SUPREME COURT OF QUEENSLAND

CITATION:	*Puryer v Legal Services Commissioner* [2012] QCA 300
PARTIES:	**TERENCE ROBERT PURYER** (appellant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO/S:	Appeal No 2131 of 2012 QCAT No 11 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	2 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2012
JUDGES:	Holmes and Gotterson JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the appellant was the subject of a discipline application under s 452 of the *Legal Profession Act* 2007 in the Queensland Civil and Administrative Tribunal – where the tribunal upheld charges that the appellant misled the Supreme Court and failed in his obligation of frankness and candour to the court – where the tribunal found that the appellant was guilty of professional misconduct – where the tribunal ordered that the appellant's name be removed from the roll of practitioners – whether the tribunal erred in considering whether the conduct was deliberate when the charges did not refer to deliberateness – whether the tribunal could properly find the charges made out when the statements made by the appellant to the court were literally correct – whether the charges concerned the same facts so that it was an abuse of process to proceed on both – whether the placing of material relevant to penalty before the tribunal before it had determined liability constituted an abuse of process – whether the tribunal's order that the name of the appellant be removed from the roll of practitioners was an excessive penalty

Legal Profession Act 2007 (Qld), s 418, s 452, s 456, s 468
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 28

A-G & Minister for Justice Qld v Priddle [2002] QCA 297, considered
Barnes v Australian Telecommunications Commission (1989) 25 FCR 283; [1989] FCA 47, cited
Battle v Bundagen Co-Operative Ltd (No 3) [2011] NSWCA 83, cited
Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors [1979] Ch 250, considered
Briginshaw v Briginshaw (1938) 60 CLR 336, [1938] ALR 334; [1938] HCA 34, cited
Legal Services Commissioner v Madden (No 2) [2009] 1 Qd R 149, [2008] QCA 301, considered
Legal Services Commissioner v Puryer [2012] QCAT 48, related
McClelland v Burning Palms Surf Life Saving Club (2002) 191 ALR 759, [2002] NSWSC 470, cited
O'Reilly v Law Society of New South Wales (1988) 24 NSWLR 204, cited
Puryer v Webb & Ors [2008] QCA 246, related
Rejfek v McElroy (1965) 112 CLR 517, [1966] ALR 270; [1965] HCA 46, cited
Rush v WA Amateur Football League (Inc) (2007) 35 WAR 101, [2007] WASCA 190, cited

COUNSEL: A Kimmins for the appellant
K Kelso for the respondent

SOLICITORS: Michael Coe Solicitor for the appellant
Legal Services Commission for the respondent

[1] **HOLMES JA:** The appellant was the subject of a discipline application under s 452 of the *Legal Profession Act* 2007, heard in the Queensland Civil and Administrative Tribunal. The tribunal upheld charges that on 13 December 2007 the appellant misled the Supreme Court and on the same date failed to meet his obligation of frankness and candour to the court. A further charge of misleading the court on that day was dismissed. On the basis of the charges made out, the tribunal concluded that the appellant was guilty of professional misconduct. It ordered that his name be removed from the roll of practitioners.

[2] The appellant has appealed against the tribunal's decision on the following grounds:

> "1. The Legal Practice Tribunal erred in considering whether the appellant acted deliberately in respect of the charges, in circumstances where the discipline application did not allege that such was done "dishonestly, that is that the appellant knowingly misled the court" or deliberately.
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> 2. The Legal Practice Tribunal erred in finding that the appellant acted deliberately.

3. The Legal Practice Tribunal erred in finding that the appellant caused Daubney J to be misled.

4. The Legal Practice Tribunal erred in finding that the appellant was guilty of professional misconduct as regard charge 3.

5. There has been an abuse of process in that the respondent proceeded upon charges 2 and 3 as individual and separate charges whereas they were either:-

   (a) duplicitous charges; or

   (b) alternative charges

6. There has been an abuse of process in that the respondent presented information as to the appellant's previous breaches to the Legal Practice Tribunal prior to the determination of whether the respondent had established the charges against him.

