SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Voll* [2008] QCA 293
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant/appellant) **v** **PAUL MICHAEL VOLL** (respondent/respondent)
FILE NO/S:	Appeal No 2015 of 2008 LPT No 1426 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Legal Practice Tribunal at Brisbane
DELIVERED ON:	26 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2008
JUDGES:	Keane JA, Wilson and Dutney JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – MISLEADING THE COURT AND PERVERTING THE COURSE OF JUSTICE – where respondent's clients did not appear at hearing before Queensland Building Tribunal – where QBT made orders in clients' absence – where respondent had given clients inadequate advice of hearing dates – whether the respondent lied to the QBT about clients' absence PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – Where Legal Practice Tribunal found respondent guilty of professional misconduct but not presently unfit to practise – where LPT reprimanded respondent and imposed fine – whether LPT's orders were adequate to protect the public and maintain confidence in the profession – where the LPT rejected evidence given by the respondent – where LPT treated rejection of evidence as reflecting on respondent's credibility – whether rejection of evidence was an aggravating factor in determination of appropriate disciplinary orders – distinction between rejection of evidence and finding that

respondent lied to LPT – procedural fairness – whether LPT erred in not finding there was potential benefit to respondent in his lying to QBT – relevance of respondent's subsequent conduct and changes in his practice – whether LPT erred in finding that respondent had subsequently refined his practice – whether Court of Appeal should allow evidence of respondent's conduct in relation to the appeal – whether such evidence could be considered in relation to adequacy of disciplinary orders – procedural fairness

Legal Profession Act 2007 (Qld), s 6(2), s 37, s 419, s 452, s 456(1), s 468, s 599(1), s 746(1)(p), s 718(2)
Legal Profession Act 2004 (Qld), s 245, s 250(1), s 276
Acts Interpretation Act 1954 (Qld), s 20(2)(c), s 20(2)(e), s 20(3)

A-G of Hong Kong v Wong [1987] AC 501, referred to
Attorney-General v Bax [1999] 2 Qd R 9; [1998] QCA 89, cited
Council of the Queensland Law Society Inc v Wakeling [2004] QCA 42, referred to
Goldsmith v Sandilands (2002) 190 ALR 370; [2002] HCA 31, referred to
Incorporated Law Institute of New South Wales v Meagher (1909) 9 CLR 655; [1909] HCA 87, cited
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408, cited
Legal Services Commissioner v Baker (No 2) [2006] 2 Qd R 249; [2006] QCA 145, cited
Legal Services Commissioner v Mullins [2006] LPT 012, referred to
O'Reilly v Law Society of New South Wales (1988) 24 NSWLR 204, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, referred to
R v Smerdon [1996] QCA 444, referred to
Smith v NSW Bar Association (1992) 176 CLR 256; [1992] HCA 36, considered and applied
The Council of the Qld Law Society Inc v Wright [2001] QCA 58, referred to
Waterways Authority v Fitzgibbon (2005) 221 ALR 402; [2005] HCA 57, referred to

COUNSEL: B W Farr SC and B I McMillan for the applicant
B D O'Donnell QC and F H Martin for the respondent

SOLICITORS: Legal Services Commission for the applicant
Sawford Voll Lawyers for the respondent

[1] **KEANE JA**: I have had the advantage of reading in draft the reasons for judgment prepared by Wilson J. I agree with her Honour's reasons and the order proposed by her Honour.

[2] **WILSON J**: Paul Michael Voll ("the respondent") was admitted to practise as a solicitor in November 1996. In February 2007 the Legal Services Commissioner ("the appellant") took disciplinary action against him in the Legal Practice Tribunal ("the LPT"), which found him guilty of professional misconduct, and ordered that he be publicly reprimanded and pay a penalty of $20,000 and costs. The appellant has appealed against the orders of the LPT, contending that the respondent's name ought to be removed from the local roll.[1]

The statutory framework

[3] The respondent is a "local legal practitioner" within the meaning of the *Legal Profession Act* 2007 ("the 2007 Act").[2]

[4] The proceeding was commenced by a discipline application made under s 276 of the *Legal Profession Act* 2004 ("the repealed legislation") filed on 20 February 2007. It related to conduct between June 2001 and June 2003.

[5] Relevant provisions of the repealed legislation came into operation on 1 July 2004. Chapter 3, *Complaints, investigation matters and discipline*, applied to conduct of someone, such as the respondent, happening in Queensland whether before or after that date.[3] The 2007 Act came into force on 1 July 2007, before the discipline application was heard and determined. The LPT continued in existence,[4] and the discipline application was taken to have been made under s 452 of the 2007 Act.[5]

[6] "Professional misconduct" is defined in s 419 of the 2007 Act as follows –

> "**419 Meaning of *professional misconduct***
>
> (1) *Professional misconduct* includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
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> (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the

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1 The Supreme Court keeps the local roll pursuant to s 37 of the *Legal Profession Act* 2007.
2 *Legal Profession Act* 2007, s 6(2).
3 *Legal Profession Act* 2004, s 250(1).
4 *Legal Profession Act* 2007, s 599(1).
5 *Legal Profession Act* 2007, s 746(1)(p) and s 718(2). See also *Acts Interpretation Act* 1954, s 20 (2)(c), (2)(e) and (3).

