishing or republishing the email to the Commission as a necessary part of making a complaint, no civil liability could attach either to Mr Humphreys or the solicitor who was acting for him in making the complaint. There can be no suggestion of lack of good faith on the part of Mr Millwater.

---

32 Gatley on Libel and Slander, (1998) 9th edition.
33 Ibid.
34 Gatley on Libel and Slander 9th ed [9.13].
35 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.
36 [2009] LPT 21 at 1-9.

[117] Because of the effect of s 487(2) of the Act, there could be no cause of action against Mr Humphreys nor aggravation of any damages to be awarded against him because of his authorisation of the publication of the email to the Commission. That is because **no** civil liability could attach to him for making the complaint. Nor could Mr Millwater's actions in acting on his client's instructions by sending to the Commission Dr Jensen's letter of 13 September 2013 complaining of Mr Humphreys' email together with a copy of that email be an act which could lead to the award of aggravated damages against Mr Humphreys. It appears that Dr Jensen was, at the time he wrote the letter of 11 October, unaware of s 487 of the Act. A legal practitioner who has been the subject of a complaint under the Act is expected to familiarise himself with the provisions of the Act rather than sending a letter containing accusations about another's behaviour in apparent ignorance of the applicable law.

[118] The argument that s 487(2) of the Act did not protect a person making a complaint from civil liability, including an award of aggravated damages as compensatory damages for defamation, is utterly lacking in merit and, in my view, unarguable. It is directly contrary to the statutory provision which provides protection in the broadest terms against civil liability for making a complaint or giving information.

[119] It follows that Mr Millwater was not in a conflict of interest situation. He was acting properly on his instructions and there was no conflict between his interests and those of his client. It was entirely inappropriate for Dr Jensen to suggest that there was a conflict of interest and improper for him to assert, as he did, that he **required** Mr Millwater to pass the defamation matter on to another firm. There was no legal justification for Dr Jensen's assertion. It was also in the circumstances discourteous as was alleged in the charge. Had Mr Millwater acted on Dr Jensen's "requirement" and refused to act for Mr Humphreys he would have been in breach of his retainer to his client.

[120] It follows from the discussion that, as was alleged in paragraph 1.8 of the particulars of charge 1, the appellant had forwarded a letter to Mr Millwater containing false statements in relation to his position at law. As alleged in paragraph 1.10, the appellant had no legal grounds to assert that Mr Millwater had caused him damage that would award him aggravated damages and, as alleged in paragraph 1.11, the appellant had no legal grounds to assert Mr Millwater was acting in a conflict of interest situation.

[121] However, I am not satisfied that, as alleged in paragraph 1.12, the letter instigated legal proceedings against Mr Millwater.

[122] Accordingly, I am satisfied to the requisite standard that the appellant is guilty of part of charge 1. That is, that on or about 11 October 2013, Dr Jensen forwarded a letter to David Millwater of McNamara & Associates which contained false statements. It represented unsatisfactory professional conduct in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. I shall deal with related questions of whether it was discourteous, offensive or provocative under charge 4.

[123] With regard to charge 2, I am satisfied to the requisite standard that that part of the claim for defamation which was said by Dr Jensen in his letter of 11 October 2013 to give rise to a claim for aggravated damages as a result of the provision of information to the Commission by Mr Millwater on behalf of his client, Mr Humphreys, was made on an occasion within the meaning of s 24 of the *Defamation Act*, namely that information provided to the Commission was protected by s 487(2) of the *Legal*

Profession Act 2007. I am also satisfied that Dr Jensen ought to have known that the publication of the information provided to the Commission was protected by the operation of s 487(2) of the Act.

[124] Accordingly, I am satisfied to the requisite standard that the appellant is guilty of charge 2 in that he pursued a claim, that is a claim for aggravated damages for defamation, that had no reasonable prospect of success. It represented unsatisfactory professional conduct in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

Charge 3

[125] **On or about 4 December 2013 [Dr Jensen] made an allegation of unsatisfactory professional conduct or professional misconduct against Millwater in breach of Rules 32 and 34 of the Australian Solicitors Conduct Rules 2012.**

[126] The third charge relates to the complaint made by Dr Jensen against Mr Millwater received by the Commission on 4 December 2013. This complaint was on the form provided to Dr Jensen by the Commission in response to his letter of 15 November 2013 when he told the Commission that he wished to make a formal complaint against Mr Millwater.

