IN THE SUPREME COURT OF THE)
) No. SC 566 of 2001
AUSTRALIAN CAPITAL TERRITORY)

In the matter of
The Legal Practitioners Act 1970

And in the matter of an application by THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY in relation to the conduct of BARRY JOSEPH ROCHE and CHRISTOPHER ROCHE

ADDENDUM

Coram:	Crispin, Higgins and Gray JJ
Date:	21 October 2002
Place:	Canberra

THE COURT ORDERS THAT:

1. By consent in Order 3(a) insert 60 as the number of days.

2. By consent amend Order 4:

   (a) (a) by deleting the words "in the amount of $200,000.00"; and

   (b) (b) after the words "pursuant to s 120(2))", inserting the words "such costs to be taxed if not agreed on a solicitor/client basis".

Associate to Justice Higgins
21 October 2002

IN THE MATTER OF *The Legal Practitioners Act 1970*
AND IN THE MATTER OF An Application by THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY in relation to the conduct of BARRY JOSEPH ROCHE and CHRISTOPHER ROCHE [2002] ACTSC 104 (21 October 2002)

CATCHWORDS

LEGAL PRACTITIONERS – solicitors – professional misconduct or conduct unbefitting barrister or solicitor – grossly excessive and unreasonable charging – blanket application of $250.00 fee per hour to all staff, however unskilled – charges of an additional 30% for care, skill and consideration including on secretarial work – imposition of 15% 'interest' or flat levy on disbursements – standard amounts charged without bona fide assessment in the individual case.

LEGAL PRACTITIONERS – solicitors – professional misconduct – improperly procuring clients to enter costs agreements that purported to authorise grossly excessive and unreasonable charging – duty of solicitors to warn a client of unusually expensive charges – need for oral advice to determine fairness of agreement – failure to advise clients of the true value of their indemnity against an adverse costs order.

LEGAL PRACTITIONERS – solicitors – discipline – professional misconduct or conduct unbefitting a barrister or solicitor – declaration of professional misconduct – suspension from practise for 18 months – significant mitigatory factor – compensation offered to clients overcharged by the solicitors.

Legal Practitioners Act 1970 (ACT) s 114, s 115, s 119, ss 179-187, s 190, s 191

Re Veron; Ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW) 136
Re Blyth & Fanshawe; Ex parte Wells (1882) 10 QBD 207
Law Society of the Australian Capital Territory v Lardner [1998] ACTSC 24 (9 April 1998)
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408

No. SC 566 of 2001

Coram: Crispin, Higgins and Gray JJ
Supreme Court of the ACT
Date: 21 October 2002

IN THE SUPREME COURT OF THE)
) No. SC 566 of 2001
AUSTRALIAN CAPITAL TERRITORY)

In the matter of
The Legal Practitioners Act 1970

And in the matter of an application by THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY in relation to the conduct of BARRY JOSEPH ROCHE and CHRISTOPHER ROCHE

O R D E R

Coram:	Crispin, Higgins and Gray JJ
Date:	21 October 2002
Place:	Canberra

THE COURT DECLARES THAT:

1. The respondents are guilty of professional misconduct as particularised in the particulars of complaint annexed to the Affidavit of A S Kidney sworn 23 August 2001.

THE COURT ORDERS THAT:

2. The respondents' right to practise in the Territory be suspended:
   (a) for a period of eighteen (18) months; and
   (b) (b) until such time as the respondents have complied with Orders 3 and 4 below.

3. The respondents:

   (a) within days pay to the Applicant the sum of $150,000.00, to establish a fund to be administered by the Applicant in its discretion to compensate persons (including but not limited to those referred to in the Lucas Report) who were clients of the Respondents during the period August 1998 to December 1999 and were charged costs under the form of Client Agreement referred to in these proceedings;

   (b) co-operate with the Applicant to facilitate the administration of the fund at the Applicant's discretion, including by providing contact details for the persons referred to in (a) and, if called upon so to do, their files and costs records in respect of those persons.

4. The respondents pay the applicants costs of these proceedings agreed and assessed in the amount of $200,000.00 (inclusive of the costs of the investigation payable pursuant to s 120(2)).

IN THE SUPREME COURT OF THE)
) No. SC 566 of 2001
AUSTRALIAN CAPITAL TERRITORY)

In the matter of
The Legal Practitioners Act 1970

And in the matter of an application by THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY in relation to the conduct of BARRY JOSEPH ROCHE and CHRISTOPHER ROCHE

Coram: Crispin, Higgins and Gray JJ

Date: 21 October 2002

Place: Canberra

REASONS FOR JUDGMENT

THE COURT:

1. 1. On 29 August 2001 The Law Society of the Australian Capital Territory (the Law Society) applied to this Court, by Notice of Motion, for orders that each of Barry Joseph Roche and Christopher Roche show cause why they should not be dealt with by the Court for "professional misconduct or conduct unbefitting a barrister and solicitor" and costs.

2. 2. The supporting affidavit was that of Anthony Summers Kidney, Professional Standards Director of the Law Society. The affidavit recited that the name of each of Mr Barry Roche and Mr Christopher Roche was entered on the Roll of Legal Practitioners (the Roll) on 22 April 1998. Each was issued with an unrestricted practising certificate on 6 August 1998.