7. The order of the Legal Practice Tribunal ordering that the name of the appellant be removed from the roll was manifestly excessive."

The appeal is by way of a re-hearing on the evidence given before the tribunal.[1]

The appellant's litigation

[3] On 2 February 2006, the appellant and his then de facto partner, Ms Coombs, commenced a 12 month tenancy of a house property. The lease contained provision for renewal in these terms:

> "Each tenant may by notice in writing exercise an option to renew the lease for a further 12 months."

In mid 2006, the relationship of the appellant and Ms Coombs broke down. She left the house, indicating that she would not consent to any renewal of the lease. Instead, on 28 July 2006, she paid to the landlord's letting agent some $4,000, representing 40 per cent of the rental payable for the balance of the lease up to 2 February 2007, less her share of the bond. (Ms Coombs explained in an affidavit that when the lease was entered, she and the appellant agreed that she would pay 40 per cent of the rent and he, 60 per cent.) On the same day, without objection from the landlord, Ms Coombs obtained an order from the Small Claims Tribunal releasing her from her obligations under the lease.

[4] In August 2006, the appellant filed an application in the Supreme Court for judicial review of the Small Claims Tribunal decision, essentially on the ground that he had been denied natural justice because he had not been given notice of or permitted to take part in the relevant proceeding. The relief he sought in the application as filed was an order quashing the decision, remittal for reconsideration, any necessary directions and interlocutory relief to prevent the enforcement of the Small Claims Tribunal's order.

[5] In December 2006, the appellant presented Ms Coombs with a consent order and suggested that she sign it, explaining that if he succeeded in his application, the

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1 *Legal Profession Act* 2007 s 468(2).

matter would simply be remitted to the Small Claims Tribunal and she would not have to pay costs. The order initialled by Ms Coombs is in the record. So far as she is concerned, it provides, by paragraphs 1 and 2, for her to make disclosure and contains this paragraph:

> "4. Subject to paragraphs 1 and 2 hereof, each of the Third Respondent [Ms Coombs] and the Fourth Respondent [the letting agent] having undertaken to abide the order of the Court, is granted leave to withdraw from taking further part in the proceedings whilst preserving the right to be heard on the question of costs, should that issue arise."

The remaining paragraphs of the consent order concern the other respondents or contain standard provisions such as liberty to apply. Written amendments appear to have been made to it after Ms Coombs signed it, but they did not affect her.

[6] On 12 December 2007, the appellant emailed an amended application to Ms Coombs. It is not in the record, but it evidently sought additional relief reflected in a draft order which the appellant produced to the court next day when his application was heard. The order contained this paragraph:

> "The Third Respondent indemnify the Applicant against and pay to the Applicant one half of the [sic] each of the rent, outgoings and services paid or payable by the tenants and other obligations pursuant to the tenancy agreement dated 25th January 2006 and made between the Fourth Respondent of the first part and the Applicant and the Third Respondent of the second part in relation to the property situated at 19 Hawkesbury Crescent Wakerley AND pursuant to each renewal of the tenancy agreement pursuant to an option to renew."

(Whether such an order was proper or available in an application for judicial review was not an issue in these proceedings.) Ms Coombs did not see the amended application or an accompanying affidavit until the following day, too late to appear at the hearing. She had not previously been made aware by the appellant that he was seeking any new order; and indeed, the letter which he sent her with the amended application did not draw her attention to the significant alteration affecting her which it now contained.

The hearing before Daubney J and the resulting disciplinary charges

[7] On 13 December 2007, the appellant appeared for himself before Daubney J seeking to have the order made in terms of the amended application. He handed up a list of the material he relied on, which included two affidavits he had sworn. Among the material exhibited to those affidavits was correspondence from the letting agents referring to Ms Coombs' advance payment of rent. Daubney J inquired whether it had been made clear to Ms Coombs that the order for indemnity was sought. The appellant said that he had done so by way of the amended application, saying,

> "[T]hat amended application, I think, goes back to February."