> legal profession under this Act or for the grant or renewal of a local practising certificate".[6]

[7] Where the LPT is satisfied that a practitioner is guilty of unsatisfactory professional conduct or professional misconduct, it may make any order it thinks fit,[7] including one or more of a large, but non-exhaustive, list of possible orders contained in the legislation. The LPT's jurisdiction is protective, not punitive, in nature.[8] As McPherson JA said in relation to the repealed legislation in *Legal Services Commissioner v Baker (No 2)*[9] –

> "It is … accepted that the sanction for violation is not intended to punish but is designed for the protection of the public and to maintain confidence in the profession in the estimation of the public and of the profession as a whole.[10]"

[8] An appeal from the LPT to the Court of Appeal may be made under s 468 of the 2007 Act:

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

Background

[9] The respondent practised as a sole practitioner from a small office in Brisbane with two employees.[11]

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6 A similar definition was contained in s 245 of the repealed legislation.

7 *Legal Profession Act* 2007, s 456(1).

8 *Smith v NSW Bar Association* (1992) 176 CLR 256 at 270 per Deane J.

9 [2006] 2 Qd R 249 at 267.

10 Cf. *Attorney-General v Bax* [1999] 2 Qd R 9 per Shepherdson J, 23.

11 Affidavit of Paul Michael Voll sworn and filed 30 November 2007, document no. 12 on LPT file BS 1426/07, para 58.

[10] Between June 2001 and June 2003 he acted for Mr and Mrs Leise in a claim against MGA Building Systems Pty Ltd in the Queensland Building Tribunal ("the QBT") at Bundaberg.

[11] Mr and Mrs Leise lived at Agnes Waters, which is approximately 85 km north of Bundaberg. They also had a house in Sydney. The LPT observed that Mr Leise was obviously a difficult client: he was unwilling to sign a client agreement, and he did not make payments due to the respondent in a timely way.[12]

[12] The proceedings in the QBT were listed for hearing in Bundaberg several times – in May 2002, July 2002 and from 11 - 13 September 2002. By letter of 25 July 2002 the QBT advised that the hearing dates had been vacated, and on 6 September 2002 it advised the respondent of new hearing dates on 23, 24 and 25 September 2002.

[13] Mr and Mrs Leise did not attend the hearing before the QBT and on 26 September 2002 the QBT ordered that their claim be dismissed and that they pay the builder $38,398.50 plus interest less $8,686.50.

The Charges

[14] The first charge against the respondent was of neglect and incompetence and lack of candour with his clients between June 2001 and June 2003. The second was that he lied to the QBT on 23 September 2002.

[15] The LPT found the charges proved. It found that the respondent's conduct amounted to professional misconduct, which was plainly unacceptable, but that it did not demonstrate an unfitness to practise.[13]

The facts

[16] On 21 August 2002 Mr Leise faxed the respondent inquiring whether the then current hearing dates were still current.

[17] On 6 September 2002 the respondent wrote to Mr Leise advising him of the new dates, enclosing a client agreement for execution and return (as well as other documents), and asking him to pay $10,000 into his trust account to cover his fees for the hearing. The letter was sent by post from Brisbane to Agnes Waters: the postal service usually took 2 - 4 days.

[18] On 9 September 2002 the respondent telephoned Mr Leise, when he may have confirmed the hearing dates.[14]

[19] Very early on the morning of 10 September 2002, Mr Leise sent the respondent a facsimile message. He said that he had not received the letter and asked that it be faxed. He advised that he and his wife would be unavailable between 12 September and 2 October 2002, and that he would like to know what was going on before going to Sydney.

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12 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [26] per de Jersey CJ; Appeal Record Book, p 147.

13 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [65] per de Jersey CJ; Appeal Record Book, p 156.

14 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [19] per de Jersey CJ; Appeal Record Book, p 145.

[20] The respondent posted Mr and Mrs Leise a letter on 10 September 2002 enclosing a copy of the letter of 6 September 2002 and its attachments.[15] He reminded them that they would be required to appear at the hearing in Bundaberg on 23 September 2002, and told them that no further adjournments would be tolerated by the QBT.[16]

[21] On 12 September 2002 Mr and Mrs Leise left Agnes Waters for Sydney. Mr Leise had probably received the letter of 6 September 2002 before they left, but had not read it carefully.[17] They left without having received the respondent's letter of 10 September 2002.[18]

[22] The respondent appeared in the QBT on 23 September 2002. Mr and Mrs Leise were in Sydney. When the matter was called on at 10.00 am, the QBT waited for the respondent to contact Mr Leise.[19] He called Mr Leise's mobile phone at 10.06 am, and spoke with him for 4 minutes 17 seconds.[20] Mr Leise said he did not realise the hearing was on, because he had not received any notification.[21] The respondent demanded that he return to Bundaberg as soon as possible, despite Mr Leise claiming that it was "impossible".[22] The respondent believed Mr Leise would accede to his demand.[23] The LPT noted the respondent's evidence that he believed Mr Leise was trying to avoid being cross-examined.[24]

[23] The respondent returned to the QBT, where the following exchange occurred between him and Ms McVeigh, the QBT Member:[25]

> "Voll ...the second problem is that the applicant himself is actually stranded in Sydney at this present moment waiting to get on his flight so as such the applicant is unable to actually commence its investigation at this stage because they're basically the only two witnesses that will be called by the applicant and because of the narrow issue that have been defined (sic).
>
> McVeigh Why is he in Sydney?

