SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Madden (No 2)* [2008] QCA 301
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant/respondent) **v** **JAMES XAVIER MADDEN** (respondent/appellant)
FILE NO/S:	Appeal No 1782 of 2008 BS No 1119 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Legal Practice Tribunal at Brisbane
DELIVERED ON:	30 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2008
JUDGES:	Holmes and Fraser JJA and White J Judgment of the Court

ORDERS:

1. **Allow the appeal.**
2. **Set aside orders 1 and 4 made by the Legal Practice Tribunal.**
3. **In lieu of those orders order that:**
   (a) **The appellant pay a penalty in the amount of $10,000 on or before 30 October 2008;**
   (b) **The appellant undertake and complete a course of study entitled "Professional Responsibility" LWB 433 at the Queensland University of Technology, or such other equivalent course as approved by the Director, Professional Standards of the Queensland Law Society, by 30 June 2009.**
4. **For a period of twelve months from the date of this order the appellant only engage in legal practice under the supervision of John Marshall Davies or another practitioner approved by the Director, Professional Standards of the Queensland Law Society.**
5. **The following condition be imposed on any practising certificate granted or issued to the**

appellant under the *Legal Profession Act* 2007 (Qld) for a period of twelve months from the date of this order:

(i) The practitioner is to engage in legal practice only under supervision as prescribed and authorised by the Director of Professional Standards, Queensland Law Society.

6. For a period of twelve months from the date of this order the appellant seek advice in relation to the management of his legal practice from Robert Phillip Howard Gunningham and Michael John Keogh, or other practitioner/s approved by the Director, Professional Standards of the Queensland Law Society, as to any ethical or professional matters upon which the appellant may consider he requires assistance.

7. **That the respondent pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – where the appellant was admitted to practise as a solicitor in 1987 – where the Legal Practice Tribunal ordered that the name of the appellant be removed from the local roll, that he pay $800 compensation and that he pay the respondent's costs of the proceedings in the Tribunal – where the striking-off order was premised on the basis that the Tribunal found that the appellant had acted dishonestly – where there was no allegation of dishonesty before the Tribunal – where the appellant appealed against the order that his name be removed from the local roll – where the appellant contended for factual, legal and jurisdictional error in the Tribunal's findings – whether the proceedings in the Tribunal were tainted by the errors alleged by the appellant

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the discipline application before the Tribunal did not allege dishonesty – where the Tribunal adjourned the hearing to allow the Commissioner to amend the application – where the Commissioner declined to amend the application – where the Tribunal then prepared an 'inferences document' for the parties which set out the facts from which the Tribunal said it felt it might infer dishonesty from the appellant's conduct – where the Tribunal then proceeded to consider whether the appellant had acted dishonestly – whether the Tribunal erred in considering whether the appellant acted dishonestly where the discipline

application did not allege dishonesty

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where s 601 of the *Legal Profession Act* 2007 (Qld) defined the Tribunal's jurisdiction as being 'to hear and decide a discipline application made to the tribunal' – where s 13 preserved the inherent jurisdiction of the Supreme Court – where s 599(2) provided that the members of the Tribunal were the judges of the Supreme Court – where the Tribunal held that it could intervene to ensure that an appropriately arguable case was properly ventilated notwithstanding the attitude of the Commissioner as the Tribunal was an emanation of the Supreme Court – whether the Tribunal possessed the power to exercise the Supreme Court's inherent jurisdiction

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where s 455(1) of the Act provided that a discipline application may be amended on application by the Commissioner – where s 602 provided that 'The tribunal may do all things necessary or convenient to be done for exercising its jurisdiction' – whether the Tribunal has the power to amend discipline applications – whether s 602 confers upon the Tribunal jurisdiction that is not otherwise conferred upon it

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the respondent submitted that all that is required to permit the Tribunal to make any of the orders stated in s 456 of the Act is a finding of professional misconduct or unprofessional conduct – where the respondent submitted that once a finding of professional misconduct or unprofessional conduct was made the Tribunal was entitled to draw inferences naturally arising from the facts, including inferences of dishonesty, in deciding the sanction/s to impose – whether the Tribunal was entitled to draw inferences naturally arising from the facts after having found professional misconduct or unprofessional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the discipline application sought orders that the appellant was guilty of professional misconduct and 'such further or other orders or directions as may be just' – where the appellant contended that because the Commissioner did not apply for an order for the removal of the appellant's name from the local roll the Tribunal had no

power to make such an order – whether the Tribunal had the power to make the order

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS – where the Court was required to consider the penalty to be imposed afresh – where the appellant was guilty of professional misconduct – where the appellant had previously been dealt with for non-compliance with statutory provisions regarding his trust account – where the appellant had cooperated fully with the investigation – where the appellant had taken steps to address his conduct and to prevent future misconduct – where the appellant had apologised and paid compensation – analysis of the factors relevant in deciding the penalty to be imposed

Legal Profession Act 2007 (Qld), s 4, s 5, s 12, s 13, s 29, s 35, s 419, s 428, s 431, s 432, s 435, s 436, s 447, s 448, s 452, s 453, s 455, s 456, s 468, s 583, s 584, s 598, s 599, s 601, s 614, s 645, s 716, s 718, s 719, s 746

A Solicitor v Council of the Law Society of New South Wales (2004) 216 CLR 253; (2004) 78 ALJR 310; [2004] HCA 1, applied
Allinson v General Council of Medical Education and Registration [1894] 1 QB 750, cited
Ayles v The Queen (2008) 232 CLR 410; [2008] HCA 6, cited
B (A Solicitor) v Victorian Lawyers RPA Ltd & Anor; G (A Solicitor) v Victorian Lawyers RPA Ltd & Anor (2002) 6 VR 642; [2002] VSCA 204, discussed
Banque Commerciale S.A., En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited
Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors [1979] Ch 250, cited
Council of the Queensland Law Society Incorporated v Roche [2004] 2 Qd R 574; [2003] QCA 469, cited
De Pardo v Legal Practitioners Complaints Committee & Anor (2000) 97 FCR 575; [2000] FCA 335, cited
GAS v The Queen; *SJK v The Queen* (2004) 217 CLR 198; [2004] HCA 22, cited
Gregory v Queensland Law Society Incorporated [2002] 2 Qd R 583; [2001] QCA 499, cited
Harvey v Law Society of New South Wales (1975) 49 ALJR 362, cited
Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563; [1995] HCA 68, cited
Law Society of New South Wales v Moulton [1981] 2 NSWLR 736, cited
Lee v Kokstad Mining Pty Ltd [2008] 1 Qd R 65; [2007] QCA 248 , cited
Legal Services Commissioner v Baker (No 2) [2006] 2 Qd R 249; [2006] QCA 145, cited
Legal Services Commissioner v James Xavier Madden [2008]

LPT 2, reversed
McCarthy v Law Society of New South Wales (1997) 43 NSWLR 42, cited
New South Wales Bar Association v Evatt (1968) 117 CLR 177; [1968] HCA 20, cited
Queensland Law Society Incorporated v Smith [2001] 1 Qd R 649; [2000] QCA 109, cited
Re Hope [1996] 2 Qd R 25; [1995] QCA 471, cited
Southern Law Society v Westbrook (1910) 10 CLR 609; [1910] HCA 31, cited
Walsh v Law Society of New South Wales (1999) 198 CLR 73; [1999] HCA 33, followed
Walter v Council of Queensland Law Society Incorporated (1988) 77 ALR 228; [1988] HCA 8, distinguished

COUNSEL: P J Davis SC, with R P S Jackson, for the respondent/appellant
B J Butler SC, with B I McMillan, for the applicant/respondent

SOLICITORS: Brian Bartley & Associates for the respondent/appellant
Legal Services Commission for the applicant/respondent

[1] **THE COURT:** The appellant was admitted to practise as a solicitor in Queensland in 1987. On 8 February 2008 the Legal Practice Tribunal ordered that the name of the appellant be removed from the local roll, that the appellant pay $800 compensation to Mrs Portch within one month of the date of delivery of that judgment, and that the appellant pay the respondent's costs, to be assessed if not agreed.

[2] The appellant appeals against the order that his name be removed from the local roll. He contends for factual error in the Tribunal's findings of dishonesty. The appellant also challenges the jurisdiction or power of the Tribunal to find that he acted dishonestly and to make the striking off order when the discipline application did not charge dishonesty and made no claim for a striking off order.

[3] In order to put these issues into context it is necessary first to identify the charges against the appellant, to summarise the uncontentious facts underlying those charges, to set out the procedural history, and to summarise the Tribunal's conclusions.

The charges against the appellant

[4] On 9 February 2007 the respondent Legal Services Commissioner filed a discipline application against the appellant under the *Legal Profession Act* 2004 (Qld) ("the 2004 Act"). Before the discipline application was heard, the 2004 Act was repealed and the relevant provisions in it were replaced by materially indistinguishable provisions in the *Legal Profession Act* 2007 (Qld) ("the 2007 Act"). The relevant provisions of the 2007 Act commenced on 1 July 2007.

[5] When the application was filed the *Legal Profession (Tribunal and Committee) Rule* 2004 (Qld) provided and, from 1 July 2007, the *Legal Profession (Tribunal and Committee) Rule* 2007 (Qld) under the 2007 Act provided:

"**4 How to make a discipline application—Act, s 452**

(1) A discipline application must be in the approved form and filed with the registrar.

(2) A discipline application may relate to more than 1 complaint or investigation matter.

(3) A discipline application must state—

(a) for an application for an order against an Australian lawyer or former Australian lawyer—particulars of the lawyer's alleged unsatisfactory professional conduct or professional misconduct;

…

5 Commissioner to serve copy of discipline application

The commissioner must serve a copy of the discipline application personally on each respondent to the discipline application."

[6] The approved form for such applications[1] provided:

"…**A. DETAILS OF APPLICATION**

This application is made under section 276 of the *Legal Profession Act 2004* ("**Act**").

On the facts stated in the particulars of charge set out below, the applicant seeks the following orders:

1. Pursuant to section 280 of the Act that the respondent is guilty of unsatisfactory professional conduct and/or professional misconduct.

2. Such further or other orders or directions as may be just.

3. The respondent pay the applicant's costs of the application.

…

B. PARTICULARS OF CHARGE

The Commissioner alleges that the following charges constitute professional misconduct or in the alternative unsatisfactory professional conduct:

Insert particulars of the practitioner's unsatisfactory professional conduct and professional misconduct. …"

[1] The 2004 Act required the form to be approved by the chairperson of the Tribunal (the Chief Justice): s 594(2)(c). The 2007 Act contains a similar provision in s 714(2)(b).

[7] The discipline application against the appellant incorporated the text of the approved form. It then set out six separate charges that concerned the appellant's alleged conduct when acting for three clients and gave detailed particulars of those charges. The first four charges concerned the appellant's conduct when acting for his client Mr Kampf in respect of personal injuries proceedings in the District Court in Toowoomba between July 1997 and May 2004. Charge five concerned the appellant's conduct in 2002 in relation to his clients Mr Portch and Ms Dakin (who later married Mr Portch). Charge six concerned the appellant's conduct in 2005 in relation to his client Mr Portch and his then former client Mrs Portch.