[8] That statement was the subject of the first of the charges of misleading the Supreme Court. The particulars of the charge provided to the appellant gave a history of the application for judicial review and said that he had misled the court by stating that Ms Coombs had been given notice of the further amended application in February

2007 when he knew that was not the case. The tribunal dismissed that charge, concluding that the appellant's statement could be construed as meaning simply that the application had been amended in February 2007, rather than suggesting that the amended document had then been served on Ms Coombs.

[9] In the hearing before Daubney J, the appellant relied on his further affidavit served on Ms Coombs the previous day. In that affidavit, he made this assertion:

> "[T]he Third Respondent has not paid any contribution to rent, outgoings or other obligations under the tenancy agreement since 28th July 2006."

He did not in the affidavit make any mention of the fact that Ms Coombs had, on 28 July 2006, paid her share of the rental moneys up until the date of expiry of the existing lease, nor did he do so in oral submissions.

[10] That conduct was the subject of the second charge, which was "That on 13 December 2007, the respondent misled the Supreme Court of Queensland." The particulars of the second charge adopted the history of the application set out in the first charge and continued:

> "At the hearing of the matter on 13 December 2008, [the appellant] relied on an affidavit filed by him on 12 December 2007 which stated that "*the Third respondent has not paid any contribution to any rent outgoings or other obligations under the tenancy agreement since 28 July 2006*".
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> By relying on the contents of that affidavit [the appellant] misled the Court as he knew he was in receipt of a letter from the letting agent for the property, the subject of the residential tenancy agreement, which advised that Coombs had, on 28 July 2006 made a payment in advance of 40% of the rent for the balance of the tenancy term."

[11] The appellant's conduct before Daubney J also founded the third charge, that he failed in his obligation of candour to the court. It was particularised by repeating and relying on the facts of the first two charges and continuing:

> "At the hearing of the matter on 13 December 2007 [the appellant], in the course of the hearing of his application, failed in his obligation of frankness and candour to the court by not drawing the attention of the Judge to the letters from the letting agent advising of the payment in advance of the rent by Coombs, which letters were annexed to his affidavit filed on 12 December 2007."

The appellant was convicted of both the second and third charges.

[12] Daubney J made it plain that he had some concerns about the order, particularly the provision requiring the third respondent to indemnify the appellant for rent and other charges, and made it a further requirement of the order that it be served personally on Ms Coombs. Ms Coombs, once served, was not able to obtain the assistance of solicitors immediately, but in February 2008, on her application, Dutney J set aside the part of the order which obliged her to indemnify the appellant. The appellant appealed Dutney J's order to this Court. His appeal was dismissed and the court ordered that the papers be sent to the Legal Services Commissioner for his consideration. In October 2009, the Legal Services Commissioner filed a discipline application.

The hearing and determination of the discipline application

[13] The matter proceeded to a hearing on 4 May 2011. Orders had previously been made for the filing in advance of affidavits or statements of evidence and the exchange of submissions. The Legal Services Commissioner, the applicant at that point, had duly filed affidavits. The appellant did not file any material, but at the hearing he tendered order sheets from the Supreme Court file and a recording of the proceedings before Daubney J on 13 December 2007, which was played. The appellant did not adduce any further evidence, but did express reliance on a letter he had written to the Legal Services Commissioner on 23 January 2009 advancing arguments against the charges made against him. There was no cross-examination of the deponents of the affidavits filed.