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15 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [22] per de Jersey CJ; Appeal Record Book, p 146.

16 Affidavit of Paul Michael Voll sworn 17 September 2007, filed 21 September 2007, document no. 7 on LPT file BS 1426/07, exh 103.

17 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [18] and [20] per de Jersey CJ; Appeal Record Book, p 145.

18 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [23] per de Jersey CJ; Appeal Record Book, p 146.

19 Transcript of Proceedings on 4 December 2007, p 49: Appeal Record Book, p 55.

20 Transcript of Proceedings on 4 December 2007, p 3: Appeal Record Book, p 9.

21 Ibid; *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [45] per de Jersey CJ: Appeal Record Book, p 152.

22 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [43], [45] and [46] per de Jersey CJ; Appeal Record Book, pp 151-152.

23 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [52] and [63] per de Jersey CJ; Appeal Record Book, pp 153 and 156.

24 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [25] and [26] per de Jersey CJ; Appeal Record Book, pp 146-147; Transcript of Proceedings on 4 December 2007, pp 46-47: Appeal Record Book, pp 52-53.

25 Discipline Application filed on 20 February 2008, para 2.2: Appeal Record Book, p 4.

> Voll — He has a house in Sydney, he was endeavouring to get back this morning and has been delayed. I spoke to him briefly on mobile phone just shortly when I was chasing him up.
>
> McVeigh — Right, yes, so what's his ETA or his doesn't even know? (sic)
>
> Voll — He should be here by lunch time".

After the matter was stood down, there was a further conversation between the respondent and Mr Leise commencing at 10.52 am and lasting 3 minutes 55 seconds.[26]

[24] Subsequently Mr Leise instructed the respondent to make an application to set aside the orders of 26 September 2002.[27] That application was filed on 14 October 2002 and dismissed on 23 December 2002.

Adverse findings

[25] The respondent gave evidence that he telephoned Mr Leise on 10 September 2002 after receiving his fax. The LPT rejected that evidence; it said[28] –

> "The finding that that conversation did not occur reflects seriously on the respondent's credibility."

[26] It found that he did not take adequate steps to ensure Mr Leise was fully aware of the hearing date appointed by the QBT. It said[29] –

> "…following any notification of hearing dates communicated by or on 9 September, the respondent received Mr Leise's fax of 10 September in which Mr Leise advised that he and his wife would be unavailable between 12 September and 2 October (being in Sydney). By that fax, if the notification on or before 9 September had occurred, Mr Leise betrayed that he had not comprehended the information he had been given. That should have alerted the respondent to the need immediately to give an unequivocally clear notification of the hearing dates to Mr Leise. That was not done prior to the departure of Mr Leise for Sydney, hence the conclusion the respondent did not give adequate notification of the hearing dates to Mr Leise".

As Senior Counsel for the respondent submitted, that came down to a mistake in mailing, rather than faxing, the letter of 10 September 2002.[30]

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26 Transcript of Proceedings on 4 December 2007, p 3: Appeal Record Book, p 9.

27 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [38] per de Jersey CJ; Appeal Record Book, p 149; Transcript of Proceedings on 5 December 2007, p 63: Appeal Record Book, p 69.

28 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [24] per de Jersey CJ; Appeal Record Book, p 146.

29 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [33] per de Jersey CJ; Appeal Record Book, p 148.

30 Transcript of Proceedings on 4 December 2007, p 644: Appeal Record Book, p 50.

[27] The LPT found that the respondent dishonestly misled the QBT.[31] After setting out what Mr Leise had in fact told the respondent,[32] it said[33] –

> "Yet the respondent told the Tribunal that Mr Leise had been 'stranded' in Sydney - which was in real terms not the case, because he was there voluntarily and intentionally; that Mr Leise was 'waiting to get on a flight in Sydney', suggesting he was at the airport - not so, because Mr Leise was elsewhere when the respondent spoke to him at 10.06 am; that Mr Leise was 'endeavouring to get back this morning and has been delayed' - there was nothing in what Mr Leise had said to the respondent, directly to support those claims; and that Mr Leise 'should be here by lunchtime' - yet Mr Leise had told the respondent it was 'impossible' that he be there. Mr Leise had been silent in the face of the respondent's demands over the telephone in that regard.
>
> On the evidence both of the respondent and Mr Leise, the respondent strongly insisted Mr Leise do all he could to get back to Bundaberg as soon as possible. It was in the nature of a demand from his solicitor. Notwithstanding Mr Leise earlier saying it was 'impossible', the respondent said he derived comfort from Mr Leise's remaining silent following the respondent's ultimate demand".