[8] The appellant did not contest the charges of professional misconduct. A hearing was nevertheless necessary because the question whether the appellant was guilty of the charges and, if so, what penalty should be imposed were matters for the Tribunal to decide. Directions were made accordingly. On 30 July 2007 the Tribunal ordered the appellant and the Commissioner to "take all reasonable steps to confer and to seek agreement on the content of a statement of agreed facts, to be prepared jointly, by 15 August 2007." In compliance with that order, the appellant and the Commissioner subsequently executed a statement of agreed facts concerning the charges.

[9] In the statement of agreed facts the appellant accepted the accuracy of the factual bases of the four charges alleged by the Commissioner. In order to appreciate the appellant's arguments it is necessary to set out each charge and to summarise the agreed facts upon which it was founded.

[10] "**Charge 1 Diligence & Competence (Complaint of Kampf)**

1. When acting for Mr Keith Kampf *("**client**")* in respect of personal injuries proceedings in the District Court in Toowoomba (*"**proceedings**")* during the period between July 1997 to February 2004, the respondent:

   (a) has been guilty of neglect and undue delay;

   (b) has failed to maintain reasonable standards of competence or diligence in relation to the conduct of the proceedings.

Particulars

1.1 At all material times, the respondent:

   (a) was a legal practitioner;

   (b) was the principal of the law practice, Madden & Co;

   (c) acted on behalf of the client in the proceedings.

1.2 During the period July 1997 to February 2004, the respondent was responsible for undue delay in the conduct of the proceedings. Some examples of the respondents delay are as follows:

(a) July 1997 to March 1998: 8 month delay in corresponding with defendant about the clients claim.

(b) July 1997 to January 1999: 18 month delay in filing a Claim and Statement of Claim.

(c) May 1999 to October 1999: 5 month delay to file Statement of Loss & Damage.

(d) November 1999 to August 2000: 9 month delay to file Supplementary Statement of Loss and Damage.

(e) September 2001 to December 2003: 27 month delay to arrange settlement conference.

1.3 On or about 19 December 2003, the proceedings were compromised following a settlement conference."

[11] The appellant accepted that he was guilty of neglect and delay. Examples of this included that Mr Kampf retained the appellant in July 1997 but the appellant did not correspond with the proposed defendant until March 1998; he took a further four months to brief counsel to draw a statement of claim; he did not commence proceedings until 18 months after he was retained and there was no reasonable explanation for that delay; it took the appellant a further four months to advise Mr Kampf that he had commenced proceedings; the appellant filed a statement of loss and damage six months late, following an interlocutory proceeding brought by the defendant; and the settlement conference took place more than six years after Mr Kampf had retained the appellant.

[12] "**Charge 2 Acting without instructions (Complaint of Kampf)**

2 Between September 1999 and March 2002 the respondent acted without instructions in respect of two applications by the defendant in the proceedings.

Particulars

2.1 The applicant repeats and relies upon the particulars in charges 1 above.

2.2 On or about 27 September 1999 and, as a direct result of the respondent's failure to file a Statement of Loss and Damage in the proceedings within the required time, the defendant's solicitors applied to the District Court at Toowoomba for orders requiring the client to deliver the Statement of Loss and Damage for costs ("***the first application***").

2.3 By letter dated 8 October 1999 to the defendant's solicitors, the respondent agreed to file and serve the Statement of Loss and Damage within 14 days and that Mr Kampf would pay the defendant's costs of and incidental to the first application.

2.4 Notwithstanding the agreement expressed in the respondent's letter dated 8 October 1999, the respondent:

(a) failed to inform or otherwise advise the client of the first application;

(b) purported to compromise the first application without the knowledge, authority or consent of the client;

(b) bound the client to pay the defendant's costs of the first application without first obtaining the client's instructions to do so.

2.5 In or about November 2000, and as a direct result of the respondent's failure to provide particulars of the client's loss and damage, the defendant's solicitors again applied to the District Court for orders that the client provide details of his damage and to deliver a List of Documents (***"the second application***").

2.6 On 29 November 2000, the second application was dismissed with no order as to costs.

2.7 The respondent again failed to inform or otherwise advise the client of the second application.

2.8 By letter dated 13 March 2002, and without the knowledge, authority or consent of the client, the respondent purported to settle the defendant's solicitors costs for the first application in the sum of $1,125.70."

[13] On or about 4 October 1999 the defendant's solicitors filed an application in the District Court returnable on 11 October 1999 for orders that Mr Kampf deliver a statement of loss and damage within 14 days and pay the defendant's costs of the application ("the first application"). The appellant wrote to the defendant's solicitors on 8 October 1999, on behalf of Mr Kampf, agreeing to settle the first application by filing the statement of loss and damage within 14 days and paying the defendant's costs of and incidental to the application. The appellant agreed that he failed to inform Mr Kampf of the first application, he purported to compromise the first application without the knowledge, authority, or consent of Mr Kampf, and he bound Mr Kampf to pay the defendant's costs of the first application without first obtaining Mr Kampf's instructions to do so.

[14] On 1 November 2000 the defendant filed an application in the District Court returnable on 29 November 2000 for orders that Mr Kampf further particularise his damages and deliver a list of documents. The appellant agreed that he failed to inform Mr Kampf of that application. The appellant appeared at the hearing on 29 November 2000 when the application was dismissed with no order as to costs.

[15] On 13 March 2002, without obtaining instructions from Mr Kampf, the appellant agreed to a compromise of the costs order in relation to the first application earlier proposed by the defendant's solicitors in the amount of $1,125.70.

[16] "**Charge 3 Breach of section 8 Trusts Accounts Act 1973 (Complaint of Kampf)**

3. On 15 March 2002 the respondent breached section 8 of the *Trusts Accounts Act 1973*.

Particulars

3.1 The applicant repeats and relies upon the particulars in charges 1 and 2 above.

3.2 On 15 March 2002 the respondent withdrew the sum of $1,125.70 from his trust account without authority or knowledge of his client, or otherwise being entitled to do so, and paid that sum to the defendant's solicitors in breach of section 8 of the *Trust Accounts Act 1973*."

[17] On 15 March 2002 the appellant wrote to the defendant's solicitors enclosing a trust account cheque for $1,125.70 in satisfaction of the compromise. The appellant agreed that he had not sought or obtained Mr Kampf's instructions to compromise the outstanding costs issue or to make any payment in respect of that compromise from the funds the appellant held in trust.

[18] Following a complaint from Mr Kampf to the Queensland Law Society and correspondence from the Society to the appellant, the appellant refunded Mr Kampf the $1,125.70, apologised to Mr Kampf for the way the appellant had conducted the matter, and offered to enrol in a practice management course. On 11 May 2007 the respondent successfully completed the practice management course.

[19] "**Charge 4 Overcharging (Complaint of Kampf)**

4. On or about 14 January 2004, the respondent charged the client legal fees which he knew, or ought to have known, were not properly chargeable.

Particulars

4.1 The applicant repeats and relies upon the particulars in charges 1 to 3 above.

4.2 On or about 14 January 2004, the respondent rendered an invoice in the amount of $23,107.20 for his professional fees to his client, which invoice included charges for legal services performed by the respondent relating to the first and second applications.

4.3 The respondent's account was rendered to the client in circumstances where:

(a) the respondent did not first obtain instructions from his client to provide legal services relating to the first and second applications;

(b) the respondent knew, or ought to have known, he was not entitled to receive payment for those services from his client;

(c) the respondent did not obtain his client's authority to deduct his fees for those services from the settlement sum.

4.4 On 14 May 2004, the respondent transferred the sum of $23,107.20 from his trust account to his general account in payment of the invoice dated 14 January 2004."

[20] On 14 January 2004 the appellant rendered an invoice for $23,107.20 for his professional fees, which, the appellant admitted, included charges for legal services performed by the appellant in relation to the first and second applications. On 14 May 2004 the appellant transferred that amount from his trust account to his general account in payment of the invoice. The appellant admitted that his account was rendered and the fees were deducted from trust monies in circumstances where he did not first obtain specific instructions from his client to provide legal services relating to the first and second applications, but relied upon his general authority to act on behalf of the client in relation to the matter. The appellant subsequently sent $2,000 to Mr Kampf by way of "reimbursement to you for the work we carried out on your behalf."

[21] "**Charge 5 Diligence and competence (Complaint of Portch)**

5. The respondent failed to maintain reasonable standards of competence and/or diligence when drafting a financial agreement dated 14 August 2002 ("***agreement***") between Ms Elsie Dakin ("***complainant***") and Mr Colin Portch ("***husband***").

Particulars

5.1 At all relevant times, the respondent acted on behalf of both the husband and the complainant.

5.2 In or about July 2002, the complainant and the husband instructed the respondent to prepare the agreement.

5.3 On or about 14 August 2002, the complainant and the husband executed the agreement prepared by the respondent.

5.4 In or about February 2005, the complainant and husband separated.

5.5 In breach of his duty as a solicitor, the respondent failed to maintain reasonable standards of competence and/or diligence in the preparation of the agreement as the respondent failed to comply with the requirements of section 90G of the *Family Law Act 1975*."

[22] In or about July 2002 the appellant was retained by Ms Dakin and her partner Mr Portch to prepare a pre-nuptial agreement pursuant to the provisions of the

Family Law Act 1975 (Cth) with the intention that the agreement be binding and enforceable. The appellant did not ensure that the agreement complied with s 90G of the *Family Law Act* 1975 (Cth), which provides that such an agreement is binding only if it contains an acknowledgement that the parties have received independent legal advice about specified matters.

[23] "**Charge 6 Conflict of interest (Complaint of Portch)**

6. The respondent acted in circumstances of conflict by continuing to act for the husband in an application for final financial orders against the complainant in the Family Court of Australia between April 2005 and June 2005.

Particulars

6.1 The applicant repeats and relies upon the particulars in charge 5 above.

6.2 Following the breakdown of the marriage, the respondent acted for the husband in respect of an application for final financial orders.

6.3 On 9 April 2005 the respondent filed the application with the registry of the Family Court of Australia.

6.4 The application sought an order that:

> "... an account be taken of the matrimonial assets and liabilities with such Orders being made as are appropriate to vest in the Applicant an amount equivalent to 50% of the net matrimonial pool."

6.5 At paragraph 20 of the application, the respondent answered "No" as to whether the parties had "*entered into a binding financial agreement under Part VIIIA of the Family Law Act or under any relevant State or Territory legislation*".

6.6 Prior to filing the application, the respondent acted for both the husband and complainant including the preparation of the agreement and taking instructions from the complainant regarding the preparation of the complainant's Will.

6.7 On behalf of the husband, the respondent:

(a) prepared the application for final financial orders dated 6 April 2005;

(b) represented the husband in respect of the application;

(c) appeared on behalf of the husband at a case assessment conference on 12 May 2005, notwithstanding the objection of the complainant.

> 6.8 By letter dated 1 July 2005, the complainant's solicitors, Murdoch Lawyers, wrote to the respondent regarding the respondent's apparent conflict of interest in representing the husband.
>
> 6.9 By letter dated 8 June 2005, the respondent agreed to cease representing the husband in the application."