3. 3. The solicitors, as they practised in the Territory, specialised in personal injury claims under the firm name of Watling Roche. Mr Christopher

Roche retired from legal practice on 1 October 1999, though he does not rule out a return to practice in the future.

4. 4. On 15 November 1999, the Council of the Law Society resolved, pursuant to s 114 *Legal Practitioners Act 1970* (ACT) (the LP Act), to appoint Eric Anthony Lucas, a solicitor, as an investigator of the affairs of the solicitors.

5. 5. Pursuant to s 119 of the LP Act, the investigator was charged with the duty, on completion of his investigations, of providing to the Council of the Law Society a written report on the investigation with a copy being provided to the solicitors.

6. 6. In June 2000, the investigator provided the report in three volumes. The third volume was a Bill of Costs prepared by Mr Ronald Travers, a legal costs consultant, at the investigator's request. He had been appointed an assistant to the investigator pursuant to s 115 of the LP Act.

7. 7. On 19 February 2001, the Council of the Law Society resolved to refer the conduct of the solicitors, as referred to in the investigator's report, to the Court for "such disciplinary action as the Court might think fit".

8. 8. It was pursuant to that resolution that the application of 29 August 2001 was made. The Law Society identified the matter and grounds of complaint in the following terms:

> *"The Council … complains that [the solicitors] are guilty of professional misconduct and/or unsatisfactory professional conduct, in that between about August 1998 and October 1999, being partners in and principals of the law firm Watling Roche ('the Firm'), they: -*
>
> *1. 1. charged the firm's clients, for professional costs, sums which were grossly excessive and unreasonable.*
>
> *Particulars*

(A) *The clients listed in the Report of Mr R Lucas were charged an effective hourly rate of $325 per hour in respect of work done by all staff members whether partners, employed solicitors, unqualified clerk [sic], or secretaries. Such a charge was grossly in excess of that which would be charged in similar circumstances by solicitors of good repute and competency and was extortionate.*

(B) *Some clients listed in the Report of Mr R Lucas were charged interest at a flat rate of 15% on 'disbursements' notwithstanding:*

(i) *(i) disbursements, as to File Establishment Costs and File Administration Costs were not paid out-of-pocket expenses by the Firm at all;*

(ii) *(ii) some disbursements were only paid by the Firm practically simultaneously with transfer from Trust of moneys in reimbursement for them;*

(iii) *(iii) in some cases money was held in trust yet disbursements were paid from the office account so as to activate a 15% interest charge payable to the Firm.*

Such charges were grossly in excess of that which would be charged in similar circumstances by solicitors of good repute and competency and were extortionate.

(C) *Some clients listed in the Report of Mr R Lucas were charged standard amounts for photocopying, faxes, printing and postage without there being any bona fide assessment for such expenditure in the individual case.*

(D) *Some clients listed in the Report of Mr R Lucas were charged standard amounts for work done from settlement to file closure without there being any bona fide assessment of the amount of such work in the individual case.*

(E) *Some clients listed in the Report of Mr R Lucas were routinely charged as a disbursement File Establishment Cost of $125 and File Administration Cost of $375 and some were further charged 15% interest on these amounts. These charges were made even in some circumstances where a claim was taken over from another firm, previously handling the matter, Scott Sheils & Glover.*

(F) In some cases where the Firm took over an existing file from Scott Sheils & Glover the client was charged an additional 30% by the Firm for care skill and consideration on the costs of Scott Sheils & Glover.

(G) Notwithstanding a Costs Agreement with the client providing for payment of a charge for care skill and consideration as a matter of discretion but not to exceed 30% of the Firm's professional costs, some clients were charged in excess of 30%.

(H) (H) In some workers compensation claims the Firm charged and deducted fees from agreed sums recovered in those proceedings in contravention of statutory provisions and without disclosing to the client what proportion of the overall costs charged related to the client's workers compensation claim and what proportion to any common law component of such a claim.

(I) (I) Charging clients amount for work performed by non legally qualified persons which would not be charged in similar circumstances by solicitors of good repute and competency and which was extortionate.

2. Improperly procured the firm's clients to enter into costs agreements with the Firm which purported to authorise the charging of costs which were grossly excessive and unreasonable.

Particulars

(A) The Costs Agreement provided for clients to be charged an effective hourly rate of $325 per hour in respect of work done by all staff members whether partners, employed solicitors, unqualified clerks, or secretaries. Such a charge was grossly in excess of that which would be charged in similar circumstances by solicitors of good repute and competency and was extortionate.

(B) The Costs Agreement provided for clients to be charged interest at a flat rate of 15% on "disbursements" notwithstanding that such disbursements were in the case of File Establishment Costs and File Administration Costs not paid out of pocket by the Firm at all, and in respect of other disbursements were only paid out of pocket by the Firm practically simultaneously with transfer from Trust of moneys in reimbursement for them. Such a charge was grossly in excess of that which would be charged in similar

circumstances by solicitors of good repute and competency and was extortionate.

(C) The Costs Agreement provided for clients to be charged standard amounts of photocopying, faxes and postage without there being any bona fide assessment of such expenditure in the individual case."

9. 9. Central to these allegations was the Firm's standard "Client Agreement" into which each client was expected to enter in order to retain the Firm's services to pursue their personal injury claims for damages or compensation.