[28] While the LPT accepted that the respondent believed Mr Leise would do as he had insisted and make every effort to come to Bundaberg and prosecute his claim,[34] it found that he had no reasonable basis, and knew he had none, for saying that Mr Leise was "at this present moment waiting to get on his flight", that he was "endeavouring to get back this morning" and that "he should be here by lunch time".[35] Later it referred to the respondent's performance before the QBT as "overstatement borne of misplaced faith in his client" which was nevertheless dishonest.[36]

[29] As the LPT said, the ramifications of this misleading conduct were substantial:[37]

> "The end result was orders that large amounts be paid by Mr and Mrs Leise. The respondent should have informed the Building Tribunal that he had spoken with Mr Leise who was in Sydney and unaware the matter was to proceed that day. The Tribunal may well then have adjourned the matter, given the seriousness of proceeding in

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31 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [53] per de Jersey CJ; Appeal Record Book, p 154.

32 See above text, [22].

33 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [46]-[47] per de Jersey CJ; Appeal Record Book, p 152.

34 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [52] per de Jersey CJ; Appeal Record Book, p 153.

35 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [49] per de Jersey CJ; Appeal Record Book, 152-153.

36 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [63] per de Jersey CJ; Appeal Record Book, p 156.

37 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [50]-[51] per de Jersey CJ; Appeal Record Book, p 153.

> circumstances where Mr Leise would not have the opportunity to give evidence.
>
> By not giving the Building Tribunal accurate information in relation to Mr Leise's non-attendance, the respondent denied the Tribunal the opportunity to make a properly informed decision about the course it should follow. What the respondent did affected, in that way, the administration of justice".

[30] The LPT went on[38] –

> "The respondent believed Mr Leise would do as he had insisted, and make every effort to come at once to Bundaberg to prosecute his $150,000 claim. When the respondent approached the Building Tribunal, he was in a state of panic and anxiety. Yet the position remains that he misled the Tribunal. On the other hand, there was no potential benefit to him personally in proceeding as he did. Further, in terms of what orders the Tribunal should now make, these events occurred some years ago, and the respondent has substantially refined his practice since".

[31] The LPT found that the respondent failed to give Mr Leise a full and candid explanation for the orders made on 26 September 2002: he should have explained the problem fully and invited him to retain other solicitors, but he did not do so.[39]

[32] The LPT found that the respondent had also failed to inform Mr Leise of a costs order made on a directions hearing in June 2002.[40] However, this was not the subject of any charge against the respondent, and the appellant did not rely on it on appeal.

Investigation and disciplinary proceedings

[33] The Queensland Law Society launched an investigation into the respondent's conduct, but, as the LPT observed, he did not willingly co-operate with the investigation and the investigator had to resort to statutory notices to unearth information.[41] On 6 April 2004 the Solicitors Complaints Tribunal found him guilty of four counts of failing to comply with such notices, and fined him $5,000.[42]

[34] In the period 2004-2005 the respondent was dilatory in matters of audit in relation to his trust account. His conduct did not involve dishonesty. In that regard on

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38 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [52] per de Jersey CJ; Appeal Record Book, p 153.

39 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [38] per de Jersey CJ; Appeal Record Book, pp 149-150.

40 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [39] per de Jersey CJ; Appeal Record Book, p 150.

41 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [54] per de Jersey CJ; Appeal Record Book, p 154.

42 Solicitors Complaints Tribunal decision, Annexure 2 to Applicant's Outline of Submissions on LPT file 1426/07; Appeal Record Book, p 154. It was accepted on appeal that those disciplinary proceedings related to failure to comply with statutory notices in the investigation of the very conduct with which the LPT subsequently dealt: Transcript of Proceedings on 5 December 2007, p 87: Appeal Record Book, p 93.

26 March 2007 the Legal Practice Committee found him guilty of unsatisfactory conduct in the administration of his trust account and publicly reprimanded him.[43]

Appellant's submissions on appeal

[35] In support of his contention that the respondent's name should be removed from the local roll, counsel for the appellant made three principal submissions:

(a) that the respondent's conduct was aggravated by his dishonest evidence before the LPT that he had telephoned Mr Leise on 10 September 2002 after receiving his fax, which demonstrated lack of insight, dishonesty and failure to learn from his mistakes;

(b) that the finding that there was no potential benefit to the respondent in misleading the QBT could not be sustained; and

(c) that the respondent's conduct since September 2002 showed that he had not learnt from his mistakes.

Rejection of evidence

[36] The LPT's rejection of the respondent's evidence that he telephoned Mr Leise on 10 September 2002 after receiving his fax was made only after careful consideration of the evidence. He did not expressly refer to the call in the explanation he gave the Queensland Law Society in April 2005,[44] mentioning it for the first time in his second affidavit which was sworn on 30 November 2007.[45] He did not produce a diary note or a telephone company record of it,[46] in contrast to the call on 9 September 2002.[47] During the hearing it was made clear to him that it was suggested that he had fabricated the evidence realising that he had made a mistake in not faxing his response to Mr Leise's fax of 10 September 2002.[48] He was given the opportunity to provide corroborating evidence within the 28 days following the hearing but did not do so.[49]

[37] The LPT observed that its finding that the conversation did not occur "reflect[ed] seriously on the respondent's credibility".[50]

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43 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [55] per de Jersey CJ; Appeal Record Book, p 154; Legal Practice Committee decision, Annexure 1 to Applicant's Outline of Submissions on LPT file 1426/07.