[24] The complainant and Mr Portch married on 16 August 2002. Following that marriage Mrs Portch instructed the appellant for the purpose of revising her will. Before 2005 the appellant acted for Mr Portch and advised him in relation to his matrimonial and financial affairs.

[25] In or about February 2005 Mr and Mrs Portch separated. In March 2005 the appellant accepted instructions from Mrs Portch to revise her will. At that time he had a detailed discussion with her regarding her separation from Mr Portch. Despite that, after that attendance the appellant accepted instructions from Mr Portch to act on his behalf in an application for financial orders in the Family Court. On Mr Portch's behalf the appellant filed an application for final orders in the Family Court of Australia and, in paragraph 20 of that application, answered "no" to the question whether the parties had "entered into a binding financial agreement under Part VIIIA of the *Family Law Act* or under any relevant State or Territory legislation."

[26] In the course of a case assessment conference on 12 May 2005 where the appellant represented Mr Portch, Mrs Portch objected to the appellant's acting for Mr Portch on the basis of the conflict of interest. Subsequently the appellant agreed, by letter dated 8 June 2005, to cease representing Mr Portch in his application.

Proceedings in the Legal Practice Tribunal

[27] On 3 December 2004 the discipline application came before the Legal Practice Tribunal constituted by the Chief Justice, who was assisted by Mr Mullins (a member of the practitioner panel who is a solicitor) and Dr Lamont (a lay panel member).

[28] Counsel for the Commissioner sought the following orders:

1. An order that the appellant pay Mrs Portch $800 within a month. (The $800 represented the amount of fees Mrs Portch had incurred when she consulted lawyers in the course of seeking to have the appellant cease to act for Mr Portch because of the appellant's conflict of interest).

2. A fine "in the range of ten thousand dollars".

3. That the appellant be publicly reprimanded.

4. That the appellant pay the respondent's costs, agreed in the amount of $2,000.

[29] The appellant's counsel acknowledged that the orders to be made were a matter for the Tribunal and indicated that those orders were agreed as between the parties.

[30] The Tribunal then raised with counsel the possible availability of an inference that the appellant had acted deceitfully, particularly in acting without instructions from or notice to his client Mr Kampf, to extricate himself from a problematic situation of the appellant's own making. The Tribunal also raised the question whether it was arguable that the appellant had misled a fellow practitioner in connection with the first application and the District Court in connection with the second application as to the appellant's having instructions to appear when he did not have those instructions.

[31] Counsel for the appellant made submissions admitting that the appellant had been guilty of professional misconduct in the manner alleged in the discipline application and in the agreed statement of facts. He submitted that there was no dishonesty involved and that the discipline application did not include any allegation of dishonesty. Counsel for the Commissioner made submissions that accepted that an inference of dishonesty might be open on the facts, he did not submit that such an inference should be drawn.

[32] After a short adjournment, the Tribunal informed the parties of its view that "there is an inference available on the commonly agreed facts that there was a dishonest attempt by the practitioner to cover his tracks in circumstances where he created the problem that led to the Court applications." The Tribunal invited the Commissioner to amend the discipline application accordingly. Counsel for the Commissioner then submitted that the appellant's counsel had properly submitted that no allegation of dishonesty had been made by the Commissioner. The Tribunal responded that if it believed that it was an inference which should be explored then the Commissioner should amend the application to facilitate the exploration of those matters in the public interest. The discipline application was adjourned until 4 December 2007.

[33] At the adjourned hearing the Commissioner's counsel informed the Tribunal that the Commissioner was not prepared to apply to amend the discipline application.

The inferences document

[34] The Tribunal then provided to both parties a document in the following terms (the "inferences document"):

"**Arguable inferences from agreed facts**

1. Charge two

(a) That having, through delay and inattention, created a situation where the defendant had to make the "first application", the respondent chose deceitfully to refrain from informing his client of that application and seeking his client's instructions, in the hope he could resolve the matter without his client becoming aware of it, and thereby preferred his own interests over those of his client;

(b) that the respondent implicitly represented to the defendant's solicitor that the respondent had his client's instructions, whereas he did not;

(c) similar to (a) in respect of the "second application";

(d) similar to (b) in respect of the "second application";

(e) appearing before the court on the "second application", implicitly representing to the court that the respondent had his client's instructions, whereas he did not.

2. Charge three

(a) That the respondent deliberately debited his client the cost of the "first application" when he knew, or should have known, that fairness meant the respondent should himself have borne them, because the application had been necessitated by the respondent's own default;

(b) thereby preferring the respondent's own interests over those of his client."

[35] The Tribunal made it clear to the parties that the purpose of providing the inferences document was to alert the parties that the Tribunal proposed to consider whether or not those inferences should be drawn, thereby affording procedural fairness to the appellant.

[36] The appellant's counsel submitted that the Tribunal did not have any power to amend the discipline application; that the only power of amendment was at the instigation of the Commissioner; and that the Commissioner had declined to seek an amendment because he did not consider that the appellant had been guilty of dishonesty.

[37] The Tribunal decided to proceed on the footing that at the hearing of the discipline application it would consider whether or not the possible inferences articulated in the inferences document should be drawn. The hearing was further adjourned until 11 December 2007.

The hearing

[38] At the adjourned hearing on 11 December 2007 the appellant swore to the accuracy, to the best of his belief and knowledge, of the facts sworn in his affidavit of 7 December 2007. In that affidavit the appellant responded to the matters set out in the inferences document.

[39] The appellant accepted that he had not advised his client, Mr Kampf, of either the first or second application when those applications were made but he swore that he did not refrain from doing so because he wished to avoid Mr Kampf finding out about the applications. He swore that he had taken the view (which he had since realised was mistaken) that it was his task to conduct the litigation without necessarily referring those matters to Mr Kampf.

[40] The appellant accepted that his conduct would naturally have been treated by the defendant's solicitors as representing that he had Mr Kampf's instructions in relation to both applications, but he swore that he did not in fact at the time turn his

mind to the question whether he was making any such representation; had he done so he would have thought that his retainer was sufficiently broad so that he did not need express further instructions. He had no intention of misrepresenting the state of his instructions.

[41] Similarly in relation to the second application, the appellant swore that he had not turned his mind to the issue whether he made any representation to the Court about his instructions but that, had he turned his mind to the question, he would have believed that his retainer extended to appearing on that application. The appellant accepted that he ought to have kept Mr Kampf better informed about both applications; that he should have told Mr Kampf that he had agreed with the solicitors for the defendants to pay their costs of the first application; and that he should have recommended settling the quantum of those costs. The appellant denied deliberately keeping Mr Kampf in the dark.

[42] As to the payment of the defendant's costs of the first application, the appellant acknowledged that in fairness he ought to have borne those costs personally, but he swore that he did not at the time consider that it was inappropriate to withdraw the money from the trust account.

[43] Counsel for the Commissioner cross-examined the appellant upon that affidavit and generally in relation to his conduct in the matters the subject of the discipline application. The cross-examination was searching but it was not put to the appellant that he had acted dishonestly.

The Tribunal's conclusions

[44] The Tribunal held that it was empowered to decide whether or not inferences of dishonesty should be drawn even though dishonesty was not alleged in the discipline application. The Tribunal's reasons for that conclusion are discussed later in these reasons.

[45] Applying that view, the Tribunal found that the appellant had acted dishonestly. The Tribunal's reasons for that finding were summarised in the following passage in the reasons for judgment.[2]

> "[36] The Tribunal, doubting the respondent's credibility, rejected his contention he acted innocently in all of this. We considered the more probable scenario was that, lacking the moral courage to front up to his client with the problem he had through his own neglect created, the respondent took the expedient course of hiding it from his client, and proceeded independently in the hope he could sail through the problem without his negligence being uncovered. That involved dishonesty. There are degrees of dishonesty in these situations: here, it is noted, the respondent expediently preferred his own interests over those of his client.
>
> **Characterization of Conduct**
>
> [37] The conduct involved in charge two, acting without instructions, should be characterized as professional

[2] *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [36]-[37].

> misconduct. The respondent should be seen as having acted without instructions, certainly in relation to the first application, for the purpose of dealing with the consequences of his own neglect, as submitted for the Commissioner. Charges three and four arose directly from the dishonest conduct involved in charge two. They involve wilful acts compounding the conduct involved in charge two, again as submitted for the Commissioner. They should also be characterized as involving professional misconduct. While taken in isolation, charge five and charge six might be characterized of instances of unsatisfactory professional conduct, when seen with the other misconduct, they go to evidence a consistent failure to reach or keep a reasonable standard of competence and diligence. They also should therefore be characterized as instances of professional misconduct."

[46] The Tribunal concluded that the appellant's conduct reflected an unfitness to practice. It went beyond sporadic incompetence and a situation of basic fitness to be restored after a period of retraining. The Tribunal recorded that its conclusion had been affected substantially by the appellant's evidence under cross-examination, to which it had given extended consideration, and that it was not in the end satisfied that the appellant properly appreciated the ethical commitment expected of a practitioner then or now. The Tribunal also referred to findings in disciplinary proceedings in 1999 that the appellant had been guilt of irregularities in the operation of his trust account.

[47] The finding in paragraphs 36 and 37 of the reasons that the appellant had acted dishonestly in the conduct involved in charge two significantly influenced the Tribunal's decision to order that the name of the respondent be removed from the local roll. The Tribunal had earlier observed that if the matter were seen as a case of negligence and ineptitude, a fine would have been an appropriate response but if the matter were a more serious case, reflecting dishonesty on the part of the appellant, protection of the public might justify a suspension or striking-off.[3] That was also reflected in the Tribunal's conclusion that the appellant was not fit to practise:

> "[50] The Tribunal is of the view the aggregation of the respondent's professional misconduct, involving expediency, and his dishonestly preferring his own interests over those of his client, committed over a period, betraying various misconceptions about the basics of his professional role, and involving "repeat" offending in relation to his trust accounts, warrants the conclusion the respondent is not fit to practise."

[48] After referring to authority[4] the Tribunal observed at [51]:

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3 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [30].

4 *Council of the Queensland Law Society Incorporated v Roche* [2004] 2 Qd R 574 at 587; [2003] QCA 469; *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736 at 740, 748; *Legal Services Commissioner v Baker (No 2)* [2006] 2 Qd R 249 at 267; [2006] QCA 145.

> "… It is the expediency of the respondent's approach which lends this case its distinctive gravity. As said in *Attorney-General v Bax* [1999] 2 Qd R 9, 22, "where…the dishonesty concerns a substantial rather than a trivial matter, and where…it is not a casual act but carried on over a period of time, it is…likely to indicate unfitness to practise at the time at which it is engaged in; whether it does so will depend on all the circumstances."