10. 10. During the relevant period, the salient provisions were as follows:

"2. WE WILL ONLY CHARGE YOU ON A NO WIN-NO BILL BASIS.

That is – you will only be charged professional fees and costs at the conclusion of the matter and only if you have been successful, unless:

(a) (a) you fail to accept our advice or that of our Barristers;

(b) (b) our retainer is terminated prior to settlement or trial;

(c) (c) there has been non-disclosure by you of facts that are relevant to the claim;

in which event you acknowledge that we shall be entitled to render an Account to you for professional fees and costs, and/or terminate this retainer with you at any stage of the claim.

Definition of 'successful' – where your action or claim is resolved other than on the basis that the Court or Tribunal in which your action or claim is brought (or any Court or Tribunal to which your action or claim is transferred) gives a judgment dismissing your action or claim."

11. 11. It may be observed that the agreement does not expressly address the situation where monies recovered are insufficient to meet the costs which, pursuant to the Agreement, the solicitors could charge.

12. 12. However, there were provisions relating to adverse costs orders:

> *"4. IN THE EVENT THAT YOUR CLAIM IS NOT SUCCESSFUL, WE WILL PAY THE OTHER SIDE'S PARTY AND PARTY LEGAL FEES AND COSTS, provided you are not in default under this agreement."*

13. 13. It is possible that clause 5 was intended to address the case of an inadequate recovery:

> *"5. WE GUARANTEE THAT THERE WILL BE NO ADDITIONAL FEES AND COSTS CHARGED BY US* ***OTHER THAN*** *THOSE DEDUCTED FROM THE SETTLEMENT OR COURT AWARDED SUM AND CONSEQUENTLY NO FINANCIAL RISK TO YOU provided you are not in default under this agreement."*

14. 14. However, the primary thrust of the complaint arises out of clause 6:

> *"6. Scale of Fees – How Calculated*
>
> *Our professional fees will be calculated at the rate of $250.00 per hour for all work undertaken by us or any of our members on your behalf (including travelling and waiting time), calculated in 6 minute units. Each unit or part thereof is therefore charged at 1/10th of the hourly rate applicable.*
>
> *At our discretion, we will charge a fee for care, skill and consideration. This fee will vary according to the risks and financial burden assumed by us and/or the complexity of the case but will not exceed Thirty Percent (30%) of our professional fees.*
>
> *Should your claim take more than one (1) year to complete, we reserve the right to increase our hourly rate by Ten Percent (10%) each year during the period your claim is current."*

15. 15. There was no case noted in which the solicitors sought to apply the third paragraph of clause 6.

16. 16. The Law Society also pointed to the last paragraph of clause 7:

> *"In consideration of the fact that we are paying the costs on your behalf, you agree that interest is payable on these costs at the flat rate of 15% of the total costs (ie, legal expenses, disbursements and/or outlays incurred on your behalf as opposed to professional fees)."*

17. 17. It may be noted that this clause does not state that the "interest" is a flat levy of 15% whether or not disbursements had in fact been paid from the funds of the solicitors and irrespective of the period for which the disbursements were individually outstanding.

18. 18. A further unusual provision (clause 12) deals with disputes as to costs. Reserving the right to render "an account strictly in accordance with the Agreement even though it may be for a higher amount" may not be unreasonable where some voluntary discount has been previously offered and declined. It is, however, curious that the client is required to agree to bear the costs of any review of accounts rendered irrespective of the result of the review.

19. 19. Clause 14 is also curious. It provides:

> "*14. You irrevocably authorise us to destroy your file(s), other than those records required to be kept pursuant to the Legal Practitioners Act 1970, one (1) month after completion of your matter or closure of your file, whichever occurs sooner.*"

20. 20. Read literally, this authorises the destruction of the file before it is ready for closure if the matter (that is, the claim) has been completed.

21. 21. Even if not so read, it certainly would preclude a file being available for costing if the request was made for such costing more than three (3) months after the file had been closed.

22. 22. It is provided in clause 21(ii)(a) that the client acknowledges that he/she has been informed:

> *"… that you are entitled to seek independent legal advice in relation to this Agreement."*

23. 23. There is, however, no warning recorded that fees to be charged might well exceed, by a considerable margin, costs payable in the absence of such an

agreement nor that the 15% was not interest, as usually understood, but a levy at the flat rate of 15% and was an unusual charge.

24. 24. Of course, whilst "no win-no fee" promises are not unusual in personal injury claims, including the outlay by the solicitor of necessary disbursements, it was unusual for the solicitors to promise to pay out any adverse costs orders. Neither of those provisions is, of course, adverse to the client's interests nor in any way improper.

25. 25. The rights of solicitors to charge fees to their own clients in respect of legal work is governed not only by contract but also by statute. It is also limited by ethical rules breach of which may constitute professional misconduct.

The Statutory Provisions

26. 26. Under s 179 of the LP Act, a client (or former client) has a limited right to request "an itemised statement of the costs and disbursements" expressed as follows:

> *"(1) Subject to subsection (1A), a person who is liable to pay or, being so liable, has paid, a solicitor's costs or disbursements may request in writing the solicitor to give to the person an itemised statement of the costs and disbursements.*
>
> *(1A) A request under subsection (1) shall be made –*
>
> *(a) (a) in the case of a person who has not paid a solicitor's costs or disbursements – within 3 months after receiving a written account of those costs or disbursements; or*
>
> *(b) (b) in the case of a person who has paid a solicitor's costs or disbursements – within 3 months after paying those costs or disbursements; or*
>
> *(c) (c) within such further time as the registrar [of the Supreme Court] allows.*
>
> *(2) [not relevant]*

(3) Where -

(a) (a) a solicitor receives a request pursuant to subsection (1) from a person who has paid the costs and disbursements to which the request relates; and

(b) (b) the solicitor does not, within 3 months of the date of receiving the request or within such further time as the registrar allows, give to the person an itemised statement of the costs and disbursements;

the solicitor is liable to repay the amount of the costs and disbursements to the person.

(4) [not relevant]

(5) [not relevant]"

27. 27. In this case, the Client Agreement results in the solicitors being paid prior to any statement, itemised or otherwise, being delivered to the client. It should be stressed that, granted proper authority and informed consent, there is no ethical reason why payment should not be so received. Prior payment does not, however, adversely affect the client's right to request delivery of an itemised statement notwithstanding that prior payment.

28. 28. The consequences which follow the delivery of an itemised statement pursuant to s 179 of the LP Act vary according to whether there is or is not a valid fee agreement.

29. 29. If there is not, the client may request the registrar, and if s 180 of the LP Act is complied with as to time (one month extendable for cause), the registrar shall, after due notice to all parties, tax the statement and allow, by reference to any prescribed scale of costs or, if none, such sum as is fair and reasonable (see ss 180-187 LP Act).

30. 30. It is relevant to note that if the sum claimed is reduced by a sixth part or more, the solicitor is liable to pay the client's costs of the taxation (see s 184 LP Act).

31. 31. However, if there is an "agreement as to costs" the following provisions apply (s 190 LP Act):

> *"(1) [not relevant]*
>
> *(2) A solicitor may make an agreement with a person that the amount of the costs (excluding disbursements) payable, or to be payable, by the person to the solicitor for work of a professional nature already undertaken, or to be undertaken, for the person by the solicitor shall be the amount specified in, or ascertainable in accordance with, the agreement."*

32. 32. The agreement, to be valid, must be in writing and signed by the client (s 190(3) and (4) LP Act). The solicitor is then limited to recovery of the agreed sum (or a sum calculated according to the agreement) (s 190(5) LP Act).

33. 33. That is not an end to the matter. The Supreme Court is granted certain powers in respect of such agreements under s 191 of the LP Act:

> *"(1) Where, on an application by a person who has made an agreement with a solicitor under section 190, the court is satisfied that the agreement is not fair and reasonable, the court may, by order –*
>
> *(a) (a) direct that the amount payable under the agreement be reduced to an amount specified in the order; or*
>
> *(b) (b) declare that the agreement is not binding on the parties to the agreement.*
>
> *(2) Where, under subsection (1), the court directs that the amount payable under an agreement be reduced, the agreement is enforceable as if the amount specified in the order of the court were specified in the agreement as the amount payable under the agreement.*
>
> *(3) Where, under subsection (1), the court declares that an agreement is not binding on the parties to the agreement -*
>
> *(a) (a) the court may make such further orders as it thinks necessary to restore the parties to the agreement to the position in which they would have been if the agreement had not been made; and*

(b) (b) this Part (other than section 190) applies as if the agreement had not been made.

(4) [not relevant]"

34. 34. Thus s 190 and s 191 of the LP Act have the effect that a costs agreement is valid only insofar as it is "fair and reasonable".

35. 35. The ethical position sets a less onerous standard. Whether or not a costs agreement may be vulnerable as being "not fair and reasonable", it will evidence professional misconduct if the costs charged are "extortionate or grossly excessive". An agreement may not have been "fair and reasonable" but not so unfair or unreasonable as to be characterised as "extortionate or grossly excessive".

36. 36. In the matter of *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136, the court found that the solicitor had, as a matter of common practice in 65 files examined, charged fees which, in the opinion of experienced solicitors, were about five times more than a reasonable fee, even taking account of the usual levels of solicitor/client fees compared with recoverable costs (party/party costs). He also retained, without advice to the client, the sums received for party/party costs (where separately received).

37. 37. In personal injury cases, then as now, a plaintiff will typically recover by verdict or agree to accept by way of settlement, a sum for damages and a further sum for costs and disbursements. The latter sum represents that which would be or is an estimate of what would be, the sum awarded by a taxing officer as between the opposing parties (party/party costs). A taxation of costs to be charged as between the solicitor and his or her own client (solicitor/client costs) will, in the absence of a costs agreement, be assessed on the Supreme

Court scale but on a more generous basis and inclusive of costs for work done at the client's request (express or implied) even if the same are not recoverable against the opposing party. In *Veron's* case, the evidence of experienced solicitors indicated the difference attributable to "solicitor/client" costs would typically result in an additional sum of up to 35%. The sum so allowable, whether greater or less than that, is not an arbitrary figure, but is required to be a genuine assessment of the additional work or additional value of the work done.