44 Cited in *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [43] per de Jersey CJ; Appeal Record Book, p 151.

45 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [24] per de Jersey CJ; Appeal Record Book, p 146; Affidavit of Paul Michael Voll sworn and filed 30 November 2007, document no. 12 on LPT file BS 1426/07, para 23.

46 Ibid.

47 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [19] per de Jersey CJ; Appeal Record Book, p 145.

48 Transcript of Proceedings on 5 December 2007, pp 79-80; Appeal Record Book pp 79-80.

49 Transcript of Order on 5 December 2007 per de Jersey CJ; *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [36] per de Jersey CJ; Appeal Record Book, p 149.

50 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [24] per de Jersey CJ; Appeal Record Book, p 146.

[38] Counsel for the appellant submitted that the LPT found that the respondent was deliberately untruthful with it, but then paid insufficient regard to that finding in considering the orders it should make for the protection of the community. They submitted that the respondent's dishonesty before the LPT demonstrated a lack of insight and a lack of remorse.

[39] Counsel for the respondent submitted –

(a) that the LPT's finding did not go beyond a mere rejection of the respondent's evidence, as opposed to a finding that he deliberately lied;

(b) that there was evidence of insight and remorse, even though these were not addressed directly in the LPT's reasons;

(c) that for the LPT to use a finding that the respondent was deliberately untruthful before it as a basis for ordering that his name be removed from the local roll without first putting him on notice of that possible outcome would have involved a denial of natural justice.

[40] In ordinary usage, "credible" means believable or worthy of belief or confidence.[51] The expression "credibility" has been used in different ways in the cases and by academic writers. Sometimes a distinction is drawn between the credibility or credit of a witness and the credibility or reliability of the evidence he or she gives[52] - in other words, a distinction is drawn between attributes of the witness and the worth of his or her evidence. Sometimes the credibility of a witness is treated as including both honesty and reliability.[53] Sometimes the credibility of evidence is treated as a separate concept from its reliability.[54] These matters of definition extend to whether there is a difference between "credibility" and "credit".[55]

[41] It is tolerably clear from the LPT's choice of words ("reflects seriously on the respondent's credibility") that it was referring to an attribute or attributes of the respondent.[56] But it stopped short of making a positive finding that he had deliberately lied to it. In *Smith v NSW Bar Association*[57] Brennan, Dawson, Toohey and Gaudron JJ said[58] -

> "There is a difference between the rejection of a person's evidence and a finding that he or she deliberately lied. … [A]s a matter of

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51 *The Australian Pocket Oxford Dictionary* (Oxford University Press, 4th ed., 1996), p 246; *The Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press, 3rd ed., 1973), p 452.

52 *Palmer v The Queen* (1998) 193 CLR 1 at [56] per McHugh J; *Goldsmith v Sandilands* (2002) 190 ALR 370 at [32] per McHugh J; *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 at [134] per Hayne J.

53 For example, *R v Smerdon* [1996] QCA 444 at 16 per Dowsett J with whom Davies and Pincus JJA agreed.

54 For example, *AG of Hong Kong v Wong Muk Ping* [1987] AC 501 at 510 per Lord Bridge of Harwich. See also *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 at [102] per Kirby and Heydon JJ.

55 See the discussion in Harold H Glass (ed.), *Seminars on Evidence* (Law Book Company Limited, 1970), pp 166–168.

56 See above text, [37].

57 (1992) 176 CLR 256.

58 (1992) 176 CLR 256 at 268.

> logic and common sense, something more than mere rejection of a person's evidence is necessary before there can be a positive finding that he or she deliberately lied in the giving of that evidence.
>
> It is particularly important in disciplinary cases, where the honesty and candour of legal practitioners assume special significance, that the distinction between the rejection of a person's evidence and a positive finding that he or she deliberately lied be observed. The mere rejection of evidence can neither justify a consequence over and above that which properly attaches to the matter charged, nor deprive the person of the benefit of personal considerations which might otherwise be taken into account".

In an appropriate case, provided the requirements of procedural fairness are met, a finding that a legal practitioner deliberately lied to a disciplinary tribunal may warrant the removal of his name from the relevant roll.[59] Yet as Clarke JA said in *O'Reilly v Law Society of NSW*[60]-

> "care must be taken in reaching a conclusion that the solicitor has lied or deceived the tribunal… It goes without saying that a tribunal needs to be satisfied to that degree of persuasion which is necessary to satisfy the *Briginshaw* test before it can properly make a finding that a solicitor has lied or deliberately deceived the tribunal".

[42] What is important in this appeal is the use to which the rejection of the respondent's evidence that he had a telephone conversation with Mr Leise on 10 September 2002 might have legitimately been put.

[43] In *Smith v New South Wales Bar Association*[61] disciplinary proceedings were instituted against a barrister in the NSW Court of Appeal. The barrister had appeared for a defendant in an assault case before a Local Court, and when his retainer had been challenged by his opponent, he had told the magistrate that he was instructed by a firm of solicitors which he named. The case was stood down for a short time, and during the adjournment he was, in fact, briefed by a member of the firm. In the disciplinary proceedings he was charged with having sought to appear without the intervention of an instructing solicitor and not believing in the truth of his statement to the magistrate that he was instructed by the firm. The Court of Appeal (Mahoney and Meagher JJA, Samuels JA dissenting) found that he lied to the magistrate and to it in relation to a critical conversation with the member of the firm; it found him guilty of professional misconduct in that he did not believe on reasonable grounds that he was instructed to appear, and disbarred him. Before the order was entered, the barrister asked the Court of Appeal to reopen the matter and sought leave to present further evidence of the solicitor. The Court of Appeal allowed the matter to be reopened, but refused to receive the further evidence, and dismissed the application that its earlier order be set aside.

[44] The barrister appealed to the High Court, which allowed the appeal and set aside the Court of Appeal's order that the barrister's name be removed from the roll of

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59 (1992) 176 CLR 256 at 274–275 per Deane J; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 208 per Kirby P and 230 per Clarke JA.

60 (1988) 24 NSWLR 204 at 230.

61 (1992) 176 CLR 256.

barristers. The matter was remitted to the Court of Appeal for rehearing by a differently constituted Court.

[45] The High Court was satisfied that the Court of Appeal had proceeded on the basis of a positive finding that the barrister had deliberately lied, and that it had not accorded him procedural fairness. Deane J identified two relevant requirements of procedural fairness – that the allegations against the practitioner be specifically identified and that the practitioner be afforded an appropriate opportunity of being heard in relation to them.[62] There was no attempt before the Court of Appeal to amend the particulars of the charge to include a specific complaint that he had deliberately given false evidence before that Court, and he was not given an opportunity to be heard as to whether the finding should be made. His Honour concluded[63] -

> "In those circumstances, the members of the Court of Appeal were not entitled to make an adverse order against the appellant which was wholly or partly based on a finding that the appellant was guilty of professional misconduct in that he had deliberately given false evidence before them."

Brennan, Dawson, Toohey and Gaudron JJ reached the same conclusion, saying[64] -

> "But even if the evidence was sufficient to support the findings so made and even if that finding could properly be taken into account in determining the result, considerations of procedural fairness required that the appellant be given an opportunity to be heard as to whether the finding should be made.[65] In the first hearing before the Court of Appeal, no allegation of deliberately lying was made against the appellant before the adverse finding was made. That being so, the finding then made that the appellant had lied and the consequence of that finding then determined by Mahoney and Meagher JJ.A. that the appellant be disbarred were flawed".

[46] In this case the LPT properly confined the consequence of its finding that the telephone conversation on 10 September 2002 did not occur to the credibility of the respondent. It was open to it to use the rejection of that evidence in the assessment of other evidence, but not as itself a factor supporting an order that the respondent's name be removed from the local roll. The LPT did not err in the manner suggested by counsel for the appellant.

[47] As counsel for the respondent submitted, there was evidence of insight and remorse. The respondent accepted that the letter of 10 September 2002 should have been faxed rather than posted; he accepted that some of what he said to the QBT was misleading; and he regretted and was embarrassed by his statements to the QBT.[66]

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62 (1992) 176 CLR 256 at 270.

63 (1992) 176 CLR 256 at 271.

64 (1992) 176 CLR 256 at 269.

65 See, in relation to disciplinary proceedings against a solicitor, *O'Reilly v Law Society of NSW* (1988) 24 NSWLR, at p 231.

66 Transcript of proceedings on 4 December 2007, pp 44 and 58; Appeal Record Book, pp 50 and 64; Second Affidavit of Paul Michael Voll, sworn and filed on 30 November 2007, document no. 12 on file BS1426/07, paras 31, 33.

Potential benefit to the respondent

[48] The LPT found that the respondent dishonestly misled the QBT, but that there was no potential benefit to him personally in doing so.[67] When he approached the QBT he was in a state of panic and anxiety.[68] In other words, his misleading the QBT was not premeditated, but an isolated occurrence in extreme circumstances.

[49] Counsel for the appellant submitted –

(a) that the LPT erred in not finding that there was a potential benefit to the respondent, namely the concealment of his own inadequacy in telling his clients about the new hearing dates; and

(b) that that was an aggravating feature which was overlooked by the LPT.

[50] The LPT's finding of lack of potential benefit was open on the evidence. As counsel for the respondent submitted, it was made after hearing extensive cross-examination of the respondent and oral evidence of Mr Leise, and was based on its assessment of the credibility of each. It has not been demonstrated that the LPT misused its advantage, or that the finding was "glaringly improbable", or "contrary to compelling inferences" or "contrary to incontrovertible facts or uncontested testimony".[69] There was no error by the LPT which undermines its finding.

[51] The respondent was not charged with preferring his own interests to those of his clients, and the LPT was not asked to find that he did so.[70] Consistently with decision in *Smith v NSW Bar Association,*[71] if this were to be alleged and relied on as a basis for the removal of his name from the local roll, the allegation would have to be squarely put to him, probably by an amendment of the charges, and he would have to be given notice of the use to which an adverse finding might be put.

Conduct after September 2002

[52] The LPT noted the respondent's failure to co-operate with the Queensland Law Society investigation into his conduct the subject of the charges, and the other disciplinary proceedings taken against him. While acknowledging the force of the LPT's observation that those matters did not involve dishonesty, counsel for the appellant submitted that they showed a preparedness to flout important rules and regulations.

[53] The LPT's finding that the respondent has substantially refined his practice since the events of September 2002 was open to it, given the passage of time and the evidence that he was no longer a sole practitioner but instead a partner in a firm where there were nine qualified solicitors and 30 staff in all, and more carefully regulated office procedures, including a computerised practice management system,

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67 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [52] per de Jersey CJ; Appeal Record Book, p 153.

68 Ibid; Second Affidavit of Paul Michael Voll, sworn and filed on 30 November 2007, document no. 12 on file BS1426/07, para 32.

69 Outline of submissions for the respondent, filed 11 August 2008, p 10; *Fox v Percy* (2003) 214 CLR 118 at [26]–[29].

70 Transcript of proceedings on 5 December 2007, p 85; Appeal Record Book, p 91.

71 *Smith v NSW Bar Association* (1992) 176 CLR 256 at 269 per Brennan, Dawson, Toohey and Gaudron JJ and 274-275 per Deane J.

and supervision of legal practitioners' work.[72] These changes in internal office procedures may have made the recurrence of defaults such as those in the conduct of Mr and Mrs Leise's claim unlikely, which was the issue before the LPT.

[54] Yet it is not at all clear that these changes have reduced the potential for default in responding to Queensland Law Society requirements, and as Keane JA observed during the hearing of the appeal, there is a common thread running through all of the complaints against the respondent - namely, a disregard for his obligations as a solicitor.[73]

[55] That disregard is starkly illustrated by the respondent's behaviour in relation to this appeal – a matter on which the appellant sought to rely to upset the finding that things have improved since 2002.

[56] The notice of appeal was filed on 6 March 2008. The appellant's outline of argument was lodged on 3 April 2008 and served on the respondent on 10 April 2008. The respondent's outline of argument was not lodged until 25 June 2008 after a Deputy Registrar had written to him on three separate occasions seeking his outline of submissions and extending the deadline.

[57] Meanwhile, by letter dated 19 May 2008, the Senior Deputy Registrar had advised both parties that the appeal had been listed for hearing on 1 August 2008. When it was called on that day, there was no appearance by or on behalf of the respondent. The Court went to considerable trouble to contact him. He then appeared by telephone from his Melbourne office. He told the Court that there had been "several extensions in respect of the supply of material, and unfortunately I just assumed that because of those extensions that there would be a further date issued".[74] He said, "I was going to appear in person…" and that he was not prepared for the hearing of the appeal.[75] He apologised to the Court. The hearing of the appeal was adjourned to 6 August 2008, and he was ordered to pay the appellant's costs of and incidental to the adjournment on the indemnity basis.

[58] In subsequent correspondence the respondent told the appellant that he wished to be represented by Mr O'Donnell QC who had represented him before the LPT, but that Mr O'Donnell would not be available on 6 August 2008. He asked the appellant to consent to a further adjournment, but the appellant refused to do so.

[59] On 6 August 2008 the respondent was represented by Mr Stobie of counsel, who applied for a further adjournment. In support of that application Mr Stobie read an affidavit sworn by the respondent on 4 August 2008, in which he deposed[76] –

> "4. It has always been my intention to brief Mr Brian O'Donnell QC to appear at the hearing of the appeal as he had the conduct of the original proceeding before the Legal Practice Tribunal.

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72 Outline of submissions for the respondent, filed 11 August 2008, p 12; Affidavit of Paul Michael Voll sworn and filed 30 November 2007, document no. 12 on LPT file BS 1426/07, paras 60-68.

73 Transcript of proceedings on 14 August 2008, p 33.

74 Transcript of Proceedings on 1 August 2008, p 4.

75 Ibid, p 5 (emphasis added).

76 Third Affidavit of Paul Michael Voll, sworn and read on 4 August 2008 (emphasis added).

> 5. As a consequence of the events of 1 August 2008, I contacted Mr O'Donnell with a view to brief him in the adjourned hearing of 6 August.
>
> 6. I particularly wanted Mr O'Donnell to appear on my behalf due to his seniority and the seriousness of the proceedings and his familiarity with the matter, particularly due to the fact that important parts of the evidence of the complainant were not transcribed on the first morning of the original hearing."

When the President (who was then presiding) put it to Mr Stobie that on 1 August 2008 the respondent had not said he wished to brief Mr O'Donnell and that he had said he would be ready to proceed on 6 August 2008, Mr Stobie responded (inconsistently with paragraph 4)[77] –

> "Yes, your Honour. That's correct. And, it's Mr Voll's subsequent consideration of a position which has caused him to see the wisdom of engaging Senior Counsel".

The appeal was ultimately adjourned to 14 August 2008, the respondent being ordered to pay the appellant's costs thrown away by the adjournment on the indemnity basis.

[60] Under s 468 of the *Legal Profession Act* 2007, an appeal is by way of rehearing on the evidence before the LPT, although this Court may give leave to introduce further evidence. Counsel for the appellant sought leave to introduce this evidence of the respondent's conduct in relation to the appeal. Counsel for the respondent did not oppose leave being given. The true import of the conduct revealed by this further evidence cannot be determined on this appeal. At the very least, it was nonchalant. It may well be indicative of a want of fitness to practise. That is a matter which may be dealt with by the appellant's bringing a fresh charge against the respondent. In the circumstances, despite the position taken by the respondent, this Court should refuse leave to rely on this further evidence.