[127] In his complaint dated 2 December 2013,[37] Dr Jensen explicitly said that the conduct he was reporting occurred on 18 September 2013. He summarised the details of his complaint as that on 18 September 2013, Mr Millwater made a baseless complaint against him in breach of ASCR rule 32. There appears no doubt therefore as to the act of Mr Millwater that was the subject of Dr Jensen's complaint. The only ambiguity that could possibly arise came from Dr Jensen's response to the request found in the form for him to provide full details of the complaint. He there referred to "see your file no. 71011 275". The Commission had previously informed him that file related to an investigation matter following Dr Jensen's subsequent conduct following receipt of the Humphreys' complaint.

[128] It is unsurprising that the Commission regarded Mr Jensen's complaint about Mr Millwater's conduct as being about Mr Millwater's letter to the Commission on 18 September 2013 making a complaint on behalf of Mr Humphreys.

[129] As Dr Jensen had been informed on 20 November 2013, there was indeed only one complaint. That was a complaint made by Mr Humphreys on 18 September 2013. File no. 71011275 was, as Dr Jensen had been informed, an investigation carried out by the Commission into Dr Jensen's subsequent conduct. It was not a second complaint.

[130] Nevertheless Dr Jensen engaged in correspondence with the Commission about what was the subject of his complaint against Mr Millwater. In his letter of 14 January 2014, he said that Mr Millwater's letter of 18 September 2013 was **not** the subject of his complaint about Mr Millwater. He referred to his letter of 15 November 2013 in support of that assertion. It is true that the letter of 15 November 2013 sought to make a complaint about Mr Millwater's conduct in sending Dr Jensen's letter of 11 October 2013 to the Commission, conduct which he described as "Mr Millwater's conduct in making the second complaint".

---

[37] In the Commissioner's letter of 4 December 2013, it was said that the complaint was received on 4 December 2013.

[131] However, at no time had Dr Jensen been told that Mr Millwater had made any complaint about him, let alone a second complaint. He had been told on 4 November 2013 by the Commission that there had been a complaint by Mr Humphreys but that it was also investigating as a separate matter Dr Jensen's conduct in sending the letter of 11 October 2013 to McNamara & Associates. The Commission did not say that this was as a result of a complaint made by Mr Millwater.

[132] Any doubts that Dr Jensen might have entertained about whether Mr Millwater had made a "second complaint" against him should have been entirely removed by the Commission's letter of 20 November 2013.

[133] I am satisfied that Dr Jensen knew, or ought to have known, that the complaint he made against Mr Millwater was baseless because Mr Millwater had not made a complaint against him. I am also satisfied that, even if Mr Millwater's letter of 18 September 2013 on behalf of his client were to be considered to be a complaint by Mr Millwater, his action in sending the letter on behalf of his client was protected by s 487(2) of the Act. Further, the provision to the Commission by Mr Millwater of Dr Jensen's letter to McNamara & Associates of 11 October 2013 was the provision of information to the Commissioner and so was also protected by s 487(2) of the Act from liability under any administrative process, such as having a complaint made against him under the Act for providing the information.

[134] The appellant nevertheless argued that he was protected from liability both by s 487(2) and 487(3) of the Act. Section 487(3) of the Act provides that merely because a person makes a complaint, the person cannot be held to have breached any code of professional etiquette or ethics or to have departed from accepted standards of professional conduct. This is not a blanket protection from liability. Importantly the protection includes the word "merely". A solicitor is prohibited by rule 32.1 of the ASCR from making unfounded allegations against another legal practitioner. It is part of the professional ethics of a solicitor not to make allegations against a legal practitioner unless the allegations are made *bona fide* and the solicitor believes on reasonable grounds that available material by which the allegations could be supported provides a proper basis for them. In other words a solicitor will be in breach of the solicitor's ethical and professional obligations if the solicitor makes any such allegation not *bona fide* or if the solicitor does not believe on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it. If the solicitor acts in such a way the solicitor is not **merely** making a complaint but is making a complaint which is not *bona fide* and so is not protected by the section which does not protect a solicitor who is not acting honestly or reasonably. This is a restriction on the protection from liability offered by s 487(2). It applies only to legal practitioners (or other professionals) who fail to comply honestly and reasonably with their profession's ethical codes and accepted standards of professional conduct.