38. 38. In the case of alleged overcharging, the Court of Appeal in *Veron* (supra) noted at 142:

> *"The Court does not sit as taxing officers dealing with individual items of costs. Nor is such an approach realistic in the present circumstances. We are guided by experience and a broad sense of what is reasonable and fair and not by any narrow approach to questions of mere overcharging."*

39. 39. In determining that the amounts charged by the solicitor were grossly excessive, despite client authority to retain the sum charged, the Court noted at 145:

> *"The amount specified in the authority appears to have been fixed arbitrarily, very commonly at £1,000 or an amount in that vicinity, and without reference to the work involved in the action … the clients from whom these authorities were taken were for the most part people of little or no business experience, or experience of litigation or its costs, and reliant in this, as in other matters concerning the litigation, upon the guidance of their solicitor."*

40. 40. There were thus two main vices attending the overcharging engaged in by Mr Veron. Not only were the charges grossly excessive, they were also arbitrary when compared with the work actually done and the degree of difficulty of it. It was also perpetrated in respect of clients who could not be

expected to exercise informed judgment about, nor give informed consent to, the proposed charges.

41. 41. Nor was it any answer to the complaint that the clients' expectations as to the sums they would receive were fulfilled. It is true that, in *Veron's* case, unlike the present, the solicitor had added to the egregious nature of his over-charging by assuming that party/party costs recovered from the defendant were his to retain as well as the lump sum deduction he made for "solicitor/client" costs. That compounded the unethical nature of his conduct. The same matter of aggravation is not alleged here. These solicitors fully accounted to their clients for the monies they received, retained and expended.

42. 42. Nor was it in dispute that it was proper and in the public interest, for the solicitor to offer to act on a "no win, no fee" basis for persons with an arguable case. It would be unjust if only such persons who could afford solicitor's fees and/or could fund disbursements and/or were able to accept the financial risk of an adverse outcome if (possibly) successful defendant(s) claimed costs, should have access to the courts. The indemnity against an adverse costs order, absent fault of the solicitor, is unusual but it is in no way improper. Indeed, it is arguable that the greater the risk of irrecoverable expenses undertaken by the solicitors, the more careful they would be to ensure that claims which were pursued were properly arguable.

43. 43. However, those matters whilst they may, up to a point, add to the care, skill and attention devoted to matters generally, cannot be used as an excuse to extort unreasonably high amounts of money from clients.

44. 44. It is timely to remind solicitors of the duty a solicitor has to warn a client of unusually expensive charges. Although *Re Blyth and Fanshawe; Ex*

parte Wells (1882) 10 QBD 207 was concerned with unusual disbursements, it applies also to unusual charges (see also *Law Society of the Australian Capital Territory v Lardner* [1998] ACTSC 24 (9 April 1998)).

45. 45. The features, not only of the Client Agreement, but also of the manner in which it was applied by the solicitors and the members of their firm which gave rise to concern, were expressed by Mr Lucas in his report as follows:

> *"(1) in clause 6 [of the Agreement it is provided] that 'Our professional fees will be calculated at the rate of $250.00 per hour for all work undertaken by us or any members on your behalf (including travelling and waiting time), calculated in 6 minute units'. Watling Roche have applied this rate to all staff, including clerks and secretaries, and to work such as typing;*
>
> *(2) in clause 6 that 'At our discretion, we will charge a fee for care, skill and consideration. This fee will vary according to the risks and financial burden assumed by us and/or the complexity of the case but will not exceed thirty percent (30%) of our professional fees'. In most cases I examined Watling Roche charged the full 30%, including on secretarial work. In many cases Watling Roche used an internal document which required those estimating professional costs to give 'Reasons if less than 30%';*
>
> *(3) in clause 7, for File Establishment Costs of $125.00 and File Administration Costs of $375.00, and Printing costs at $1 per page;*
>
> *(4) in clause 7, in consideration of the fact Watling Roche was paying certain costs on the client's behalf 'you agree that interest is payable on these costs at the flat rate of 15% of the total costs (ie. legal expenses, disbursements and/or outlays incurred on your behalf as opposed to professional fees)'."*

46. 46. Mr Lucas was not able to determine whether the Client Agreement and the solicitors' interpretation and application of it was fully and accurately explained to all clients but noted that:

> *"There were many clients who were not given oral advice, so that the issue of fairness in their cases must be determined on*

the basis of the Client Agreement alone, taking into account the client's own circumstances."

47. 47. We would interpolate here that it is highly unlikely that the blanket application of both the $250.00 per hour fee to all staff, however unskilled, and the 30% uplift to all such fees, unless the contrary was justified to the solicitors (or one of them), let alone the imposition of "interest" on all disbursements, whether incurred or not by the firm and irrespective, if incurred, of the period the firm bore the burden of those outlays, could have been properly explained. No person, if they understood those imposts and were made aware of the availability of legal services elsewhere on more modest terms, is likely to have accepted them.

48. 48. Most of the initial clients of Watling Roche's ACT office had been clients of Scott Sheils & Glover, a firm of solicitors with a large personal injury practice. The personal injury practice of that firm was taken over by Watling Roche and the former firm urged those clients to agree to the transfer of their instructions to Watling Roche. It was not alleged that the terms in which inducements and representations were offered by Scott Sheils & Glover for them to do so were the responsibility of the solicitors. However, in at least one case, the solicitors actively endorsed those inducements.

49. 49. There had been interest charges levied on disbursements for numerous cases, Mr Lucas found. Those charges were levied irrespective of the immediate availability of funds out of settlements to pay those disbursements. As already noted, it was a flat levy. It was misleading to describe it as "interest" if it had been intended to be a levy.

50. 50. In many cases, there had been a "Settlement Checklist Sheet" on which, pre-printed, there were estimates of charges for $250.00 for

photocopying, $150.00 for faxes and $100.00 for postage. Whilst the purpose of these "Sheets" was for the proper purpose of giving to clients a definite minimum estimate of the return to the clients from a proposed settlement of a verdict after payment by the clients of the costs and disbursements which might come to be properly chargeable. In many cases, with the apparent approval of the solicitors, clients were charged the pre-estimated amounts without any attempt at a bona fide estimate as to whether such expenses had actually been incurred.

51. 51. The same "Sheet" included an estimate of "WIP" (work in progress) to file closure. This was estimated at $2,000.00, later that estimate became $2,500.00. In a number of cases that pre-estimated charge was levied even though less than eight hours work was done. Again, there had been no apparent assessment of the actual work done to justify levying the charge.

52. 52. The more general complaint was that of overcharging generally.

53. 53. An illustration of it, a typical one, albeit an egregious example, was one client file examined by Mr Ron Travers, legal costs consultant. In that case, Mr Barry Roche had personally directed that the client be charged, not only the 30% surcharge for "care and consideration", (that is, $4,353.00) but over 35% (that is, $5,115.00). The file in question showed that the total charged by the solicitors for the work they did was $19,626.00. In Mr Travers' opinion, a reasonable charge, based on the Supreme Court scale, would have been $3,196.35.

54. 54. Such a comparison leads ineluctably to the conclusion that the system of charging followed by the solicitors led to clients being grossly overcharged. Even if the $250.00 per hour charge might be justified – Scott Sheils & Glover

had charged for work done by principals at $262.50 per hour but much lesser rates for less skilled and non-professional staff producing, in Mr Travers' view, a reasonable result – it is impossible, however, to justify a blanket 30% uplift for care, skill and attention – a resultant $325.00 per hour. Even if, in a particular case, a charge of $325.00 per hour could be justified for the work of a highly skilled professional lawyer, applying that rate to **all** staff, professional or not, is simply outrageous. The aroma of greed represented by that practice was compounded by the standard charges for items usually comprehended within the overhead component of an hourly time costing rate for solicitors and clerical staff. It comes as no surprise to note, as Mr Lucas did, that where a time cost charge produced an uneven result, it was always (at least on those files he inspected) rounded up to the advantage of the firm.

55. 55. Not all overcharging will amount to professional misconduct. Nor, as already noted will all fee agreements entered into, if found not to be fair and reasonable, constitute professional misconduct.

56. 56. The Court of Appeal in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 made some observations concerning time costing and fee agreements.

57. 57. Kirby P (as then he was) stated, at 422-423:

> *"Litigants look to this Court, ultimately, to protect them from over-charging by legal practitioners where this is so high as to constitute professional wrongdoing. The courts of other Australian jurisdictions have begun to deal determinedly with gross over-charging by legal practitioners where this is proved to amount to professional misconduct: see eg,* Cornall v AB (a Solicitor) *(Supreme Court of Victoria, Appeal Division 24 June 1994, unreported) [now reported at [1995] 1 VR 372]. No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety. Time charges*

> *have a distinct potential to result in overcharging: cf* New South Wales Crime Commission v Fleming & Heal *(1991) 24 NSWLR 116 at 126-127. I depart from this case with a real sense of disquiet that what may arguably be the most serious issue revealed by it may not have been fully considered in a way protective of the true standards of the legal profession and the legitimate expectations of the community. The alteration by an individual solicitor of documents governing charges represents a serious professional wrong. But what lay behind it? The defence of charges which are by any account enormous and tend to put the courts and their constitutional function beyond the reach of ordinary citizens."*

58. 58. The emphasis is on two matters, the vulnerability of the client and the fiduciary duty of the solicitor towards his or her client.

59. 59. Mahoney JA in *Foreman* (supra) stressed that a fee agreement was no different from any other commercial dealing a solicitor has with his or her own client. They impose fiduciary obligations on the solicitor. At 435-436, his Honour said:

> *"Such obligations ordinarily or at least frequently involve: that the client, because of independent advice or otherwise, be seen not to have entered into the agreement in reliance upon her relationship with or trust of the solicitor; that there be full and frank disclosure to the client of all information known to the solicitor which the client should know … if there be aspects of the contract in respect of which the solicitor may be in a position of advantage vis-à-vis the client, those matters be brought by her to the attention of the client so that the client can decide whether she should enter into the contract …. The making of a special agreement in respect of costs is, in my opinion, essentially no different in principle from an agreement by the solicitor to sell property or services to her client."*

60. 60. His Honour went on to emphasise the need for "careful explanation" of such agreements. This is especially necessary in the context of time costing which, effectively, at 436:

> *"… allows the solicitor to engage others to work in the litigation on a time basis and so to increase greatly the benefit to the solicitor and the burden on the client."*

61. 61. It is, at 437:

> *"… likely to involve a conflict between the solicitor's duty and his interest … the solicitor may determine how much time is to be spent on the client's litigation and by whom …. The temptation may exist to spend … time for which costs would not otherwise be billed or to engage on it staff whose time could or would not be used elsewhere in the firm."*

62. 62. That obligation is not lessened because, as here, the solicitors have agreed to charge no fees if the litigation is not successful, nor because they have agreed to fund the litigation by paying such disbursements as they could not arrange to be deferred. (Typically, some disbursements, for example counsel's fees, were, by agreement with the service providers, able to be deferred.)

63. 63. All monies obtained, whether on account of the client's claim for damages or for costs, belong to that client. To take more than is reasonable for costs is, in effect, to misappropriate monies belonging to the client and intended to compensate him or her for the injury and other losses the subject of the client's claim.

64. 64. Such clients will, usually, be particularly vulnerable and reliant on their solicitor to explain unusual terms, to fully and frankly advise them of the relative level of the fees they propose to charge and to take from the proceeds of their compensation or damages claims no more than that which is fair and reasonable. To take more, without independent advice and, thus, informed consent, is no better than theft.

65. 65. That is not to say that it may not be reasonable to charge a fee more than the Supreme Court Scale or to claim interest at reasonable rates on outlays that a client could otherwise be expected to fund. Nor is it unreasonable to use a time costing method to assess fees.

66. 66. It is noteworthy that, at least in the Adams' matter (one of the files examined by Mr Lucas and by Mr Travers), even relative to the Supreme Court Scale, the Client Agreement used by Scott Sheils & Glover produced, in Mr Travers' opinion, a reasonable result.

67. 67. The practice of the solicitors in relation to their Client Agreement was, as they now concede, unreasonable and unfair. It was more than that. It was extortionate. They have cheated and, effectively, defrauded their clients of many thousands of dollars intended for their compensation. They have preferred their own interests to those of vulnerable and disadvantaged clients. They made no effort to inform clients that other solicitors would act for them with comparable skill and on a "no win, no fee" basis and charge them considerably less. They failed to advise clients of the true value of their indemnity against an adverse costs order. That indemnity would only rarely, if ever, be called upon. In common with other solicitors of good repute, the solicitors made it clear to the court that they would only pursue claims that had reasonable prospects for success. The solicitors were further protected by the provision of clause 2 in the Client Agreement (not unreasonably) that the client agrees to give full and frank instructions. If he or she did not, then the indemnity (and "no fee" provision) would not apply. They also failed to advise that a solicitor may, in any event, be liable to indemnify a client if the solicitor negligently places that client in a position of financial disadvantage or wastes time and costs.

68. 68. We have no doubt that these solicitors are guilty of gross overcharging. That was their habitual practice. It was not an isolated

instance. It follows that they were, each of them, guilty of professional misconduct, a finding they no longer contest.

The Solicitor's Explanations

Christopher Roche

69. 69. This solicitor was admitted to practice in Queensland on 24 February 1986. His name was entered on the Roll of Legal Practitioners in this Territory on 22 April 1998. An unrestricted practising certificate was issued on 6 August 1998 and renewed on 5 July 1999. On 21 October 1999, he advised the Law Society that he had retired from practice with effect from 1 October 1999. His name remains on the Roll.

70. 70. He gave evidence in the matter. He agreed that the firm screened potential claims weekly to ensure that only claims likely to be successful were accepted.

71. 71. He acknowledged that all time spent on a matter – even by a secretary – was to be charged out at $250.00 per hour. This was described as a "blended rate". The very description acknowledged implicitly that the rate, as applied to the work of unqualified staff, would result in an unfair and unreasonably excessive charge. It appeared that whether in consequence of that or not, most work charged out in most matters was performed by junior solicitors and unqualified staff.

72. 72. The choice of the "blended rate of $250 per hour" would itself have resulted in a gross overcharge given that circumstance. It also provided the solicitors with an incentive to favour that form of practice, that is, performance of works by the least qualified and least remunerated, possibly to the detriment

of clients. It should be said that there is no evidence that any such detriment in fact occurred.

73. 73. However, there was more. Even those fees were subjected to the 30% "uplift" for "care, skill and consideration". The Client Agreement would lead a reader of it to assume that the uplift would be selectively applied to work that warranted legal skills of an order above and beyond the usual.

74. 74. Mr Christopher Roche sought to explain the routine application of the "uplift" to all matters, however routine, and all staff, however qualified, by saying that he had not realised it had been applied "across the board".

75. 75. We have difficulty accepting this assertion. It was obvious from any perusal of any detailed statement prepared and from their own records that the $325.00 per hour rate was being applied "across the board". At the very least the solicitors were grossly neglectful of their obligations to review their own and their subordinates billing practices.

76. 76. It was suggested by Mr Christopher Roche that this neglect, which he only belatedly acknowledged (defending it up until at least 13 October 2000), was "inappropriate".

Mr Barry Roche

77. 77. Mr Barry Roche was next. He had been admitted to practice in Queensland on 14 December 1989, in Tasmania on 16 March 1998 and in this Territory on 22 April 1998. He was also issued with an unrestricted practising certificate on 6 August 1998. It was renewed on 5 July 1999.

78. 78. He acknowledged that his firm's charging practices had been "incorrect". He agreed that there should have been a differential rate for solicitors and support staff. It was also "inappropriate", he conceded, to

charge interest on funds not advanced. He was even prepared to accept that it was "grossly inappropriate" and "morally unsustainable".