The grounds of the appeal

[49] The appellant relies upon the following grounds of appeal:

> "(a) The learned Judge erred in finding that the appellant acted dishonestly;
>
> (b) The learned Judge erred in finding that the appellant expediently preferred his own interests over those of his client;
>
> (c) The learned Judge erred in finding that the appellant's conduct reflected an unfitness to practice;
>
> (d) The learned Judge erred in considering whether the appellant acted dishonestly in respect of the charges in circumstances where:
>
> (i) The discipline application did not allege dishonesty;
>
> (ii) The appellant was called upon, during the course of the hearing, to justify his conduct with respect to inadequately particularised assertions of dishonesty;
>
> (iii) The respondent refused to make application to vary the discipline application pursuant to sub-section 455(1) of the *Legal Profession Act 2007* despite the Tribunal's invitation to do so;
>
> (iv) The respondent's refusal was based upon the Commissioner's belief that there was no reasonable prospect of the Tribunal's finding that the respondent had deliberately acted to cover up his own neglect, at the expense of his client; and
>
> (v) The discipline application was not amended to allege dishonesty;
>
> (e) The first order of the Tribunal ordering that the name of the appellant be removed from the local roll was manifestly excessive."
>
> (f) That the Tribunal had no power to recommend that the appellant's name be removed from the local roll.[5]

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[5] This ground was added by leave granted at the hearing.

[50] Under grounds (d) and (f) the appellant contends that the proceedings in the Tribunal fundamentally miscarried. He contends that the discipline application did not charge him with dishonesty and that the Tribunal therefore had no jurisdiction to decide that he acted dishonestly. The appellant contends that it necessarily follows that the Tribunal's finding of dishonesty, and the findings and orders that flowed from it, must be set aside. The appellant also contends that the Tribunal had no power to order that his name be removed from the roll because no such order was sought in the discipline proceedings. It is appropriate therefore to consider these grounds of appeal first.

Ground (d): That the Tribunal erred in considering whether the appellant acted dishonestly where the discipline application did not allege dishonesty.

[51] The first limb of the appellant's jurisdictional argument under ground (d) is his contention that the discipline application did not charge him with the dishonesty found by the Tribunal.

Did the discipline application charge the dishonesty found by the Tribunal?

[52] Before the Tribunal the parties were agreed that the discipline application did not charge the appellant with dishonesty. The Tribunal was of the same view: it prepared the inferences document because of its concern that dishonesty was not charged in circumstances in which the Tribunal considered that an inference of dishonesty arguably arose from the agreed facts. The Commissioner does not now contend that the discipline application charged dishonesty, except possibly in relation to charge four.

[53] Charge four did not in terms allege dishonest conduct, but such a characterisation is arguably available in the allegation that the respondent charged legal fees which he "knew, or ought to have known were not properly chargeable" and in the particular of that allegation that the appellant "knew, or ought to have known" that he was not entitled to receive payment for the particular services.

[54] It is, however, a well recognised rule of practice in civil proceedings that, although the word "dishonesty" is not necessarily required, any charge of dishonesty must be made in clear terms. In a well known passage in *Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors*[6] Buckley LJ said:

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word "fraud" or the word "dishonesty" must necessarily be used: see *Davy v Garrett*, 7 Ch. D. 473, 489, *per* Thesiger L.J. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

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6 *Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors* [1979] Ch 250 at 268.

[55] Many similar statements concerning allegations involving dishonesty may be found in the authorities and in many different contexts.[7]

[56] In circumstances in which the substance of the allegations in the discipline application was of incompetence and dilatoriness on separately defined occasions, where the statement of agreed facts included no reference to dishonesty and no facts necessarily conveying dishonesty, charge four should not be construed as comprehending dishonesty.[8]

[57] In any event, the Tribunal did not find dishonesty separately in relation to charge four. Rather, the Tribunal found dishonesty in relation to charge two and that this pervaded or explained the appellant's subsequent conduct. It is clear that no such case was made in the discipline application.

[58] That being so, the issue under ground (d) of the appeal is whether, upon the proper construction of the 2007 Act, it was within the jurisdiction of the Tribunal to find that the appellant acted dishonestly where that dishonesty was not charged in the discipline application but where notice of a possible finding of dishonesty was given to the parties before the hearing.

The 2007 Act

[59] The critical provision for present purposes is s 601 of the 2007 Act, which confers the Tribunal's jurisdiction. It provides:

> "**601 Jurisdiction**
>
> The tribunal's jurisdiction is to hear and decide a discipline application made to the tribunal."

[60] Section 601 is in Part 7.2, the main purpose of which is "to establish the Legal Practice Tribunal to deal with matters it is empowered to deal with under this Act".[9] In order to determine the scope of the Tribunal's jurisdiction it is thus important to consider those other provisions of the 2007 Act which confer power upon the Tribunal to deal with discipline applications. Further, the terms of s 601 itself require reference to the provisions that identify the content of the expression "discipline application" and, as will be seen, the scope of the jurisdiction conferred by s 601 is also influenced by the broader statutory context in which it appears.

[61] It is convenient to commence this discussion of the statutory context by outlining the scheme set up by the 2007 Act[10] for the investigation of possible misconduct by legal practitioners. Section 583 provides that there is to be a Legal Services Commissioner. The Commissioner is given the function of investigating complaints about the conduct of an Australian legal practitioner to which the relevant chapter of

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7 See, eg, *Krakowski & Anor v Eurolynx Properties Ltd & Anor* (1995) 183 CLR 563 at 573; [1995] HCA 68;
Banque Commerciale S.A., En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279 at 295; [1990] HCA 11.

8 cf *Walter v Council of Queensland Law Society Incorporated* (1988) 77 ALR 228 at 234; [1988] HCA 8.

9 *Legal Profession Act* 2007 (Qld), s 598.

10 These provisions were copied from provisions of the 2004 Act, with some changes that are presently immaterial.

the Act applies.[11] The Commissioner may also conduct an investigation about a matter even though there is no complaint: such a matter is called an "investigation matter".[12] The Commissioner is empowered to require a complainant to provide further information about a complaint.[13] The Commissioner is also given power summarily to dismiss a complaint in specified circumstances: for example, the Commissioner may dismiss a complaint if it does not disclose conduct that the Commissioner considers may be unsatisfactory professional conduct or professional misconduct.[14] The Commissioner is also empowered to dismiss a complaint or investigation matter if satisfied that there is no reasonable likelihood of a finding by a disciplinary body of either unsatisfactory professional conduct or professional misconduct.[15] The discretion whether or not to start a proceeding before a disciplinary body is vested exclusively in the Commissioner.[16]

[62] Those provisions make it clear that that the Commissioner exercises critically important functions under the 2007 Act. That is recognised by the statutory requirement that before recommending a person for appointment as the Commissioner the Minister must be satisfied that the appointee possesses appropriate qualities of independence, fairness and integrity.[17]

[63] As was mentioned earlier, when the Commissioner filed the discipline application on 9 February 2007 the 2004 Act was in force. The discipline application recited that it was made under made under s 276 of the 2004 Act. The effect of transitional provisions in the 2007 Act[18] is that from 1 July 2007 the discipline application was taken to have been made under s 452 of the 2007 Act.

[64] Section 452 of the 2007 Act relevantly provides:

> "**452 Starting proceeding before a disciplinary body**
>
> (1) The commissioner may apply—
>
> (a) to the tribunal for an order against an Australian legal practitioner in relation to a complaint against the legal practitioner or an investigation matter; or
>
> …
>
> (2) An application under subsection (1) is a ***discipline application***."

[65] Section 453 provides:

> "**453 Hearings**
>
> The disciplinary body must hear and decide each allegation stated in the discipline application."

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11 *Legal Profession Act* 2007 (Qld), s 428(1), s 436.
12 *Legal Profession Act* 2007 (Qld), s 435(1)(c).
13 *Legal Profession Act* 2007 (Qld), s 431.
14 *Legal Profession Act* 2007 (Qld), s 432(1).
15 *Legal Profession Act* 2007 (Qld), s 448(1)(a).
16 *Legal Profession Act* 2007 (Qld), s 447, s 452.
17 *Legal Profession Act* 2007 (Qld), s 584.
18 *Legal Profession Act* 2007 (Qld), ss 716, 718, 719 and 746.

[66] The variation of discipline applications is provided for in s 455:

> "**455 Variation of discipline application**
>
> (1) The disciplinary body may, on the commissioner's application, vary a discipline application by omitting allegations or including additional allegations, if the body is satisfied that it is reasonable to do so having regard to all the circumstances.
>
> (2) Without limiting subsection (1), when considering whether or not it is reasonable to vary a discipline application, the disciplinary body must have regard to whether varying the application will affect the fairness of the proceeding.
>
> (3) The inclusion of an additional allegation is not precluded on any or all of the following grounds—
>
> (a) the additional allegation has not been the subject of a complaint;
>
> (b) the additional allegation has not been the subject of an investigation;
>
> (c) the alleged conduct happened more than 3 years ago, including conduct that happened before the commencement of section 430."

[67] Subsection 456(1) provides:

> "(1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section."

[68] Subsection 456(2) specifies orders which the Tribunal may make under that subsection "in a way it considers appropriate". Those orders include:

> "(a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
>
> (b) an order that the practitioner's local practising certificate be suspended for a stated period or cancelled;
>
> (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period;
>
> (d) an order that—

(i) imposes stated conditions on the practitioner's practising certificate granted or to be issued under this Act; and

(ii) imposes the conditions for a stated period; and

(iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;

(e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;

…"

[69] Subsection 456(4) empowers the Tribunal to make other orders, including:

"(a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than $100000;

(b) a compensation order;

(c) an order that the practitioner undertake and complete a stated course of further legal education;

(d) an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;

(e) an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;

…

(g) 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;

(h) 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;

(i) an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice;

…"

[70] Subsection 456(7) provides that the Tribunal may find a person guilty of unsatisfactory professional conduct even though the discipline application alleged professional misconduct.

[71] The right of appeal to this Court is given by s 468, which provides:

> "**468 Appeal may be made to Court of Appeal from tribunal's decision**
>
> (1) The following may appeal a decision of the tribunal to the Court of Appeal—
>
> (a) a party dissatisfied with the tribunal's decision;
>
> (b) the Minister.
>
> (2) The appeal is by way of a rehearing on the evidence given in the matter before the tribunal.
>
> (3) However, subsection (2) does not prevent the Court of Appeal from giving leave to introduce further evidence, whether fresh, additional or substituted, if the court considers the further evidence may be material to the appeal.
>
> (4) The appeal must be made—
>
> (a) if the appeal is being made by the Minister—within 28 days after a copy of the tribunal's order is given to the Minister; or
>
> (b) otherwise—within 28 days after the tribunal's order is made."

Discussion

[72] This statutory context provides strong support for the construction of s 601 propounded for the appellant. The procedural provisions in Part 4.9 of the 2007 Act, notably ss 452, 453, 455 and 456, confirm that the legislative intention was to confine the Tribunal's jurisdiction by reference to the particular allegations made by the Commissioner in the discipline application. That appears clearly from the requirement in s 453 that the disciplinary body must hear and decide "each allegation stated in the discipline application". It is that which the Tribunal is "empowered to deal with under this Act" in terms of s 598, the provision that identifies the purpose of s 601.

[73] Further, under s 456(1), the power of the Tribunal to make any of the orders stated in s 456 arises only after the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct; and s 456(1) provides that the Tribunal may only decide it is satisfied and make an order "after the Tribunal has completed a hearing of a discipline application". The context makes it clear that that hearing and decision are those identified in s 453, that is to say the hearing and decision of each allegation stated in the discipline application.