[135] I am satisfied that Dr Jensen could not have made his allegations of unsatisfactory professional conduct or professional misconduct against Mr Millwater *bona fide* nor could he have believed on reasonable grounds that material was available by which the allegation could be supported provided a proper basis for making the allegations.

[136] Accordingly, I am satisfied that Dr Jensen's actions in making a complaint to the Commission in respect of Mr Millwater was in breach of rule 32 of the ASCR and his actions were not protected by s 487 of the Act.

[137] Rule 34 is irrelevant as it relates only to actions or communication associated with representing a client. At all relevant times, Dr Jensen was acting on his own behalf.

[138] Accordingly, I am satisfied to the requisite standard that Dr Jensen is guilty of charge 3 in that on or about 4 December 2013, Dr Jensen made an allegation of unsatisfactory professional conduct or professional misconduct against Mr Millwater in breach of rule 32 of the ASCR. It represented professional misconduct as it was conduct which involved a substantial failure to reach a reasonable standard of competence and diligence.

Charge 4

[139] **4. That by his correspondence to the Legal Services Commission and David Millwater ('Millwater'), [Dr Jensen] engaged in conduct that would justify a finding that he is not a fit and proper person to engage in legal practice.**

[140] This charge related to five pieces of correspondence by Dr Jensen. Paragraph 4.3 related to the letter dated 11 October 2013 which Dr Jensen sent to Mr Millwater and which, it was alleged, contained communications that:

(a) were in breach of Dr Jensen's duty as set out in rule 4 of the ASCR;

(b) were in breach of Dr Jensen's duty as set out in rule 5 of the ASCR; and

(c) amounted to unsatisfactory professional conduct or professional misconduct pursuant to the Act.

[141] Paragraph 4.2 made similar allegations with regard to the correspondence sent by Dr Jensen to the Commissioner on 11 October 2013, 15 November 2013, 2 December 2013 and 12 February 2014.

(1) Letter dated 11 October 2013 from Dr Jensen to Mr Millwater

[142] The contents of this letter have previously been examined in detail in [13] – [17] and in the discussion of charges 1 and 2.

[143] It appears that when Dr Jensen wrote to Mr Millwater he had not read the *Legal Profession Act* 2007 and so had failed to acquaint himself with the protections afforded by s 487.

[144] If he had acted diligently and acquainted himself with the relevant statute Dr Jensen would have been aware that he had no legitimate claim for aggravated damages. Nonetheless he asserted that Mr Millwater was in a conflict situation and **required** him to pass the defamation matter on to another firm. I accept that at the time Dr Jensen honestly, although not reasonably, believed that Mr Millwater was in a conflict situation. He should have taken steps to ensure that he was correct in his legal assertions before accusing Mr Millwater, wrongly, of being in a conflict situation. He did not do so but rather demanded that Mr Millwater cease acting for Mr Humphreys in the defamation matter. That behaviour was in these circumstances at the very least discourteous and therefore in breach of 4.1.2 of the ASCR. It represented unsatisfactory professional conduct.

(2) Letter dated 11 October 2013 from Dr Jensen to the Commission

[145] The contents of this letter have previously been examined in detail in [12] and in the discussion of charges 1 and 2.

[146] Dr Jensen's letter displays behaviour that was neither honest nor courteous. His statement that the $20,000 was a "genuine estimate of damages" likely to be awarded to him for the alleged defamation in Mr Humphreys' email to his mother could not have been the statement of a genuinely held belief. The vigorous assertions of vicarious liability on the part of the employer were not in my view made honestly.