Adequacy of orders

[61] For a legal practitioner to lie to a Court or tribunal is a very serious matter in any circumstances. In *Incorporated Law Institute of NSW v Meagher*, Isaacs J said[78] -

> "The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors, or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure."

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77 Transcript of Proceedings on 6 August 2008, pp 2-3 (emphasis added).

78 (1909) 9 CLR 655 at 681.

[62] The efficient administration of justice depends on the probity and candour of practitioners who appear before Courts and tribunals. As Mahoney JA said in *Law Society of NSW v Foreman*[79] -

> "It is … necessary that the courts be able to place reliance upon what practitioners say and do. The administration of justice would proceed more slowly and with greater costs if the courts before whom a solicitor practised felt it necessary to check the accuracy of what the solicitor had said to it."

[63] What disciplinary orders are necessary to protect the public and maintain confidence in the profession will depend on all the circumstances. Counsel for the respondent submitted that the core message their client conveyed to the QBT (that Mr Leise was in Sydney but would be travelling to Bundaberg to participate in the hearing) was not dishonest: the LPT accepted that the respondent believed Mr Leise would do as he had insisted and make arrangements to travel to Bundaberg immediately, although he acknowledged that "the embellishments" (that Mr Leise was at that moment waiting to get on a flight, that he had endeavoured to return that morning and that he should be there by lunch time) entailed dishonesty. I do not accept this submission of counsel for the respondent.

[64] Nevertheless there are varying degrees of seriousness of dishonesty, even in this context. As Pincus JA (with whom McPherson JA and Shepherdson J agreed) said in *Attorney-General v Bax*[80] -

> "It is not, in my opinion, every proved act of dishonesty on the part of a practitioner which justifies a substantial penalty; dishonesty, like other forms of misbehaviour, has grades of seriousness… [a] momentary or at least temporary lapse from proper standards of honest behaviour is one thing; persistence in such conduct over a substantial period is another."

That was a case of dishonesty in backdating a mortgage, but His Honour's observation is of general application. I am unpersuaded that the orders of the LPT were inadequate in all the circumstances.

[65] Further, for this Court to order that the respondent's name be removed from the local roll would necessarily involve reversing the finding that he is not unfit to practise. The LPT concluded its reasons for judgment by saying[81] -

> "The respondent is nevertheless very much on notice now, that should he commit any further breach of significance, there will be a compelling case for barring him from practice, in the short or long term. But at this stage, though his misconduct was plainly unacceptable, it does not demonstrate an unfitness to practise."

Somewhat curiously, the appellant made no direct attack on that finding. That he may have intended to do so by the orders he sought on appeal is no answer. He was

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79 (1994) 34 NSWLR 408 at 445.

80 [1999] 2 QdR 9 at 20.

81 *Legal Services Commissioner v Paul Michael Voll* [2008] LPT 1 at [65] per de Jersey CJ; Appeal Record Book, p 156.

obliged clearly and unequivocally to set out the grounds on which he relied in his notice of appeal; the respondent could not be expected to speculate what was really sought. For this Court to substitute a finding that the respondent was unfit to practise and order that his name be removed from the local roll would be to deny him procedural fairness.

[66] I respectfully agree with the LPT[82] that the respondent's dereliction did not approach the seriousness of the misconduct which led to the striking off in *Wright*[83]and *Wakeling.*[84] *Wright* involved four counts of deliberately misleading the Court and one count of attempting to suborn a witness to swear a false affidavit, while *Wakeling* involved knowingly misleading the Court to make a grant of probate and trust account defalcations.

[67] The LPT considered that this respondent should be treated similarly to the respondent in *Legal Services Commissioner v Mullins,*[85] who deliberately misled professional colleagues in an important material respect in a mediation. I do not accept the appellant's submission that *Mullins* was a significantly less serious case because there the respondent did not challenge the alleged facts, had an unblemished record, did not give evidence which was rejected by the LPT, had sought and acted on senior counsel's advice, and had acted in his client's best interests, and because it did not involve misleading a Court or tribunal. Probity is essential to the utility of mediation as a form of alternative dispute resolution. Further in *Mullins,* the mitigating effect of having taken senior counsel's advice was compromised by the flawed statement of facts provided to senior counsel. In my respectful opinion the LPT did not err in treating this respondent similarly to Mr Mullins.

Further investigation

[68] The LPT's rejection of the respondent's evidence about the telephone conversation on 10 September 2002 and the respondent's conduct in relation to this appeal warrant further investigation by the appellant. There may be grounds for charges based on deliberately lying to the LPT, lack of the irreducible minimum of competence to be held out as an officer of the Court, and deliberately lying to this Court.

Order

[69] I would dismiss the appeal with costs.

[70] **DUTNEY J:** I have had the advantage of reading the reasons for judgment of Wilson J. I agree with the order she proposes for the reasons she has set out.

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82 Ibid.

83 *The Council of the Qld Law Society Inc v Wright* [2001] QCA 58.

84 *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42.

85 [2006] LPT 012.