[74] The scheme of the 2007 Act is that the Commissioner investigates possible misconduct, decides whether to bring a charge, and decides what to charge. The Tribunal's role is adjudicative. Section 455 is consistent with that scheme, in that any amendment of the discipline application may be made only upon the

Commissioner's application; the Tribunal then exercises a judicial discretion in deciding whether the amendment sought by the Commissioner is to be allowed.

[75] One aim of these provisions is to ensure fairness to legal practitioners accused of misconduct. That was one aspect of the reforms incorporated in the 2004 Act and substantially re-enacted in the 2007. Those provisions should not be given a narrow construction. In relation to analogous provisions in earlier Victorian legislation, in *B (A Solicitor) v Victoria Lawyers RPA Ltd & Anor; G (A Solicitor) v Victoria Lawyers RPA Ltd & Anor* Charles and Batt JJA said: [19]

> "The new Act introduced (largely in 1997) a new regulatory scheme and a new procedure governing the disciplinary process for members of the Victorian legal profession. A comparable regime was introduced in New South Wales by the Legal Profession Act 1987. The New South Wales scheme has been considered in *Barwick v Law Society of New South Wales* [(2002 169 ALR 236; 74 ALJR 419]*; Law Society of New South Wales v Boland* [[2001] NSWADT 35]*; Walsh v Law Society of New South Wales* [(1999) 198 CLR 73]*;* and *Murray v Legal Services Commissioner* [(1999) 46 NSWLR 224]. In *Barwick* Kirby J said [at [90]] of the New South Wales scheme:
>
> > "It was part of a general reform of procedures for the handling of complaints against legal practitioners outside the inherent jurisdiction of the Supreme Court. The object of that reform was to secure greater transparency in the determination of complaints and to establish new institutions for the process but with balancing provisions designed to afford procedural and other safeguards for the practitioner involvedhttp://www.austlii.edu.au/au/cases/cth/HCA/2000/2.html - fn18#fn18. These safeguards should not be narrowly construed. In its comment on the approach to a new system for handling complaints against legal practitioners, the New South Wales Law Reform Commission remarked that:
> >
> > > "Lawyers should never be subjected to procedures which arbitrarily or unfairly do harm to their reputations or qualify or remove their practising rights. The Commission makes a number of recommendations ... aimed at improving the level of procedural fairness for a lawyer who is the subject of a complaint. For example, the Commission proposes that there be a limitation period on complaints ..."
>
> Similarly, in *Walsh* McHugh, Kirby and Callinan JJ observed: [at 95, [62] and 96 [66]]
>
> > "Given the scheme of the legislation, and the introduction of new statutory bodies for the tasks of discipline of members of the legal profession formerly conducted by professional bodies and by the Supreme Court, the requirements of particularity contained in the Act (and the safeguards thereby introduced for

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19 *B (A Solicitor) v Victoria Lawyers RPA Ltd & Anor; G (A Solicitor) v Victoria Lawyers RPA Ltd & Anor* (2002) 6 VR 642 at 656 [38]; [2002] VSCA 204.

> the practitioner concerned) would not be narrowly construed … The provisions of the Act must be complied with.""

[76] The High Court's decision in *Walsh v Law Society of New South Wales*[20] concerned the *Legal Profession Act* 1987 (NSW). That Act included a provision under which the function of the New South Wales Legal Services Tribunal was to conduct a hearing "into each allegation particularised in the information":[21] s 453 of the 2007 Act is in indistinguishable terms. The legislation also included a provision, s 171M, preserving the Court's inherent jurisdiction: the 2007 Act contains an analogous provision, s 13, which is set out later in these reasons. The High Court held that the New South Wales Court of Appeal had exceeded its jurisdiction in an appeal from the Tribunal by making findings which went beyond the particular allegations formulated and particularised against the solicitor in the complaint heard by the Tribunal. In reaching that conclusion McHugh, Kirby and Callinan JJ said:[22]

> "59. By s 171M of the Act, it is provided (relevantly):
>
> "(1) The inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners ... is not affected by anything in this Part or Part 2."
>
> Part 2 is that Part of the Act which deals with the admission of legal practitioners to practise. It contains s 12 of the Act which obliges the Admission Board to consider, on application for admission as a legal practitioner, whether it is satisfied that "the candidate is of good fame and character and is otherwise suitable for admission". Thus s 171M preserves the inherent jurisdiction of the Supreme Court over both the admission and discipline of legal practitioners, including Mr Walsh. [cf *Legal Practitioners Act* 1898 (NSW), s 79: *Datt v Law Society of New South Wales;* (1981) 148 CLR 319 at 328-329.]
>
> 60. This notwithstanding, the scheme of the Part of the Act in which s 171M appears (Pt 10), dealing with complaints and discipline, introduces significant changes in the law governing the investigation of such complaints against legal practitioners and the conduct of disciplinary proceedings arising out of the investigation of such complaints. The general objects of Pt 10 include to redress "consumer complaints of users of legal services"[The Act, s 123(a)] and to ensure compliance by individual legal practitioners with the necessary standards of "honesty, competence and diligence" [The Act, s 123(b)]. As part of the statutory scheme, a differentiation is introduced between "professional misconduct" and "unsatisfactory professional conduct" [The Act, s 127]. Clearly, this distinction was designed to meet dissatisfaction with the response of those charged with deciding the complaints of users of legal services and the

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20 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33.

21 *Legal Profession Act* 1987 (NSW), s 167(2).

22 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at [59]; [1999] HCA 33.

suggestion that they sometimes tended to neglect conduct falling short of proper standards of competence and diligence. A special statutory officer, the Legal Services Commissioner (the Commissioner), was created by the amending Act which introduced the new scheme [*Legal Profession Reform Act* 1993 (NSW), s 3 (Sch 2)]. The Commissioner has a wide range of functions including the receipt of complaints about professional misconduct or unsatisfactory professional conduct of legal practitioners [The Act, s 131(1). See also s 134]. The Commissioner is empowered to monitor investigations by the relevant Council (in this case the Law Society Council) into a complaint [The Act, s 149(1)]. He or she is empowered to give directions [The Act, s 150]. and to arrange for a complaint to be independently investigated in certain circumstances [The Act, s 151(1)]. He or she is afforded large statutory powers in doing so [The Act, s 152]. The Act also establishes the Tribunal [The Act, s 162] which is empowered to conduct hearings with respect to a complaint against a legal practitioner brought before it [The Act, s 167].

61. In this scheme of discipline, a number of protections are included for the legal practitioner brought before the Tribunal. Proceedings may only be instituted "with respect to a complaint" by "an information laid by the appropriate Council or the Commissioner" in accordance with Pt 10 of the Act [The Act, s 167(1)]. The function of the Tribunal is confined to that of conducting a hearing "into each allegation particularised in the information" [The Act, s 167(2)]. The Tribunal has certain powers of amendment to vary the information laid against the legal practitioner, for example, to permit the inclusion of additional allegations where that is justified [The Act, s 167A. This section was introduced into the Act by the *Legal Profession Amendment Act* 1996 (NSW), having effect from 1 April 1997]. For the purpose of a hearing into a question of professional misconduct, the Tribunal "is to observe the rules of law governing the admission of evidence" [The Act, s 168(1)]. In other hearings, the Tribunal is not so bound but may inform itself of any matter in such manner as it thinks fit [The Act, s 168(2)].

62. Given the scheme of the legislation, and the introduction of new statutory bodies for the task of discipline of members of the legal profession formerly conducted by professional bodies and by the Supreme Court, the requirements of particularity contained in the Act (and the safeguards thereby introduced for the practitioner concerned) would not be narrowly construed.

63. The function of the Tribunal, after having completed a hearing "relating to a complaint against a legal practitioner" [The Act, s 171C(1)], is to determine whether it is satisfied that the legal practitioner is guilty of professional misconduct or

unsatisfactory professional conduct. Only if it is so satisfied may it make any of the orders specified in the Act, including an order for the removal of the name of the legal practitioner from the roll [The Act, s 171C(1)(a)] and an order that the legal practitioner pay a fine [The Act, s 171C(1)(d). The fine is not to exceed $50,000 if the legal practitioner is guilty of professional misconduct or $5,000 if guilty of unsatisfactory professional conduct]. The scheme of specificity continues into the provision for an appeal against the order of the Tribunal. By s 171F it is provided (and we add emphasis to the words):

> "(1) Any party to a hearing conducted by the Tribunal may appeal to the Supreme Court *against the Tribunal's determination of a complaint*."

It is only an appeal against such determinations which the Supreme Court, by the Act, is empowered to hear and determine [The Act, s 171F(3). Note that this provision has now been repealed and replaced by the *Administrative Decisions Legislation Amendment Act* 1997 (NSW). See *Datt v Law Society of New South Wales;* (1981) 148 CLR 319 at 331 where the distinction, under the previous legislation, between the exercise by the Court of Appeal of the inherent jurisdiction of the Supreme Court and of the appellate jurisdiction under the legislation is called to notice].

64. A question arises as to whether the preservation of the inherent jurisdiction of the Supreme Court in s 171M of the Act, previously noted, empowers that Court, in an appeal from the Tribunal heard by the Court of Appeal, to go beyond the "determination of a complaint" which is otherwise expressed to ground the Supreme Court's jurisdiction [The Act, s 171F(1)]. In favour of that view might be the specification that the appeal lies to the Supreme Court whose inherent jurisdiction is preserved and whose ancient functions include the maintenance of standards and enforcement of discipline in relation to legal practitioners whom such courts admit to legal practice. But, by the scheme of the Act, it is clear that this is not what the legislation provides. The provision preserving the inherent power or jurisdiction of a Supreme Court appears in Div 10 (Miscellaneous) of Pt 10 of the Act. In the context, the section's purpose is to permit the Supreme Court to deal directly with cases other than appeals (provided for in Div 8 of Pt 10) where it is appropriate or necessary to invoke the inherent power and jurisdiction of the Court.

65. An instance which springs to mind in which the inherent power might be invoked is the case of a legal practitioner who is convicted of a relevant criminal offence warranting immediate removal of his or her name from the roll. In New South Wales, proceedings of that kind are commonly brought by the Prothonotary of the Supreme Court. They are ordinarily uncontested. But for appeals from the Tribunal, invoking the jurisdiction of the Supreme Court as provided

by s 171F, the measure of particularity which runs through Div 8 applies. Neither the jurisdiction of the Tribunal nor the power and jurisdiction of the Supreme Court are at large, as formerly the latter were under the common law and within the inherent jurisdiction of the Supreme Court untouched by legislation [Even before the Act, a high measure of particularity was required by the principles of procedural fairness in respect of complaints against legal practitioners. See, eg, *Smith v NSW Bar* Association; (1992) 176 CLR 256; *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1 at 6; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204].