[147] More importantly his assertion to the Commission that his behaviour, which consisted of nothing more than advising Mr Humphreys that he refrained from addressing his claim for defamation to Mr Humphreys' employer so that Mr Humphreys would not suffer difficulties in his employment so long as he paid Dr Jensen $20,000 promptly, was not intimidatory of Mr Humphreys is disingenuous.

[148] His behaviour was designed to threaten Mr Humphreys that if he did not pay Dr Jensen $20,000 promptly Dr Jensen would inform Mr Humphreys' employer which Dr Jensen expected would cause Mr Humphreys difficulties in his employment. The explanation he gave of his behaviour to the Commission was not honestly given and the behaviour itself would be likely to a material degree to bring the legal profession into disrepute in breach of rule 5 of the ACSR. It represents professional misconduct and demonstrates that he was not a fit and proper person to practise law.

(3) Letter dated 15 November 2013 from Dr Jensen to the Commission

[149] The contents of this letter were examined in [21] – [23].

[150] In this letter Dr Jensen asserted that Ms Ingram seemed "to have no sympathy" for his position as "the victim of a gross defamation by Mr Humphreys". That appears to be a wilful misunderstanding of the role of the Commission and the Commissioner to receive complaints against legal practitioners, investigate and where appropriate, prosecute proceedings in a disciplinary body. Whether or not the staff of the Commission have sympathy for a practitioner is irrelevant to their task which must be approached professionally and objectively.

[151] However, more significantly Dr Jensen asserted that Ms Ingram "seemed to be trying to pressure" him into not suing Mr Humphreys. This was both insulting and untrue. Ms Ingram was carrying out the statutory function of investigating the matters raised against Dr Jensen in the complaint and the investigation matter in a professional and objective manner. There is nothing in the tone or content of her correspondence to suggest that Dr Jensen had any honest or rational basis for making this insulting statement. For a solicitor to make such a statement attributing an improper motive to an investigator whose behaviour had been professional and objective is to my mind professional misconduct. It demonstrates that he was not a fit and proper person to practise law.

(4) Letter dated 2 December 2013 from Dr Jensen to the Commission

[152] The contents of this letter were examined in [28] – [29]. In this letter Dr Jensen repeated his previous assertions about the quantum of damages he would be awarded, vicarious liability and the effect of s 487 of the Act. The letter is however in quite measured language. On its own I would not regard it as being unprofessional conduct or professional misconduct.

(5) Letter dated 12 February 2014 from Dr Jensen to the Commission

[153] In his letter to the Commission of 12 February 2014, Dr Jensen made stringent criticisms both of the draft report, which had been sent to him enclosed with a letter

from the Commissioner on 21 January 2014, and of Ms Ingram. He criticised paragraphs 50-56 of the draft report which dealt with why she was not recommending charges with regard to Dr Jensen's letter to McNamara & Associates of 13 September 2013. The analysis by Ms Ingram, whom he referred to as "NI", was, he said, "grossly flawed and unbalanced".

[154] Dr Jensen's first criticism was that Ms Ingram failed to recognise that Mr Humphreys' email contained an "appalling slander and alleged grave misconduct". He criticized her lack of knowledge of defamation law in the following terms:

> "Anyone who knows a modicum about defamation law would have realized that the email was a serious defamation and actionable by me. That realization should have been a central and fundamental finding by NI. Instead she brushes it aside as if it were peripheral."

[155] Dr Jensen then criticised Ms Ingram's describing the correspondence from him of 13 September 2013 being "clearly a threat". Dr Jensen describes this "finding" as "flawed and incompetent". He then referred to a High Court case[38] and a 2008 article[39] which he said supported his analysis of the vicarious liability of the employer. He asserted it was not extortionate for him to advise Mr Humphreys that if he was willing to settle the claim he would not need to address it with his employer. He said he realised that Mr Humphreys had probably not told his employer that he was using his employer's time to send defamatory emails about his mother's lawyer and that Dr Jensen's addressing the claim to his employer might well cause Mr Humphreys difficulty but that that did not make his letter a threat to cause problems with his employer. He asserted that Ms Ingram appeared not to appreciate the principles of vicarious liability for tort.