79. 79. He also claimed to have been unaware of the fact that the fees the firm had retained had been grossly excessive. His firm, had, however, as he acknowledged, been so advised by some barristers who had been briefed on behalf of some clients. He, also, was, at the least, grossly careless of the interests of his clients, preferring his firm's desire for profit to the proper interests of those clients.

The Submissions of Counsel

80. 80. Mr Brereton SC, for the Law Society, made reference to the established principles underlying disciplinary proceedings which he cited from the judgment of Giles A-JA in *Foreman* (supra) at 470G – 471C:

> *"The jurisdiction of the Tribunal and of this Court in disciplinary matters is exercised to protect the public, not to punish the solicitor. The object of protection of the public may require that a legal practitioner be removed from the roll, be suspended from practice, or only be permitted to practise under particular circumstances, where the practitioner is not fit to be held out to be entrusted, at all, for a time, or without qualification, with the heavy responsibilities attendant upon the office. The public is protected by ensuring that those unfit to practise do not continue to hold themselves out as fit to practise. But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them. And the public, and professional colleagues who practise in the public interest, must be able to repose confidence in legal practitioners, so an element in deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with."*

81. 81. He submitted that professional misconduct was established and, indeed, conceded by the solicitors.

82. 82. The solicitors had, in consequence of their acceptance that they had been guilty of professional misconduct, indicated consent to a number of proposed orders. They invited the court to:

> *"1. Declare that the respondents are guilty of professional misconduct as particularised in the particulars of complaint annexed to the Affidavit of A J [sic] Kidney sworn 23 August 2001.*
>
> *2. Order that the respondents' right to practise in the Territory be suspended:*
>
> *(a) (a) for a period of twelve (12) months; and*
>
> *(b) (b) until such time as the respondents have complied with Order 4 below and their undertaking contained in paragraph 3 below.*
>
> *3. Note that the respondents undertake to the Court:-*
>
> *(a) that they will within days pay to the Applicant the sum of $150,000.00, to establish a fund to be administered by the Applicant in its discretion to compensate persons (including but not limited to those referred to in the Lucas Report) who were clients of the Respondents during the period August 1998 to December 1999 and were charged costs under the form of Client Agreement referred to in these proceedings;*
>
> *(b) that they will cooperate with the Applicant to facilitate the administration of the fund at the Applicant's discretion, including by providing contact details for the persons referred to in (a) and, if called upon so to do, their files and costs records in respect of those persons.*
>
> *4. Order that the respondents pay the applicants costs of these proceedings agreed and assessed in the amount of $200,000.00 (inclusive of the costs of the investigation payable pursuant to s.120(2)).*"

83. 83. Mr Brereton conceded that the solicitors had offered a measure of restitution, had submitted to Law Society advice and, as a result, adopted a more satisfactory form of Client Agreement. They appeared to have

acknowledged their past errors. He also accepted that the solicitors had undertaken a greater than usual burden in offering a "no win, no fee" service and an indemnity against an adverse costs order, although they did, he submitted, somewhat exaggerate the degree of risk they thereby assumed.

84. 84. In summary, Mr Brereton, whilst acknowledging that the penalty to be applied to the solicitors was for the Court to decide, whatever the parties might have agreed upon, submitted that:

> *"… the court is entitled, though not bound, to conclude that these gentlemen are not permanently unfit, and that a suspension would meet the justice of the case. But the Society's position is that anything less than a suspension for a period of 12 months would not be of sufficient general deterrence to the profession as a whole to mark out the serious consequences for which overcharging will be attended by."*

85. 85. Mr Harrison SC acknowledged his clients' fault, pointed out that their initially pugnacious defence had been abandoned in January 2002, bespeaking, he submitted, an acknowledgement of their past misconduct.

86. 86. Expressly, he acknowledged the vice in the so-called "blended rate". He pointed out that there had been no suggestion that clients had been ill-served (save in the obvious respect that they had been overcharged).

87. 87. In summary, Mr Harrison submitted that the proposed orders sufficiently responded to the misconduct in which the solicitors had engaged.

The Court's Response

88. 88. In general terms, we agree with the submissions of counsel, save in one respect. We accept that the compensation offered to clients overcharged by the solicitors is a significant mitigatory factor. It acknowledges that the solicitors have some, albeit belated, realisation that they have behaved disgracefully in exploiting their clients as they did.

89. 89. The one respect in which we do not concur is in the length of suspension from practice which the solicitors should serve. We do recognise that over-lengthy suspension is not appropriate. We also recognise that these solicitors' misconduct was not as egregious as the misconduct of the solicitor in *Foreman*. It was, however, an exercise in calculated greed, depriving vulnerable injured persons of many thousands of dollars. It exposes the legal profession to disrepute and it must not be thought that such conduct is to be tolerated.

90. 90. In all the circumstances we would make the orders proposed but amend 2(a) to impose a period of 18 months suspension on the solicitors. We will hear the parties as to ancillary orders and directions.

I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Date: 18 October 2002

Counsel for the applicant:	Mr P Brereton SC with Mr G Stretton
Solicitor for the applicant:	Phelps Reid
Counsel for the respondent:	Mr I G Harrison SC
Solicitor for the respondent:	Meyer Clapham
Date of hearing:	15 and 16 July 2002
Date of judgment:	21 October 2002