66. The provisions of the Act must be complied with. The focus of its attention is the "complaint against a legal practitioner" expressed in the "information laid by the appropriate Council or the Commissioner" in accordance with the Act [The Act, s 167]. That complaint, and the information containing it, may be varied and amended [The Tribunal had power at the time of the proceedings before it to allow amendment of the information. See Legal Services Tribunal Rules (NSW). As from 1 April 1997, the Act conferred such a power by s 167A. That section applied to information filed before 1 April 1997. See *Legal Profession Amendment Act* 1996 (NSW), Sch 5, cl 50. By s 75A(6) of the Supreme Court Act 1970 (NSW), the Court of Appeal enjoyed powers to make amendments to the information if it was appropriate to do so]. Notwithstanding dismissal of the complaints contained in one information it remains open to the relevant Council or the Commissioner to bring later complaints [*Weaver v Law Society of New South Wales;* (1979) 142 CLR 201]. But the function of the Tribunal is to determine the complaint. And the function of the Supreme Court, in this aspect of its power and jurisdiction is, and is only, to hear and determine the appeal "against the Tribunal's determination of a complaint" [The Act, s 171F]. To the extent that the Tribunal proceeded beyond that function or the Supreme Court on appeal did likewise, they would be exceeding the jurisdiction conferred by the Act.

67. This conclusion reinforces our view about the error in the approach of the Court of Appeal. Instead of addressing its attention to determining the appeal and cross-appeal against the Tribunal's determination of the several complaints about Mr Walsh, it addressed itself to what was described as the "ultimate question" [Court of Appeal Judgment at 63, per Powell JA] of Mr Walsh's good fame and character and his suggested unfitness to remain on the roll of legal practitioners. In this, it consciously went outside the "complaints as formulated and particularised" [Court of Appeal Judgment at 63, per Powell JA]. In doing so, it strayed beyond its power and jurisdiction. By reason of the preservation of the inherent jurisdiction of the Supreme Court, it may have been open to the Law Society or the Prothonotary in this case to invoke the Supreme Court's inherent jurisdiction and to seek immediate relief in relation to Mr Walsh within that jurisdiction. We leave aside questions of procedural fairness

> and other objections that might be raised if such an exceptional course had been taken. But if it were, different procedures would have been followed and a different hearing would have ensued. That course was not taken. Instead, the ordinary course, envisaged by Div 8 of Pt 10 of the Act, was followed. In going outside the scheme of the Act and proceeding to ignore the "complaints as formulated and particularised", the Court of Appeal erred. It was an error substantially disadvantageous to Mr Walsh. He is entitled to complain about it and, on this ground too, to succeed on his objection to the course which the appeal took."

[77] That reasoning supports the appellant's contentions that, under the similar provisions of the 2007 Act, the Tribunal's jurisdiction was limited to hearing and determining the allegations in the discipline application and that this Court's jurisdiction is limited to correcting any error on the same basis.

The Tribunal's reasons

[78] The Tribunal observed of the respondent's submission that the only power to amend a discipline application was at the instigation of the Commissioner that, if that submission was correct, the resultant position was unsatisfactory and that it "may be consideration was not given to s 602(1)".[23] Section 602 provides:

> "**602 Powers**
>
> (1) The tribunal may do all things necessary or convenient to be done for exercising its jurisdiction.
>
> (2) Without limiting subsection (1), the tribunal has the powers conferred on it under this Act or another Act."

[79] It is submitted for the appellant that s 602 does not confer upon the Tribunal jurisdiction that is not elsewhere conferred upon it. That construction accords with the text and with decisions of this Court upon similar statutory provisions.[24] The respondent's senior counsel did not advance any contrary submission.

[80] Section 602 does not qualify the condition of the Tribunal's power of variation expressed in s 455(1) that the Commissioner must first apply for any such variation. Nor should it be implied that the Tribunal possesses any unconditional power to vary discipline applications. The disciplinary processes are not criminal in nature.[25] But the 2007 Act does adopt the familiar adversarial procedure under which it is no part of the judicial function to determine what charges are to be brought or pursued: under this Act the decision to institute proceedings is the province of the executive

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23 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [24].

24 *Lee v Kokstad Mining Pty Ltd* [2008] 1 Qd R 248; [2007] QCA 248 at [13], [14]; *HR & CE Griffiths Pty Ltd v Rockbottom Fashion Market Pty Ltd* [1999] 1 Qd R 496 at 504.

25 See *McCarthy v Law Society of New South Wales* (1997) 43 NSWLR 42 at 58 and the cases cited therein.

and decisions directed to ensuring a fair trial and prevention of abuse of the Tribunal's processes are the province of the Tribunal.[26]

[81] The Tribunal considered that it should not be denied the opportunity to explore an arguably serious case against a practitioner merely because the Commissioner had pegged the charge at what turned out to be an inappropriately low level.[27]

[82] That reflects an approach adopted in *Walter v Council of Queensland Law Society Incorporated*.[28] In that case the High Court allowed an appeal from a decision in which the Full Court found that the penalty of suspension imposed by the former statutory committee of the Queensland Law Society Incorporated ("the Committee") was inadequate. The Full Court held that, although the Committee did not find dishonesty in terms, it must have found that the appellant's conduct was dishonest. The majority of the Full Court considered that for that reason the appellant's conduct required that his name should be struck off the rolls. The High Court allowed the appeal because of the absence of any allegation of dishonesty of the character found by the majority of the Full Court, but remitted the matter to the Committee for further consideration on the footing that the Committee could continue the hearing, receive further evidence if tendered by either party and give further consideration to the order that should be made. The Court observed:[29]

> "The matter cannot be resolved simply on the basis of an adversarial proceeding in which the appellant has been successful, with the consequence that the decision under appeal be set aside and the original order restored. The public interest is an important factor in disciplinary proceedings because a primary object of such proceedings is to protect members of the public from professional misconduct: see *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183-4; *Weaver v Law Society of New South Wales* (1979) 53 ALJR 585 at 587; 25 ALR 359 at 363. In the present case, we consider that the materials before the court give rise to grave suspicion touching the appellant's fitness to practise. The public interest requires that further consideration be given to the culpability of the appellant in respect of the facts alleged in para 15(c)(vii) and also to the question of the veracity of the appellant's evidence to the committee in that regard. The respondent should be at liberty to particularise further its allegations against the appellant."

[83] However those statements were made in the context of a regulatory scheme that has since been superseded. The 2007 Act confers upon the Commissioner the role of determining what particular allegations, if any, are made against a practitioner. As mentioned earlier, the Act adopts an adversarial scheme, one aim of which is to secure procedural fairness by the provisions now in issue. The reasons for the Tribunal's conclusion that it was empowered to consider the inferences of dishonesty which the Tribunal brought to the party's attention are, with respect,

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26 cf *Ayles v The Queen* (2008) 232 CLR 410; [2008] HCA 6 per Kiefel J, Gleeson CJ and Hayden J agreeing, at [70]-[72].

27 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [27].

28 cf *Walter v Council of Queensland Law Society Incorporated* (1988) 77 ALR 228; [1988] HCA 8.

29 cf *Walter v Council of Queensland Law Society Incorporated* (1988) 77 ALR 228 at 235; [1988] HCA 8.

substantial, but that conclusion cannot stand with the High Court's analysis of an analogous statutory scheme in *Walsh*[30].

[84] The Tribunal also considered that there must be capacity for the Tribunal independently to intervene to ensure an appropriately arguable case was properly ventilated, notwithstanding the attitude of the Commissioner, especially recognising that it is the Tribunal as an emanation of the Supreme Court which is the ultimate custodian of professional standards.[31] This consideration requires reference to the relationship between the Supreme Court's inherent jurisdiction and the Tribunal's jurisdiction.

[85] The Legal Practice Tribunal is a "disciplinary body" as defined in the dictionary in Schedule 2 of the 2007 Act. Section 599 of the 2007 Act continues in existence the Tribunal, which was established under s 429 of the 2004 Act. The members of the Tribunal are the Supreme Court Judges.[32] It is constituted by any one of its members.[33] The Chief Justice is the chairperson of the Tribunal.[34] Subsection 614(2) of the 2007 Act provides that the Tribunal member constituting the Tribunal "is to be helped by two panel members chosen by the Brisbane Registrar and approved by the Tribunal member".

[86] Section 13 of the 2007 Act provides:

> "**13 Inherent jurisdiction of Supreme Court**
>
> (1) The inherent jurisdiction and power of the Supreme Court in relation to the control and discipline of local lawyers and local legal practitioners is not affected by anything in this Act.
>
> (2) The inherent jurisdiction and power—
>
> (a) extends to an interstate legal practitioner as mentioned in section 78; and
>
> (b) may be exercised by making any order that a disciplinary body may make under this Act."

[87] In *Walsh*[35] Gummow J observed that disciplinary proceedings under the *Legal Profession Act* 1987 (NSW) and in the inherent jurisdiction are *sui generis* and the outcome of the first does not dictate an outcome in the second. Difficult questions may therefore arise concerning the relationship between the inherent jurisdiction of the Supreme Court and existing or completed disciplinary proceedings under the 2007 Act, but it is not necessary in this appeal to attempt to resolve those questions. It is clear, and both parties contend, that the Legal Practice Tribunal here did not exercise the Court's inherent jurisdiction: the Chief Justice heard and decided the

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30 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33.
31 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [27].
32 *Legal Profession Act* 2007 (Qld), s 599(2).
33 *Legal Profession Act* 2007 (Qld), s 599(4).
34 *Legal Profession Act* 2007 (Qld), s 599(3).
35 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at 109; [1999] HCA 33.

discipline application in his Honour's capacity as the chairperson of the Tribunal and with the acknowledged assistance of panel members of the Tribunal.[36]

[88] That being so, even though the Tribunal (unlike the tribunal considered in *Walsh*[37]) is constituted by a judge of the Supreme Court, the preservation in s 13 of the 2007 Act of the inherent jurisdiction does not favour a view that the Tribunal was entitled to exercise that jurisdiction.[38] Nor does s 13 justify rejection of the natural construction of the provisions discussed above that confine the Tribunal's jurisdiction by reference to the allegations in the discipline application.

The Commissioner's further arguments

[89] Senior counsel for the Commissioner accepts that a discipline application must contain allegations that are properly particularised. He submits, however, that it is sufficient for a discipline application to allege conduct which amounts to unprofessional conduct or professional misconduct, at least in a case in which a finding of dishonesty is not a necessary ingredient of a finding of professional misconduct or unprofessional conduct. Thus in this case, in which it was conceded that the admitted allegations justified a finding of professional misconduct, it is submitted that evidence of dishonesty was admissible on the question of the appropriate sanction to be applied following the finding of professional misconduct. That is said to follow from the fact that a finding of professional misconduct (or, in another case, a finding of unsatisfactory professional conduct) is all that is required by s 456 to empower the Tribunal to make any one or more of the orders stated in that section.

[90] In a related submission, the Commissioner's senior counsel argues that the Tribunal was entitled to draw inferences naturally arising from the facts for the purpose of considering the disciplinary orders to be imposed on a person it was satisfied was guilty of professional misconduct. The Tribunal's role in imposing a disciplinary order is submitted to be analogous to the role of a criminal court in imposing sentence; the Tribunal, as in the case of a sentencing court, was entitled to find relevant facts and draw reasonable inferences from those facts for the purpose of determining the disciplinary orders; and that in doing so the Tribunal was not bound by the position taken by either party.[39]

[91] Those submissions must be rejected for the reasons given earlier. Section 456 does not envisage the two step process contemplated by the argument. It contemplates a hearing followed by both the findings of any proved misconduct and the imposition of the appropriate penalty for that misconduct. Further, as was pointed out in the joint judgment in *Walsh*[40], the statutory requirements of particularity in legislation of this character, and the safeguards introduced by those requirements for the practitioner concerned, should not be construed narrowly. That statutory objective

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36 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [31].