[14] The tribunal, foreshadowing that it was likely to deliver its reasons and order in writing, made orders for the provision of written submissions. The Legal Services Commissioner's submissions were filed on 11 May 2011 and the appellant's (somewhat out of time) on 24 June 2011. At the same time, however, the appellant wrote to the tribunal and asked for leave to give sworn evidence, expressing his willingness to make himself available for cross-examination. On 29 July 2011, he filed a further affidavit which annexed his letter to the Legal Services Commissioner of 23 January 2009 and court order sheets; raised some minor matters in relation to the transcript of the hearing before Daubney J; and noted that he had handed up a list of material to be read in those proceedings. On 26 August 2011, the tribunal gave its decision on that application, refusing the request for a further oral hearing, but permitting the appellant to rely on his affidavit. It proceeded to determine the charges and delivered a written decision on 2 February 2012.

[15] The tribunal's findings in respect of the second and third charges were as follows:

> "[54] Mr Puryer always knew that, in truth, the co-tenant had paid 40% of the outgoings for the balance of the lease period. It is compelling, in the transcript of his answers to Daubney J's questions, that his failure to refer the Judge to the letter of 31 July 2006 was deliberate. That conclusion is strongly reinforced by his sworn evidence, in his affidavit filed 12 December 2007, that the co-tenant had *not* paid *any* contribution to rent, outgoings or other obligations.
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> [55] A finding that a party, lawyer or not, has deliberately misled a Court is a serious one. Nevertheless, these elements of the present case dictate that conclusion here. Just as it is inconceivable that Daubney J would have made his order had he known the facts, it is equally inconceivable that Mr Puryer could not have been aware of their relevance, and importance, in the relief he was seeking.
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> [56] The Tribunal is for these reasons satisfied that the second charge of misleading - the particulars of which are that Daubney J was misled about the co-tenant's actual contribution - are established, and aggravated by the additional circumstance that the misleading was deliberate.

> [57] Dutney J, in ordering costs on an indemnity basis against Mr Puryer, said that Daubney J '... *appears to have been misled into making the order and that notice in any appropriate time frame was not given to (the co-tenant) of any intention to seek such an order…*', and concluded that, for that reason alone, the order of Daubney J should be set aside. That is not, of course, an actual finding of misleading.
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> [58] As Dutney J went on to observe, however, the application before Daubney J had been made '... *in essence, ex parte'* and in those circumstances Mr Puryer had '... *an obligation of utmost good faith to the Court*'. That circumstance is particularly relevant when, as the Court of Appeal went on to observe, Mr Puryer was a lawyer, carrying a lawyer's obligation of candour to the Court.
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> [59] The finding, in respect of the third charge, that he failed to meet his obligations of frankness and candour to the Supreme Court follow, logically and inevitably, from the adverse finding against him in respect of the second charge." (Footnotes omitted.)[2]

Grounds 1 & 2 – Error in considering and in finding deliberateness

[16] The appellant submitted that in circumstances where the charge as framed and particularised did not make any reference to deliberateness, the tribunal's consideration and determination of whether his conduct was deliberate constituted both a denial of natural justice and an exceeding of its jurisdiction. Natural justice required that the appellant "be apprised in clear terms of the nature of the case which he [was] called upon to meet"; it was not sufficient for the nature of the case against him to emerge during the hearing.[3] The first suggestion of any such allegation appeared in the Legal Services Commissioner's submissions filed on 11 May 2011.

[17] In those submissions, the Legal Services Commissioner argued that if the tribunal were to find that the appellant acted dishonestly by knowingly or deliberately misleading the court, his conduct could only be categorised as professional misconduct. The appellant addressed that argument in his submissions filed on 24 June 2011, arguing that there was no direct evidence he had deliberately misled the court and contending that taking into account his submissions made in the letter of 23 January 2009, the tribunal should find, on the balance of probability, that he had not done so. In circumstances where the underlying events were not in dispute, the fact that the appellant had, and took, the opportunity to address the contention of deliberateness makes the argument that he was denied natural justice untenable.