[156] Dr Jensen's third criticism was that what he asserted was Ms Ingram's unwillingness to embark upon consideration of whether the foreshadowed defamation action was flawed at law was "appalling". He asserted that any competent lawyer should know that Mr Humphreys' email was defamatory and actionable.

[157] Dr Jensen ended his criticism of that part of the draft report by saying that in the end Ms Ingram decided to do nothing about his letter asking for $20,000 and he was grateful for that. But he concluded his response to those paragraphs of the draft report by saying that Ms Ingram's "analysis at paras 51 to 61 is deeply flawed, unreasonable and misguided. It also appears to infect the balance of her Report."

[158] Dr Jensen's next criticism was of paragraphs 62 to 83 of the draft report which dealt with Dr Jensen's letter to McNamara & Associates of 11 October 2013.

[159] Dr Jensen commenced his criticism of this section of the draft report by saying that the paragraphs were simply misconceived as a matter of law and that s 487 did not abolish the aggravated damages rule either expressly or impliedly. He asserted that s 487 of the Act merely declared that a person is not liable civilly (including for defamation) for communications with the Commission. He continued:

> "It does **not** say: *further a person claiming damages for a previous publication unrelated to the Commission is not entitled to any additional damages by reason of a communication with the LSC.*"

---

38 *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511.

39 Guthrie and Bunn, "Innovation and ICT at Work: Areas of Developing Employers' Liability" (2008) 10 *Legal Issues in Business* 15.

He asserted that as the aggravated damages rule was not dealt with expressly by s 487 it is likely that a court would hold that s 487 did not displace the aggravated damages rule and that rule continued. Therefore, he said, a statement that a court could award additional damages for the original email for the distress caused to him by McNamara & Associates sending his 13 September letter to the Commission was correct in law or that at least it was very strongly arguable.

[160] He continued his criticism in strong terms, including that her inability to see another view was usually considered a sign of poor legal ability. He also asserted that if his reading of s 487 was arguably correct, then it was arguable that the Commission's pursuit of him on misconceived charges amounted to conduct which exerted pressure on him not to plead a claim for aggravated damages in the statement of claim and that conduct might amount to contempt of court proceedings. He said it was "simply staggering" that Ms Ingram had never asked him whether he had started proceedings against Mr Humphreys and that the Commissioner was now on notice about a possible contempt of court and that continued pursuit of him might have adverse consequences for the Commissioner and for Ms Ingram.

[161] Dr Jensen then criticised Ms Ingram's treatment of his complaint about Mr Millwater.

[162] Dr Jensen described Ms Ingram's analysis as "deeply flawed and unfair". He referred to his letter of 15 November 2013 in which he explicitly stated that he wished to complain about "the second letter" and his subsequently filling in the form where he gave the date of 18 September because he said he had never been told the date when Mr Millwater sent to the Commission Dr Jensen's letter of 11 October. He concluded, "Any reasonable person would have understood I was complaining about his second letter to you. Alternatively you could have sought clarification if the scope of my complaint were unclear." He said that it was clear that the Commission had misunderstood his complaint and that he wrote to the Commissioner immediately on 14 January 2014 stating that Dr Jensen's complaint was intended only to refer to Mr Millwater's second letter. Dr Jensen concluded, "Presumably you think I am a liar and concocted that explanation after the event. I am not a liar."

[163] He asserted that it was not improper for him to make the cross-complaint. He said that Mr Millwater had no right to tell the Commission that he, Dr Jensen, was deeply upset that Mr Millwater had referred Dr Jensen's letter of 13 September to the Commission and that he intended claiming aggravated damages as a result. He then opined that perhaps Mr Millwater shared Ms Ingram's ignorance of the aggravated damages rule. He said that any fair analysis by the Commission should place considerable weight on the fact that he was "the innocent victim of a vicious defamation" by Mr Humphreys whom he had never met and that Mr Humphreys' solicitors added to his hurt.

[164] Ms Ingram in her draft report said that the public interest in this case was finely balanced. She took into account that the appellant had no previous disciplinary history which was relevant to the Commissioner's not proceeding with a disciplinary proceedings. However, the public interest factors in favour of commencing disciplinary proceedings were that the appellant had not shown any insight into his conduct; the conduct displayed serious lack of judgment; disciplinary proceedings would act as general deterrence to others in the profession from engaging in similar conduct; the impact on the complainant; and the likely prejudice to public confidence in the integrity of the disciplinary process and to the reputation of the profession if the

Commissioner exercised his discretion not to make a discipline application. The conclusion was that as the appellant had failed to show insight into his conduct or take steps to correct his mistakes, it was important that the public be protected from such actions of a legal practitioner.

[165] Dr Jensen ended his response to the draft report by saying that any charges pursued by the Commissioner would be vigorously defended and he would seek costs from both the Commissioner and Ms Ingram. He said he would demand an oral hearing at the Ethics Committee and call witnesses and that Ms Ingram was likely to be severely censured by the Committee for her "unbalanced, unfair and legally erroneous report". He also said that he intended to make a complaint about Ms Ingram's handling of the matter to the State Ombudsman and reserved his rights under the *Judicial Review Act* to seek administrative law review. He said that if the Commissioner proceeded further against him he would vigorously and resolutely oppose his action and said that he had been treated most unfairly by the Commissioner.

[166] This is not merely the giving of information to the Commission which would engage the protection of s 487 of the Act. The matters complained about by the Commission are not the giving of information but the making of comments and the nature of those comments.

[167] Dr Jensen's comments in this letter were highly emotional and inappropriate. He accused Ms Ingram of "grossly flawed and unbalanced" analysis, of being incompetent, of appalling behaviour, arguably conduct to exert pressure on him not to plead aggravated damages, possibly reckless as to whether her behaviour was in contempt of court, of being unfair and unreasonable and treating him as a liar and then made threats about demanding actions and costs against her personally.

[168] His extraordinarily virulent reaction to the investigation and the aggressive, offensive and professionally improper language used against the investigator cannot be justified and demonstrates that he was not a fit and proper person to engage in legal practice at that time. It is professional misconduct.

[169] Accordingly, I am satisfied to the requisite standard that Dr Jensen is guilty of count 4 that by his correspondence with the Commissioner on 11 October 2013, 15 November 2013 and 12 February 2014 he demonstrated that he was not a fit and proper person to practise law.

Summary of findings

[170] On charges 1 and 2, I find Dr Jensen guilty of unprofessional conduct; on charge 3, guilty of professional misconduct; and on charge 4, guilty of unprofessional conduct and of professional misconduct which justifies a finding that he was not a fit and proper person to engage in legal practice.

[171] These findings are different from those made by QCAT and mean that the appeal should be allowed and replaced with these findings.

Penalty

[172] To determine what was the proper penalty to impose in the circumstances, it is necessary to consider what penalties have been applied in other cases. The appellant was correct in his submission that s 456(2)(a) enables QCAT to recommend the removal of the appellant's name from the roll of practitioners rather than to order its removal.

[173] In *Legal Services Commissioner v Thomas*,[40] the Legal Practice Tribunal ("the Tribunal") considered eight charges against the respondent, Thomas, concluding that his name should be struck from the roll of solicitors. Four of the charges related to clients' complaints of neglect and delay of their legal proceedings. The other charges related to the respondent's conviction for criminal stalking of his wife; a breach of the duty of candour; the swearing of a false or misleading affidavit; and the respondent's correspondence with the Legal Services Commission. In relation to the final charge, between 26 April 2006 and 5 September 2007, the respondent sent 112 letters and facsimiles to the Commission. The material related to his criminal conviction, with the respondent making complaints to the Commission about the conduct of the prosecutor and his own defence counsel. Mullins J noted that the voluminous correspondence showed "that the respondent lacked judgment in communicating with the Commission and lacked insight about his behaviour that had resulted in the stalking conviction and his inability to treat that episode as finished after the sentencing".[41] Mullins J noted that the way in which he generated multiple letters on the same day or within a few days was not a reasonable and professional way to correspond with the Commission. Mullins J concluded that this conduct amounted to professional misconduct on the part of the respondent of a very serious kind.

[174] The Tribunal ordered that the respondent's name be struck from the roll.

[175] In *Queensland Law Society v Priddle*,[42] the respondent, Priddle, had been found guilty by the Tribunal on 30 October 2001 of two charges of unprofessional conduct. The first charge related to failing to keep or cause to be kept adequate accounting and other records of trust moneys. The second charge related to the respondent's failure to provide a beneficiary accounts of the application of the assets of a trust. The Tribunal ordered, on the undertaking of the respondent solicitor not to practise on his own account on an indefinite basis, that he be suspended from practice until 30 June 2002 and that he pay the costs of the Society.

[176] The appellant, the Attorney-General, appealed against the penalty, contending that it was inadequate and did not reflect the gravity of the unprofessional conduct or the lengthy period over which it occurred. The Attorney-General sought an order that the respondent's name be struck from the roll. The appeal concerned the appropriateness of an order for suspension, not the length of the order.

[177] McMurdo P, Williams JA and Mackenzie J agreeing, held the Tribunal was entitled to conclude in all the circumstances that suspension was the appropriate penalty. Her Honour noted that:

> "Suspension from practice rather than striking from the Roll of Solicitors is an appropriate order in cases of unprofessional conduct where a legal practitioner's behaviour has fallen below the high standards expected of such a practitioner but not in such a way as to indicate that the practitioner is lacking the necessary attributes of someone entrusted with the important responsibilities of a legal practitioner".[43]

[178] It was further noted that the Tribunal's power to strike off or suspend is not punishment but is focused on the protection of the community from unsuitable

---

40 [2009] LPT 13.
41 Ibid [56].
42 [2002] QCA 297.
43 Ibid [9].

practitioners. A suspension order must be based on a finding that at the end of the period of suspension the respondent will no longer be unfit to practise. It was relevant that the respondent's conduct was not deceitful or dishonest, he did not use trust moneys for his own purposes. The respondent's conduct seemed "to have arisen from his difficulty in admitting to his relatives and the Society that his poor judgment was responsible for the loss of a substantial amount of trust money". It was his only apparent lapse in his legal career and there were personal circumstances of the respondent which helped provide some explanation for his conduct.

[179] Ultimately, it was concluded that it was open to the Tribunal to conclude that upon the expiry of the suspension period the respondent would no longer be unfit to practise and that the suspension order was sufficient to protect the public.

[180] In *Council of the Queensland Law Society Incorporated v Whitman*,[44] Whitman was found guilty by the Solicitors' Complaints Tribunal of professional misconduct on the basis of four charges, including the misappropriation of client trust funds and making false representations to the Law Society. The false representations related to Whitman's employment of Mr Allen as a solicitor when he did not hold a practising certificate, and subsequently misleading the Law Society about the nature of his role. The Tribunal ordered that Whitman be suspended from practise for nine months. The Council appealed that decision on the basis that the penalty imposed was manifestly inadequate. Whitman cross appealed submitting that charges two, three and four should not have been upheld by the Tribunal.

[181] Before the Tribunal and on appeal, it was submitted that Whitman's conduct warranted his removal from the roll. The Court of Appeal balanced the seriousness of Whitman's conduct and the lack of his cooperation with the Law Society with his "previously unblemished 25 years as a solicitor, with 18 of those in sole practice, evidence of detriment to his health and finances and the favourable character evidence, and acknowledging the absence of evidence to detriment to clients".[45] It was noted that the key consideration is whether public protection requires that his name be struck off the roll. In these circumstances, the Court of Appeal concluded that suspension was all that was warranted.

[182] In *Prothonotary of the Supreme Court of NSW v P*,[46] the Prothonotary applied to the New South Wales Court of Appeal for an order than the name of P be struck off the Roll of Solicitors. P worked as a solicitor until 3 February 2000 as a senior associate at a large, reputable law firm. P had been using cocaine and heroin, unknown to anyone associated with her legal career, since 1994. Despite attempts to undertake rehabilitation, P was not successful in becoming drug free. In January 2000, P and her partner were detected by Customs Department drug detector dogs at the Sydney Airport attempting to smuggle cocaine into Australia on their return from holiday in Argentina. P was charged with importing in Australia not less than the trafficable quantity of cocaine. P pleaded guilty to the charge and was sentenced to six months imprisonment with release on a good behaviour bond after three months.

[183] P did not work as a solicitor after February 2000. She notified the Law Society of her guilty plea in March 2001. The Court of Appeal considered whether or not P's name should be struck from the roll of solicitors. In doing so, Young CJ, with whom

---

44 [2003] QCA 438.
45 Ibid [31].
46 [2003] NSWCA 320.

Meagher and Tobias JJA agreed, summarised the relevant considerations arising from the case law when determining whether a practitioner should be struck from the roll. Young CJ listed 10 considerations, including:[47]

1. The onus is on the claimant to show that the opponent is not a fit and proper person. This is a civil onus.
2. An order striking off the Roll should only be made when the probability is that the solicitor is permanently unfit to practise.
3. The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in a relevant community, character refers to the person's actual nature.
4. The attitude of the professional association is that the application is of considerable significance.
5. The question is present fitness, not fitness as at the time of the crime.

[184] Young CJ also listed 10 compelling mitigating circumstances, arising from American case law:[48]

1. Absence of prior disciplinary record or criminal record;
2. Absence of motive for personal enrichment;
3. Honesty and cooperation with the authorities after detection;
4. The offences being unrelated to the practice of law;
5. The ignominy of having suffered a criminal conviction and the deterrent element;
6. The absence of premeditation with respect to the commission of the crime;
7. Evidence of good character;
8. Any voluntary self-imposed suspension or court imposed temporary suspension from practice;
9. Delay in commencing disciplinary proceedings; and
10. Most importantly, clear and convincing evidence of rehabilitation.

[185] Young CJ noted that P scored well on those 10 points. He then went on to consider whether P was still affected by her previous drug addiction. At the time of the application, P had lived drug free for four years and withstood considerable personal pressure during those years. Young CJ noted that it was difficult to see how P's name being struck from the roll would protect the public and did not consider that there was any worthwhile deterrent element in the case. The application was dismissed.

[186] An order recommending that a legal practitioner's name should be removed from the roll should, as Young CJ held, only be made when the probability is that the practitioner will be permanently unfit to practise.

[187] In *Watts v Legal Services Commissioner*[49] this court recorded with approval that the question before QCAT was whether or not the appellant was a fit and proper person at the time of the hearing. To answer that question the Tribunal needed to consider "what was necessary for the protection of the public and the maintenance of professional standards".[50] Disciplinary penalties are not imposed to punish the practitioner but to protect the public.[51]

---

47 Ibid [17].
48 Ibid [24].
49 [2016] QCA 224 at [20].
50 Ibid [20].
51 See also at [45].

[188] The correspondence from Dr Jensen from 11 October 2013 to 12 February 2014 showed that he was not a fit and proper person to practise law during much of that period. He continued to show lack of insight into the inappropriateness of his behaviour during the hearing in QCAT.

[189] However he had never previously been the subject of complaint during a very long period in legal practice. His affidavit filed with this court on 4 July 2017 showed emerging understanding of the inappropriateness of his behaviour.

[190] I am not persuaded that the appellant is permanently unfit to practise law. There is reason to conclude that with a period of suspension from practice, during which he is professionally counselled, the appellant will attain an appropriate level of fitness for practice. It is in his and the community's interests that the counselling continue for some time after the appellant resumes practice.

[191] In those circumstances it would be appropriate to allow the appeal against the order made by QCAT on 22 May 2017 and instead to publicly sanction Dr Jensen, to suspend him from practice for a period of nine months and to order that he seek the advice of a senior counsellor nominated by the President of the Queensland Law Society from the time of this decision until twelve months after he recommences practice.

Orders

1. The appellant be given leave to rely upon his affidavit sworn 24 May 2017 and his affidavit sworn 4 July 2017.

2. Allow the appeal.

3. Order:

   (1) The appellant be publicly sanctioned;

   (2) The appellant be suspended from practice from 22 May 2017 to 21 February 2018;

   (3) The appellant receive counselling from a senior counsellor nominated by the President of the Queensland Law Society until 21 February 2019.