37 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33.

38 The better view also appears to be that the jurisdiction to order the removal of a practitioner's name from the roll is exclusively vested in the Court of Appeal as the admitting authority in succession to the Full Court: see the 2007 Act, s 35, schedule definition of "Supreme Court", s 29, *Re Hope* [1996] 2 Qd R 25 per McPherson JA at 30; [1995] QCA 471; *Queensland Law Society Incorporated v Smith* [2001] 1 Qd R 649 per Thomas JA at 650 [4]; [2000] QCA 109; and *Gregory v Queensland Law Society Incorporated* [2002] 2 Qd R 583 at 588 [19]; [2001] QCA 499, but it is not necessary here to express a concluded view on that question.

39 cf *GAS v The Queen*; *SJK v The Queen* (2004) 217 CLR 198 at 211; [2004] HCA 22 [30]-[31].

40 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33 at [63].

of ensuring fairness by the means provided in the Act is as relevant to the penalty as it is to the findings of fact. Furthermore, the Tribunal did not adopt the approach now advocated for the Commissioner. Rather, the Tribunal took into account the allegations of dishonesty in formulating its findings of fact and in concluding that the appellant was guilty of professional misconduct.

[92] Nor do the submissions for the Commissioner derive any support from the provision in s 645(1) that, when conducting a hearing, a disciplinary body is not bound by the rules of evidence and may inform itself in the way it considers appropriate. Subsection 645(1) does not purport to expand the jurisdiction conferred upon the Tribunal. In any event, s 645(2) provides that s 645(1) "is subject to another provision of this Act that states a particular way the disciplinary body must conduct the hearing." That subsection is apt to render s 645(1) subject to the requirement in s 453 that the disciplinary body must hear and decide the allegations in the discipline application.

Conclusion

[93] The terms of the 2007 Act must be applied. Section 601 confers jurisdiction on the Tribunal to hear and decide only the discipline application. Sections 453, 455 and 456 of the 2007 Act have the effect that a discipline application must include the allegations which, to the extent that the Tribunal accepts them, will inform the Tribunal's decisions whether the practitioner is guilty of unsatisfactory professional conduct or professional misconduct and, if so, what penalty should be imposed. In this case the inferences document adverted to possible dishonesty that was inextricably bound up with those decisions. It follows that the Tribunal exceeded its jurisdiction by embarking on a hearing to determine whether the appellant acted dishonestly when engaging in the conduct alleged in charge two and three. The Tribunal's finding of dishonesty must be set aside for that reason.

[94] It should be noted here that, so far as the appeal record reveals, important decisions referred to in these reasons, notably including *Walsh*[41], were not brought to the Tribunal's notice. Nor, it seems, did the Tribunal have the benefit of the detailed submissions made in the appeal, which included an extensive analysis of the relevant provisions of the Act and reference to other authorities. Given the significant role of the Commissioner in the administration of the regulatory scheme under the 2007 Act the Tribunal is entitled to expect that the Commissioner will ensure that appropriate submissions about the construction of the Act are made if such issues arise.

Ground (f): that the Tribunal had no power to recommend that the appellant's name be removed from the local roll.

[95] The discipline application sought orders that the appellant was guilty of professional misconduct and "[s]uch further or other orders or directions as may be just." The appellant contends that because the Commissioner did not apply for an order for the removal of the appellant's name from the local roll the Tribunal had no power to make such an order. If so, this Court's power would be limited in the same way.

[96] The appellant's contention requires s 452(1)(a) to be construed as though it conditions the Tribunal's power to make a particular order upon that order being

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41 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33.

claimed expressly in the discipline application. Section 452, however, is expressed as a conferral of power upon the Commissioner ("the Commissioner may apply"). It does not in terms require the specification of any particular order in the application. Importantly, s 456(1), which empowers the Tribunal to make orders, is not in terms limited by reference to the specification of any particular order in the application: rather, the Tribunal is empowered to make "any order as it thinks fit".

[97] Furthermore, it is to be observed that the power of the disciplinary body to vary a discipline application is confined, by s 455(1), to a power to omit or include "allegations": it does not extend to a power to omit or include reference to the nature of the order sought on the application. The consequence of the interpretation propounded for the appellant therefore is that, whereas the disciplinary body is empowered on application by the Commissioner so to amend a discipline application as substantially to affect the seriousness of the allegations in it, the power of the disciplinary body to make orders is confined by whatever particular order was originally framed in the discipline application with reference to the unamended allegations in it. That is a most unlikely legislative intention.

[98] It is submitted on behalf of the appellant that his propounded construction is required because the discipline application is the only document required to be served upon the practitioner: it is the only means by which the practitioner is necessarily informed of what order is sought against him or her. This is not a persuasive reason for reading down the unqualified terms of s 456(1). Practitioners should appreciate that the Tribunal is empowered to make any of the orders specified in s 456 that the Tribunal considers appropriate if it is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct. The requirements of procedural fairness are met by the other statutory provisions discussed earlier, which require the discipline application to express the charge and to provide particulars of the facts upon which the charge is based. If a practitioner is taken by surprise by the late specification by the Commissioner of any particular order sought any prejudice thereby created may be met by appropriate orders by the Tribunal.

[99] The Tribunal did not lack jurisdiction or power to make the order for removal of the appellant's name from the roll.

Ground (a): The learned Judge erred in finding that the appellant acted dishonestly; Ground (b): The learned Judge erred in finding that the appellant expediently preferred his own interests over those of his client; Ground (c): the learned Judge erred in finding that the appellant's conduct reflected an unfitness to practice; Ground (e): The first order of the Tribunal ordering that the name of the appellant be removed from the local roll was manifestly excessive.

[100] Senior counsel for the appellant submits that the approach of the Tribunal in going beyond the allegations in the discipline application in fact created unfairness to the appellant, even though the Tribunal sought to avoid any such unfairness by providing advance notice of the possible inferences of fact that might be drawn by the Tribunal, and that the approach resulted in factual error in the Tribunal's finding of dishonesty.

[101] The Tribunal identified in its reasons as the most significant feature of the evidence concerning the finding of dishonesty that the appellant sought to cast blame on his client for the first time in oral evidence. As to that the Tribunal observed:[42]

> "[35] But it was the circumstance that for the first time, in oral evidence before the Tribunal, the respondent sought to cast blame on his client, which led to our seriously doubting the credibility of his claim to have believed at the time he could ethically do these things without specific notice to his client. He was equivocal, also, about the circumstances rendering the "first application" necessary."

[102] It is submitted for the appellant that this proposition, that in oral evidence before the Tribunal the appellant first sought to blame his client for the applications brought by the defendant in Mr Kampf's claim for personal injuries, was not a proper basis for the adverse finding of credibility. Reference to the evidence is necessary for an understanding of the thrust of this submission.

[103] Before the appellant gave evidence he had admitted the charges as formulated in the discipline application and he had agreed the facts underlying those charges. The effect of the appellant's evidence in relation to charge two was that he had originally taken the view, which he acknowledged was mistaken, that it was not necessary for him to refer matters to Mr Kampf for decision or to inform Mr Kampf of the making of the applications and their results. That being so, the occasion did not necessarily arise for the appellant, in responding to the discipline application, to comment upon the question whether or not Mr Kampf had in any way contributed to the bringing of the applications.

[104] The appellant agreed in his oral evidence that his understanding of matters in 1999, when the first application was brought, was that it was due to his delay in conducting proceedings. During further cross-examination the appellant was pressed to explain why he had not finalised the statement of loss and damage at different points in time. He then observed that there might have been "a bit of an argument" about whether or not his client would have told him to pay the defendant's costs in relation to the first application; but the appellant added then that he accepted that his obligation as a solicitor then was to have that argument with his client before he took his money out of trust. When pressed further the appellant said that he believed that "there was certain things Mr Kampf should have done that he didn't do"; that the argument "would have been over a contribution as to – this is at the time I am speaking about, your Honour, not now; this is at the time … where the argument would have been as to why that assessment or order had been made. Now at the time I believe that Mr Kampf didn't provide me with the appropriate instructions and that was at the time, and that's not a proper explanation now, but that was at the appropriate time."

[105] When it was put to the appellant that he had said earlier that when the matter arose in 1999 he believed that the first application was brought because of his delay and neglect, he agreed: but he added that there was also "another factor on top of that, and that is getting instructions from Mr Kampf, but I'll certainly accept – and I say that positively – that by my delay, my neglect and relation of that, that was a result of that compromise being made. Now I saw that also as being a factor involving

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42 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [35].

Mr Kampf. But that's not what I should have seen at the time at all." The appellant made similar comments in response to further cross-examination. The appellant added, when pressed again, that "I'm not here to bag Mr Kampf."

[106] The appellant's senior counsel argues that the appellant did not in his evidence seek to blame his client; rather when pressed, he said that he had earlier **wrongly** held the view that his client contributed to the delay.

[107] The appellant's senior counsel also submits that in circumstances where the appellant had admitted for the purpose of the discipline application, which did not allege dishonesty, that it was the appellant's neglect and delay which led to each of the applications it was not surprising that the appellant had not earlier raised this issue and that he did so, apparently reluctantly, when pressed in cross-examination. It is submitted that, where the appellant and the Commissioner had been encouraged to agree facts and to file any affidavit material only "if required", the criticism of the appellant in paragraph 35 of the Tribunal's reasons was unfair.

[108] Senior counsel for the Commissioner makes submissions to the contrary effect, particularly pointing out that the appellant's affidavit, in which the appellant apparently maintained his earlier acceptance of sole responsibility for the delay, was sworn after the inferences document had been provided. That is so, but the appellant did not resile from that in his evidence. He maintained his acceptance of his sole responsibility for the delay but added that at the earlier time he had wrongly thought that his client had arguably contributed to the delay.

[109] It is not necessary to say any more about those or the other competing submissions made under ground (a) concerning the question whether the Tribunal erred in fact in finding dishonesty. That finding must in any event be set aside because the Tribunal did not have jurisdiction to find dishonesty.

[110] The appeal to this Court from the Tribunal's decision is made under s 468, which is set out earlier in the reasons. Under that section the Court's role is confined to correcting any error by the Tribunal and, where necessary, exercising afresh the statutory jurisdiction conferred upon the Tribunal by the 2007 Act.[43] That being so, it is not open to this Court to find that the appellant acted dishonestly.

[111] The further findings challenged in grounds (b) and (c) of the notice of appeal must also be set aside because those findings depended upon the finding of dishonesty.

What orders should now be made?

[112] It follows that the appeal must be allowed, the order that the name of the appellant be removed from the local roll must be set aside, and the Court must consider afresh what orders should now be made.

[113] The appellant and Commissioner joined in submitting that this Court should proceed to make findings of fact and make orders finally disposing of the discipline application. There are a number of considerations that support that course. In oral submissions, the Commissioner's senior counsel disclaimed any application to amend the discipline application to make an allegation of dishonesty that reflected the findings made by the Tribunal. That being so, if the matter were remitted to the Tribunal it would remain outside the Tribunal's jurisdiction to make findings going

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43 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33.

beyond the allegations in the discipline application, just as it is outside the scope of this Court's jurisdiction to make such findings. It is in the public interest for the Court now to exercise its power to make the necessary findings and impose appropriate penalties in order to resolve the controversy.