[18] But it was not sufficient, the appellant argued, that he knew it was asserted the misleading was deliberate and had the opportunity to respond. Deliberateness had to be identified as an element of the misconduct in the charge. He relied on *Legal Services Commissioner v Madden*[4] as supporting his argument: there the discipline application had made no reference to dishonest or deliberate conduct and it was held

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2 *Legal Services Commissioner v Puryer* [2012] QCAT 48 at p10-11.

3 *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 224.

4 [2009] 1 Qd R 149; [2008] QCA 301.

that the tribunal exceeded its jurisdiction by embarking, in those circumstances, on a hearing to determine whether the appellant had acted dishonestly when engaging in the relevant conduct.

[19] But *Legal Services Commissioner v Madden* was a rather different case. The charges, as they stood, alleged that the respondent had acted without instructions from his client in personal injuries proceedings in respect of two applications by the defendant. A further charge was that he had overcharged his client by deducting fees for the two applications from the sum for which the proceedings eventually settled, when he knew or ought to have known he was not entitled to receive payment for them. The tribunal took the view that the charge should be amended to allege that the respondent had acted deceitfully in not informing his client of the applications and had deliberately debited his client for the costs of the first application when he knew he ought not to do so. The Commissioner declined to seek an amendment of the charge in those terms. When the hearing resumed, and the respondent cross-examined, it was not put to him that he had acted dishonestly. Although dishonesty was not alleged in the discipline application, the tribunal held, notwithstanding, that it was empowered to decide whether inferences of dishonesty should be drawn. It found that the respondent's conduct in concealing his negligence from his client, by not telling him what had actually occurred in relation to the applications, involved dishonesty.

[20] This court, hearing the appeal in *Madden*, noted that the dishonesty found by the tribunal related to the respondent's conduct of the applications without informing the client, not his charging of legal fees for them. In any event, the focus of the over-charging complaint was on incompetence and dilatoriness, while the agreed facts contained no reference to dishonesty, and no facts necessarily conveying dishonesty; consequently, that charge should not be construed as extending to dishonesty. There was no case of dishonesty made against the respondent in relation to his acting without instructions. The tribunal's jurisdiction was limited to hearing and determining the allegations in the discipline application. It exceeded that jurisdiction by embarking on a hearing to determine whether the appellant acted dishonestly; accordingly, the finding of dishonesty was set aside.

[21] The way the particulars of the second charge were framed in this case was quite different. They were, that the respondent misled the court by relying on the affidavit asserting that Ms Coombs had made no contribution to the rent since 28 July 2006, when he knew he had the letter advising of her advance payment. In an often-cited passage in *Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors*[5] (referred to in *Madden*[6]), Buckley LJ said this on the subject of pleading dishonesty:

> "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 LJ. 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

5 [1979] Ch 250.

6 [2009] 1 Qd R 149 at 168.

> 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."[7]

[22] It may be assumed that a deliberate misleading is a dishonest one, so as to make the strictures in *Belmont Finance Corporation* applicable here. But there was nothing complicated about the facts relied on for charge 2, and it clearly alleged a misleading statement made with knowledge of the facts which made the statement misleading. It left no room for any notion of inadvertence. As particularised, the charge could not have conveyed anything other than that the allegation was of deliberate conduct. Accordingly, the tribunal was entitled to consider whether any misleading was deliberate and to make a finding to that effect.

Grounds 3 & 4 – Errors in finding that the appellant caused Daubney J to be misled and in finding professional misconduct

[23] Counsel for the appellant adverted to the level of persuasion required before the tribunal could properly make findings of misleading the court and ultimately of professional misconduct:

> "[B]ecause of the grave nature of the charges there must be clear proof of the facts said to give rise to the misconduct to as to induce 'on a balance of probabilities, an actual persuasion of the mind as to [their] existence': *Rejfek v McElroy* (1965) 112 CLR 517 at 521 and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362".[8]

[24] It was submitted that the tribunal could not properly come to the conclusion that the appellant had misled Daubney J when the statement he made in his affidavit as to Ms Coombs' having made no contribution since 28 July 2006 was literally true. The tribunal, at paragraph 54 of its reasons, had said that the appellant's evidence was "that [Ms Coombs] had not paid any contribution to rent, outgoings or other obligations". That omitted the crucial part of what he had said; that she had not done so since 28 July 2006.

[25] Given the truth of the statement made, the appellant contended, the tribunal's finding should have accorded with this court's characterisation of his conduct in his appeal against the setting aside of Daubney J's order. Identifying grounds for an investigation by the Legal Services Commissioner, the court said this:

> "While it is not necessary for us, in order to dispose of this appeal, to come to a view as to whether Mr Puryer deliberately misled DaubneyJ, we must record our concern that, to say the least, Mr Puryer did not seem to understand that a lawyer's obligations of candour to the court, whose officer he is, are not discharged by leaving it to the court to plough through a bundle of papers in order to discover relevant material adverse to his case."[9]

Counsel argued that the only finding reasonably open, applying the *Briginshaw*[10] standard, was that suggested in the passage: that the appellant had failed, through

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7 [1979] Ch 250 at 268.

8 *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 220.

9 *Puryer v Webb & Ors* [2008] QCA 246 at [31].

10 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

ignorance, in his obligation of candour. He had simply not appreciated it was not enough to leave the court to look through the material before it to find anything adverse.

[26] I must say that I doubt that the court was, in fact, advancing any such possible finding as opposed to a wry understatement ("to say the least") of the significance of the appellant's conduct. But it does not matter for the purposes of this argument. The tribunal was not bound by what this court said on that appeal. The question is whether the tribunal erred in finding proved the charge that the appellant deliberately misled Daubney J.

[27] The submission that the tribunal mistook what the appellant had actually said in his affidavit ignores the very first of its findings:

> "In an affidavit that he prepared, swore and filed on 12 December 2007 Mr Puryer deposed that his co-tenant had not paid any contribution to rent, outgoings or other obligations under the tenancy agreement since 28 July 2006."[11]

And the literal correctness of what was deposed does not preclude the finding that the charge was made out. A statement may be misleading when made in a particular context without actually being false. The appellant made the statement in the affidavit in the context that he was seeking from the court an order that Ms Coombs pay to him half of the rent payable under the tenancy agreement: the very moneys she had already paid to the letting agents, as he knew. (The only possible issue was whether she was responsible for 40 per cent or 50 per cent of the rent.) The clear and only purpose of the statement was to induce the court to make the order by leading it to believe that Ms Coombs would not meet her obligations as a co-tenant to pay rent, when in fact she had already done so. In those circumstances, the obvious conclusion was that the appellant misled Daubney J and that he did so deliberately.

[28] The appellant maintained that the finding on charge 3 ought similarly to have gone no further than a conclusion that he had not understood his obligation of candour. Such a finding could sustain, at the highest, only a finding of unsatisfactory professional conduct; and in the circumstances of this case that result was not, in fact, available. Section 418 of the *Legal Profession Act* 2007 limits unsatisfactory professional conduct to "conduct … happening in connection with the practice of law". In this case, the appellant was appearing on his own account, not as a legal representative for another.

[29] For reasons similar to those discussed in relation to charge 2, the tribunal was entitled, given the context of what the appellant was seeking and the importance of what was not identified to the court, to regard the appellant's conduct as far more serious than a failure to appreciate what he should disclose. It was, as the tribunal observed, relevant that the appellant was a lawyer and the application was effectively made *ex parte*, giving rise to an obligation of good faith. Taking the view that the failure in the obligation of candour was not through ignorance but design, the tribunal properly found the third charge made out. The conclusion that the conduct particularised in both charges 2 and 3 amounted to professional misconduct was inevitable.

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[11] *Legal Services Commissioner v Puryer* [2012] QCAT 48 at p 8.

Ground 5 – Abuse of process: proceeding on both charges 2 and 3

[30] The appellant contended that it was an abuse of process for the respondent to proceed on both charges 2 and 3, because they relied on the same facts. That was apparent from the fact that the particulars of charge 3 expressly repeated and relied on the facts of charge 2. In paragraph 59 of its decision, the tribunal, it was contended, had effectively treated the charges as identical. Counsel conceded that the charges were not properly characterised as duplicitous, but argued that they were effectively alternative charges, both based on the appellant's omission to draw Daubney J's attention to the relevant annexure to his affidavits showing that the rent payment had been made by Ms Coombs. It was submitted that he could not lawfully be convicted of both charges.

[31] But there was a difference between the charges: charge 2 concerned the appellant's reliance on his affidavit asserting that Ms Coombs had not made any contribution since 28 July 2006, when he knew that she had paid her share on that date, while charge 3 concerned his failure to draw the judge's attention to the letting agent's document referring to that payment. The charges were based on distinct allegations of fact, all of which the tribunal found to be made out. The facts of one were relevant to the other because they provided context reinforcing the conclusion that the conduct was deliberate. For that reason, the particulars of charge 2 were properly adverted to as part of the particulars for charge 3, but the charges involved separate acts.

[32] At paragraph 57 of its reasons, the tribunal found that the particulars of the second charge, "that Daubney J was misled about the co-tenant's actual contribution", were made out. The tribunal then turned its attention to the gravamen of the third charge, the failure in the duty of candour in not drawing the court's attention to the adverse information. The tribunal's conclusion on that charge in paragraph 59, that it followed from the adverse findings in respect of the second charge, was not that the charges were identical, but that once the view was taken that the purpose of the appellant's conduct was to mislead the court, the only possible conclusion was that his action in not pointing out the document revealing Ms Coombs' payments was a failure to meet the obligation of frankness and candour (as opposed to some inadvertent oversight). I do not consider that any abuse of process has been made out in this respect.

Ground 6 – Abuse of process: placing material relevant to penalty before the tribunal

[33] The written submissions filed by the Legal Services Commissioner on 11 May 2011 dealt with penalty as well as the charges and gave details of findings of professional misconduct against the appellant on two earlier occasions. It was submitted that the only appropriate penalty was the removal of the appellant's name from the roll. The appellant, in response, said that there was no evidence of his previous breaches; that his antecedents were only relevant and should only be placed before the tribunal if an adverse finding were made; and that the paragraphs dealing with penalty were prejudicial and should be struck out.

[34] In oral submissions, the appellant's counsel conceded that he could not point to anything in the tribunal's reasons which showed that it had used the information about the appellant's previous breaches in considering whether the charges were made out. Indeed he rejected any suggestion that the deliberations of the judicial

member of the tribunal could have been affected by the material. He could not point to any prejudice to his client and did not put his submission any higher than that it would be good practice, where the tribunal consisted of lay members as well as a judicial member, to separate submissions about penalty from those about liability.

[35] Section 456(1) of the *Legal Profession Act* provides as follows:

> "**456 Decisions of tribunal about an Australian legal practitioner**
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> (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 has engaged in 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."

That section appears to envisage that the tribunal may make its order upon the necessary satisfaction without necessarily conducting any further hearing. Counsel for the appellant very properly drew the court's attention to the fact that in *Madden's* case the notion of a two-step proceeding was rejected; instead, it was said that s 456 "contemplate[d] a hearing followed by both the findings of any proved misconduct and the imposition of the appropriate penalty for that misconduct".[12] Generally speaking, it is not a denial of natural justice for a disciplinary body to receive submissions on both charge and penalty at the same time, provided the person charged has been given the opportunity to address on penalty should the question of guilt be resolved against him.[13] Here, the appellant had the opportunity - although he did not take it - to respond to the Legal Services Commissioner's submissions on penalty.

[36] The Queensland Civil and Administrative Tribunal is not bound by the rules of evidence or the practice or procedures of courts of record; it may inform itself in any way it considers appropriate; and it is required to act with as little formality and technicality with as much speed as the requirements of the Act in consideration of the matters before it permit.[14] Nonetheless, it must act on probative evidence, and there was no suggestion here that the previous breaches were relevant to the proof of the charges as, for example, similar fact evidence. But as counsel for the appellant conceded, there is no basis for supposing that the reference in the submissions to prior breaches affected the tribunal's deliberations on whether the appellant was guilty of the charges. He did not contend, in my view correctly, that what was done rose to the level of an abuse of process.

[37] However, as counsel for the appellant also submitted, the practice of putting in submissions on penalty in the same document as submissions on liability is generally undesirable. Apart from anything else, until it is known what charges

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12 *Legal Services Commissioner v Madden* [2009] 1 Qd R 149; [2008] QCA 301 at [90]-[91].

13 *Barnes v Australian Telecommunications Commission* (1989) 25 FCR 283 at 290; *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 at 792; *Rush v WA Amateur Football League* (2007) 35 WAR 101 at 116, 125; *Battle v Bundagen Co-Operative Ltd* [2011] NSWCA 83 at [66].

14 *Queensland Civil and Administrative Tribunal Act* 2009 s 28.

have been found proved it will usually be difficult to make useful submissions; and, if adverse material in relation to antecedents is not put forward as probative on liability, the risk exists of its having a prejudicial effect. One would think, in general, that unless there were some agreement to adopt a different approach, the better course would be to give each party an opportunity to make submissions once the findings on the charges were made.

Ground 7 – That the penalty was manifestly excessive

[38] The appellant submitted that the removal of his name from the roll was excessive having regard to the fact that the relevant jurisdiction was to protect the public, not to be punitive. It was relevant that he was acting in a private capacity; unusually in disciplinary proceedings, he was not holding himself out to the public as a lawyer or receiving remuneration in that capacity. The fact that the proceedings related to the ending of a personal relationship between him and Ms Coombs lessened the potence of any consideration of the public's need for protection from him. Any wrong suffered as a result of Daubney J's decision was soon after rectified, with the appellant having to pay indemnity costs. He had not sought a practising certificate and had not worked as a solicitor for a decade. An appropriate penalty would be an order precluding him from applying for a practising certificate for a fixed period of, say, 12 or 24 months.

[39] There is some force in the appellant's submission that his conduct did not occur in the course of practice as a legal practitioner. But it was undertaken with some calculation and for personal gain, and the fact that it occurred in the context of the breakdown of a personal relationship does not afford any great comfort on the question of protection of the public. The misleading of a court on what was, effectively, an *ex parte* application speaks strongly against the appellant's fitness to practise as a legal practitioner. And as counsel for the respondent pointed out, in *A-G & Minister for Justice Qld v Priddle*[15] this court observed that:

> "an order for suspension must be based on a finding that at the termination of the period of suspension the respondent will no longer be unfit to practise within the terms of the order".[16]

[40] The conclusion that the appellant's unfitness was not a short-term concern is reinforced by his previous episodes of professional misconduct. In 2001, six findings of professional misconduct or unprofessional conduct were made against him, relating to breaches of the *Trust Accounts Act* 1973; failing to comply with Law Society notices; undue delay and a failure to maintain reasonable standards of competence or diligence in the conduct of his practice; and making representations to the Law Society which were false or misleading. He was fined $30,000. In September 2002 he was suspended from practice for 12 months for professional misconduct and unprofessional conduct in respect of a failure to render a bill of costs, a failure to deliver documents held on behalf of a client to her, and two failures to comply with Law Society Council notices.

[41] In my view, the tribunal rightly concluded that the proper course for the protection of the public was the removal of the appellant's name from the roll of practitioners.

[42] I would dismiss the appeal with costs.

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15 [2002] QCA 297.

16 At [10].

[43] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.

[44] **NORTH J:** I have read the reasons of Holmes JA. I agree with the orders proposed by her Honour for the reasons given by her Honour.