Professional misconduct

[114] The conduct alleged against the appellant in charges one to five occurred before the relevant provisions of the 2004 Act commenced on 1 July 2004. The question whether that conduct amounted to professional misconduct is to be determined by reference to the standard applicable at the time.[44] Reference is commonly made in this respect to the description of professional misconduct in *Allinson v General Council of Medical Education and Registration* as behaviour on the part of the practitioner in the pursuit of the profession "…which would reasonably be regarded as disgraceful and dishonourable by his professional brethren of good repute and competency."[45]

[115] The statutory definition applies to charge six. Section 419 provides:

> "**419 Meaning of professional misconduct**
>
> (1) Professional misconduct includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
>
> (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."

[116] The relevant conduct is that alleged and particularised in the charges and admitted in the agreed facts. The nature of that conduct is described earlier in these reasons under the heading "The charges against the appellant". The conduct is serious because of the high degree of negligence and the repetition of similar negligent acts and omissions reflected in the first five charges and because of the appellant's failure to recognise the conflict of interest the subject of charge six. The latter is particularly concerning. As the Tribunal observed, it was a particularly obvious conflict of interest.[46]

[117] The Commissioner's senior counsel submitted that this Court should find, under charge four, particular (b), that the appellant charged his client for services when the appellant knew that he had no entitlement to do so. Reference was made to the

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44 2004 Act, s 614(4).

45 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 per Lopes LJ at 763.

46 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [45].

Tribunal's finding concerning the appellant's letter on the related topic of the payment of the $1,125.70 the subject of charge three[47]:

> "We considered disingenuous the statement in the letter of 16 June 2003 (p 64): "There was an amount which we had to pay to Messrs Epsworth and Epsworth, Solicitors, of $1,125.70 in relation to an application they had brought on their clients' behalf." (The solicitors were Ebsworth and Ebsworth.) The vice lay in the words, "we had to pay". Bear in mind that was four years after the event, with the respondent still not being forthcoming with his client."

[118] Reference was also made to the following paragraph in the appellant's cross-examination:

> "As to the respondent's reliance on what he called a "general retainer", as meaning he need not seek his client's instructions on particular matters, it is important to note his concession that nothing his client said to him justified that reliance."

[119] The Commissioner invites this Court now to affirm the rejection of the appellant's evidence that he did not write the 16 June letter with the intention of deceiving his client. It is submitted that it should be inferred that the appellant knew he was not entitled to charge for his work.

[120] Those submissions should be rejected. The breach of s 8 of the *Trust Accounts Act* 1973 (Qld) which concerned the appellant's withdrawal of the $1,125.70 (in charge three) was not itself alleged to involve any dishonesty. The Tribunal's findings set out above were influenced by its finding that the appellant had acted dishonestly in the earlier conduct described in charge two. Once that finding is set aside, no sufficient basis appears for rejecting the appellant's evidence relating to charge four that he did not appreciate when he charged his client that he had no entitlement to do so, even though (as the appellant admits) he should have understood that. The proper conclusion on this evidence is that the appellant's failure to appreciate that he should not have charged his client reflected his obtuseness, rather than underhandedness or deceit.

[121] The appellant maintains his admission that he was guilty of professional misconduct. Having regard to that and the degree and repetition of negligence involved in the charges, the Tribunal's finding of professional misconduct should be confirmed even though the findings of dishonesty must be set aside.

Penalty

[122] Disciplinary penalties are not imposed as punishment but rather in the interests of the protection of the community from unsuitable practitioners.[48] In determining what order the Court should now make, regard should primarily be had to the protection of the public[49] and the maintenance of proper professional standards.[50] That is reflected in the expression of the main purposes of chapter 4 ("complaints

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47 *Legal Services Commissioner v James Xavier Madden* [2008] LPT 2 at [34].

48 *Harvey v Law Society of New South Wales* (1975) 49 ALJR 362.

49 *The New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183; [1968] HCA 20.

50 *Southern Law Society v Westbrook* (1910) 10 CLR 609 at 622; [1910] HCA 31; *De Pardo v Legal Practitioner's Complaints Committee & Anor* (2000) 97 FCR 575; [2000] FCA 335 at [42].

and discipline") in the 2007 Act, which include "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", and (d) "to otherwise protect members of the public from unlawful operators."

[123] It goes against the appellant, as the Tribunal held, that on 4 November 1999 the Solicitors Complaints Tribunal found the appellant guilty on six charges involving breaches of statutory provisions relating to his trust account. He was fined $1,250 and ordered to pay the Society's costs. It appears, however, that there was no allegation of dishonesty in those charges. The significance of those earlier charges is also, to some extent, diminished by the fact that they concerned events now many years ago.

[124] It is in the appellant's favour that he fully cooperated in the investigations leading to these charges; he accepted his guilt of the charges of professional misconduct and agreed to the facts. He compensated Mr Kampf in the total amount of $3,174.75. He voluntarily ceased acting for Mr Portch without the need for Mrs Portch to pursue her intended court application and he undertook a practice management course at his own expense. He apologised to Mr Kampf and extended his apologies to Mrs Portch.

[125] The question of the appellant's fitness to remain a solicitor is to be ascertained now rather than at the date of the impugned conduct.[51] With the Court's leave the parties provided further affidavit material on that question.

[126] The appellant's entitlement to practice has now been restricted for some time. On 5 March 2008, on the application of the appellant, this Court stayed the order of the Tribunal that the name of the appellant be removed from the local roll upon the undertakings of the appellant:[52]

> "1. Not to undertake any legal work, including having contact with clients in his professional capacity
>
> 2. To step aside from the day-to-day conduct of his practice and not play any active role in the practice but to remain as principal in name only pending the determination of this appeal
>
> 3. To use his best endeavours to cause his existing staff and any additional staff engaged pending the determination of the appeal to take over the conduct of all files on a day-to-day basis under the supervision of John Marshall Davies pending determination of this appeal
>
> 4. To use his best endeavours to cause John Marshall Davies to undertake the steps set out in paragraphs 11 to 14 of Mr Davies' affidavit filed 3 March 2008 and to cause his staff to cooperate in that …"

[127] Mr Davies is a solicitor whose good reputation was acknowledged by the Commissioner and by the Law Society. He inspected the firm's files after the

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51 *A Solicitor v Council of the Law Society of New South Wales* (2004) 78 ALJR 310; [2004] HCA 1.

52 *Legal Services Commissioner v Madden* [2008] QCA 52.

orders made by the Tribunal and found that all files were in a satisfactory state. Following the stay order, Mr Davies supervised the appellant's practice through the appellant's employed solicitor as well as attending upon the practice. Mr Davies found no problems with the conduct of any of the appellant's files or otherwise. This evidence, though not conclusive, tends to suggest that the appellant's proved misconduct does not necessarily reflect a general unfitness to practise.

[128] Another reputable solicitor in Toowoomba, Mr Keogh, has agreed to assist Mr Davies in any supervisory role as required and to perform a mentoring role for the appellant. A third reputable solicitor in Toowoomba, Mr Gunningham, who previously supervised the appellant's practice when he was ill, is also willing to act as a mentor for the appellant.

[129] There is no suggestion of any inappropriate conduct by the appellant in the three years since the last of the events alleged in the discipline application in mid-2005. The evidence demonstrates that the appellant understands and appreciates that his conduct was wrong in the respects alleged in the discipline application. He undertakes to assist Mr Davies in the performance of any continued supervisory role and he undertakes to assist each of Mr Keogh and Mr Gunningham in their role as his mentors and to fully and frankly discuss with them any issues that might arise in relation to his practice.

[130] In part the appellant's conduct in acting in the position of conflict was attributed by him to an absence of appropriate legal education. Between June 2006 and May 2007 the appellant undertook the Practice Management course and obtained a Practice Management statement. That course included modules covering the operation of trust accounts, risk management, ethics and file management. The appellant satisfactorily completed an examination over a period of one day at the end of the course. The appellant also committed to attend and participate in a further seminar "ethics and creativity in building practices in the law", one of the participants in which is the respondent. The appellant also undertook to enrol in the Queensland University of Technology course "Professional Responsibility".

[131] In an affidavit by the appellant he referred to his further education and the effect of attending court and obtaining advice since the proceedings were commenced in February 2007. He deposed to his belief that he now has a complete understanding of those aspects of his professional conduct which have been unsatisfactory and that he appreciates his obligation to alter the way in which he practices. Statements of this kind, even where, as here, they are not challenged, may not carry much weight in some cases, such as those involving dishonesty or deliberate, repeated or egregious breaches of fiduciary duty, but some weight should be attributed to them here. The appellant's misconduct was not alleged to involve dishonesty, it mostly occurred many years ago, the appellant has demonstrated genuine efforts to rehabilitate himself with the assistance of continuing further education, and there is apparently reliable evidence that his practice and files have now been satisfactorily conducted for a significant period of time.

[132] Most of the conduct charged in the discipline application occurred more than six years ago. The conflict of interest charge, which occurred in June 2005, is more recent. It is of concern that it was necessary to address this conduct by further education, particularly given that the conduct was of such a character as to be obviously inappropriate. On balance, however, the proper conclusion is that, assessing the matter as at today's date, unfitness to practice is not demonstrated.

[133] For these reasons, the public interest is appropriately met by orders falling short of an order that the name of the appellant be removed from the roll.

[134] It is not submitted that the Court should disturb the second order made in the Tribunal, that the appellant pay $800 compensation to Mrs Portch within one month of the Tribunal's judgment: the Court was informed that that order has been obeyed. Nor is it submitted that the order that the appellant pay the Commissioner's costs in the Tribunal should be disturbed.

Orders

[135] The appropriate orders are as follows:

1. Allow the appeal.

2. Set aside orders 1 and 4 made by the Legal Practice Tribunal.

3. In lieu of those orders order that:

   (a) The appellant pay a penalty in the amount of $10,000 on or before 30 October 2008;

   (b) The appellant undertake and complete a course of study entitled "Professional Responsibility" LWB 433 at the Queensland University of Technology, or such other equivalent course as approved by the Director, Professional Standards of the Queensland Law Society, by 30 June 2009.

4. For a period of twelve months from the date of this order the appellant only engage in legal practice under the supervision of John Marshall Davies or another practitioner approved by the Director, Professional Standards of the Queensland Law Society;

5. The following conditions be imposed on any practising certificate granted or issued to the appellant under the *Legal Profession Act* 2007 (Qld) for a period of twelve months from the date of this order:

   (i) The practitioner is to engage in legal practice only under supervision as prescribed and authorised by the Director of Professional Standards, Queensland Law Society.

6. For a period of twelve months from the date of this order the appellant seek advice in relation to the management of his legal practice from Robert Phillip Howard Gunningham and Michael John Keogh, or other practitioner/s approved by the Director, Professional Standards of the Queensland Law Society, as to any ethical or professional matters upon which the appellant may consider he requires assistance.

7. That the respondent pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis.