LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v Winning* [2008] LPT 13
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **V** **DOUGLAS JOHN WINNING** (respondent)
FILE NO:	BS5544 of 2006
DELIVERED ON:	13 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2008
TRIBUNAL MEMBER:	White J
PRACTITIONER PANEL PERSON:	Mr P Mullins
LAY PANEL PERSON:	Ms K Keating
ORDER:	**Submissions on sanction orders and costs within 14 days.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS FOR DISCIPLINARY ORDERS – OTHER ACTS AND OMISSIONS – the respondent solicitor became aware that police were intending to conduct a search on premises occupied by clients of the solicitor – the respondent contacted the clients and warned that a search was likely to take place and that they should get rid of any utensils used for smoking unlawful drugs and any cash – whether this conduct breaches any professional duties owed by the solicitor to the administration of justice PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS FOR DISCIPLINARY ORDERS – OTHER ACTS AND OMISSIONS – the respondent solicitor used offensive language to staff of the Office of the Director of Public Prosecutions, staff of the Australian Crime Commission, a member of the Queensland Police Prosecutions Branch and the then Director of Public Prosecutions – whether this conduct amounts to unsatisfactory professional conduct – whether this conduct

amounts to professional misconduct

Legal Profession Act 2004 (Qld), s 280
Legal Profession Act 2007 (Qld), s 418, s 419, s 456, s 645, s 649, s 718, s 746
Police Powers and Responsibilities Act 2000 (Qld), s 790
Queensland Law Society Act 1952 (Qld), s 3B

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498, applied
Allison v General Council of Medical Education and Registration (1894) QBD 750, cited
Attorney General v Clough [2002] 1 Qd R 116, cited
Groom v Crocker [1939] 1 KB 194, cited
Re Hodgekiss [1962] SR(NSW) 340
In Re (A Practitioner of the Supreme Court) [1927] SASR 58, cited
Kennedy v The Council of the Incorporated Law Institute of NSW (1940) 13 ALJ 563, cited
Legal Services Commissioner v Baker [2005] LPT 002, cited
LSC v Madden (No 2) [2008] QCA 30, cited
Legal Services Commissioner v McLelland [2006] LPT 13, cited
Legal Services Commissioner v Podmore [2006] LPT 005, cited
Legal Services Commissioner v Twohill [2005] LPT 001, cited
NSW Bar Association v Livesey [1982] 2 NSWLR 231, cited
Prothonotary of NSW v P [2003] NSWCA 320, cited
Rondel v Worsley [1969] AC 191, cited
R v Felderhof (2004) 235 DLR (4th) 131, cited
R v Tighe & Maher (1926) 26 SR(NSW) 94, cited
The Queen v Rogerson (1991) 174 CLR 268
Re Wheeler [1991] 2 Qd R 690, cited

COUNSEL: Mr B Farr SC for the applicant Legal Services Commissioner
Mr P Davis SC for the respondent practitioner

SOLICITORS: Legal Services Commission for the applicant
Michael Cooper Lawyer for the respondent

[1] The applicant ("the LSC") seeks orders pursuant to s 280 of the *Legal Profession Act* 2004 ("the *2004 Act*")[1] that the respondent is guilty of professional misconduct or alternatively unsatisfactory professional conduct. There are nine charges relating to conduct occurring between 22 May 2003 and 6 August 2004.

[2] At the outset it must be stated that none of these charges alleges incompetence or dishonesty against the respondent. Rather, the LSC alleges that the respondent's conduct in "tipping off" clients about an imminent police raid and using insulting

1 The application was filed on 5 July 2006.

and offensive language to various persons constituted unsatisfactory professional conduct and/or professional misconduct.[2]

[3] Whilst the respondent has admitted some of the conduct, some aspects of some of the charges are disputed. Several witnesses and the respondent were cross-examined – the respondent at some length.

The legislative scheme

[4] The legal profession in Queensland is regulated by the *Legal Profession Act* 2007 ("the *2007 Act*") which came into force on 1 July 2007. The *2004 Act* was thereby repealed. It had come into force on 1 July 2004. Prior to the enactment of that Act the *Queensland Law Society Act* 1952 ("the *QLS Act*") regulated the disciplinary regime for Queensland solicitors.

[5] Mr B Farr SC and Mr P Davis SC, who appeared for the LSC and the respondent respectively, agreed that the conduct described in Charges 1 to 5 is to be assessed by reference to the standard enunciated in the *QLS Act* because that conduct occurred before the *2004 Act* came into force. Charges 6 to 9 concern conduct after the *2004 Act* came into force. By virtue of s 718 and s 746 of the *2007 Act* this application is to be determined by reference to the procedural requirements of the *2007* Act.[3] Chapter 4 of the *2007 Act* concerning complaints and discipline applies to conduct of a legal practitioner happening in the jurisdiction whether before or after the commencement of the Act.[4] Although the *QLS Act* and the *2004 Act* were repealed by the *2007 Act*,[5] s 418, s 419 and Schedule 2 of the *2007 Act*, in the definition of "professional misconduct" and "unsatisfactory professional conduct", preserve the regime under the *QLS Act* for conduct which occurred before the *2004 Act* came into force.

[6] There is no definition of "professional misconduct" in the *QLS Act*. In *Adamson v Queensland Law Society Inc*[6] Thomas J (as his Honour then was) expressed the approach to an allegation of professional misconduct[7] against a solicitor as follows:[8]

> "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency."

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2 See generally on the nature and ambit of a discipline application under the *Legal Profession Act* 2007, *LSC v Madden (No 2)* [2008] QCA 30.

3 In particular, by s 645 of the *2007 Act* the Tribunal is not bound by the rules of evidence and may inform itself of anything in any way.

4 Section 423(1).

5 Section 767 and section 752 respectively.

6 [1990] 1 Qd R 498.

7 See generally on what constitutes professional misconduct, *Allison v General Council of Medical Education and Registration* (1894) QBD 750 at 768; *Re Hodgekiss* [1962] SR(NSW) 340 at 351; *Kennedy v The Council of the Incorporated Law Institute of NSW* (1940) 13 ALJ 563 per Rich J; *In Re (A Practitioner of the Supreme Court)* [1927] SASR 58; *Re Wheeler* [1991] 2 Qd R 690 at 697; *Attorney General v Clough* [2002] 1 Qd R 116 at 135.

8 At 507.

That test has been applied to conduct occurring before the *2004 Act* came into operation by the Tribunal established under the *2004 Act*.[9]

[7] The expression "unprofessional conduct or practice" was defined in s 3B of the *QLS Act* in the following way:

> "(1) A practitioner commits unprofessional conduct or practice if the practitioner, in relation to the practitioner's practice, is guilty of –
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> (a) serious neglect or undue delay; or
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> (b) the charging of excessive fees or costs; or
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> (c) failure to maintain reasonable standards of competence or diligence; or
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> (d) conduct described, under another Act, as unprofessional conduct or practice.
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> (2) Subsection (1) does not, by implication, limit the type of conduct or practice that may be regarded as unprofessional for this Act."

[8] The provisions of the *2007 Act* which are to be applied to the alleged conduct described in Charges 6 to 9 are s 418 and s 419 which provide:

> "**418 Meaning of unsatisfactory professional conduct**
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> ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
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> **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
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> (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,

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[9] *Legal Services Commissioner v Baker* [2005] LPT 002 at [17]; *Legal Services Commissioner v Podmore* [2006] LPT 005 at [7]; *Legal Services Commissioner v Twohill* [2005] LPT 001; *Legal Services Commissioner v McLelland* [2006] LPT 13 at [20].

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

As is clear, the definition of "unprofessional conduct or practice" in s 3B of the *QLS Act* and "unsatisfactory professional conduct" in the *2007 Act* is inclusive and can extend to conduct of the kind alleged against the respondent although the specific conduct described in the legislation concerns competence and diligence.

Fitness to practice

[9] The other matter which the Tribunal must address is the respondent's fitness to practice. That expression is contained in the meaning of "professional misconduct".[10] Whether a person is fit to practice must be determined at the time the Tribunal considers the discipline application, not at the time the practitioner engaged in the impugned conduct.[11] The LSC does not contend that the respondent is not now a fit and proper person to practice law.[12]

Overview of chronology of events

[10] It will assist in an appreciation of the context of the charges if a broad overview of events is given. The respondent is aged 55 years. He worked in the Supreme and District Court Registries as a public servant for many years before being admitted to practice as a solicitor in February 1986. Between October 1986 and April 1988 he was employed as a solicitor in the Legal Aid Office at Rockhampton. From May 1988 until January 2006 he was employed as a solicitor by the Aboriginal Legal Service. The respondent had a right to private practice and practised with a partner under the firm name Winning & Sorensen. Both the respondent and Mr Sorensen were employed by the Aboriginal Legal Service. This practice was almost exclusively in the field of criminal law and he handled thousands of files without any adverse comment about his competence or integrity. As a result of restructuring, Mr Winning ceased to be employed by the Aboriginal Legal Service in January 2006. The firm Winning & Sorensen was dissolved amicably on 30 June 2006 and from that date the respondent has practised as a sole practitioner under the name Winning Lawyers. No previous disciplinary proceedings have ever been instituted against the respondent. The respondent readily admits to being an alcoholic but for nearly 20 years has been in sustained remission by following the AA program. He has been a bankrupt due to gambling. He has had ongoing

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10 Section 419(1)(b) and (2).

11 *Prothonotary of NSW v P* [2003] NSWCA 320 per Young CJ in Eq at paragraph [17(10)]

12 This is discussed below.

matrimonial problems despite being divorced some years ago. Some of these problems were operating upon him during the period of the charges.

[11] On 22 May 2003 the facts which constitute Charge 1 occurred.[13] In November 2003 the respondent became aware that allegations were being made against him by the authorities about his conduct. In May 2004 the respondent was charged with one count of attempting to prevent the course of justice and one count of attempted official corruption. A committal proceeding was held on 4 April 2005. The prosecutor did not offer any evidence on the charge of attempted official corruption and the Chief Magistrate, his Honour Judge Irwin, found that there was no case to answer on the charge of attempting to prevent the course of justice, and the respondent was therefore discharged.

[12] Towards the end of 2005 the Director of Public Prosecutions advised that an *ex officio* indictment was to be presented charging the respondent with one count of attempting to prevent the course of justice, the count upon which he had been discharged at committal. An *ex officio* indictment was presented on 8 December 2005 in the Supreme Court at Rockhampton. An application to stay proceedings on the *ex officio* indictment was foreshadowed on the basis that it was an abuse of process as there were no reasonable grounds of success. That application was to be heard by the Chief Justice in Rockhampton on 28 February 2006. Before the hearing of the application a *nolle prosequi* was entered by the Prosecution on 20 February 2006.

[13] In the meantime, on 2 December 2005, the respondent had been provided with a draft Discipline Application by the Legal Services Commission.

The charges

Charge 1: 22 May 2003 – Police Investigation

[14] The charge alleges:

> "1. That on 22 May 2003, the respondent:
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> (a) informed his client and/or a third party of the impending execution of a search warrant by officers of the Queensland Police Service and/or Australian Crime Commission; and/or
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> (b) informed his client and/or a third party to dispose of evidence disclosing a criminal offence; and
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> (c) such actions were in breach of his duty to the administration of justice and/or had the potential or tendency to bring the legal profession or Queensland justice system into disrepute.

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13 "Tipping off" clients about an imminent police raid.

Particulars

1.1 At all material times, the respondent was:

(a) a legal practitioner;

(b) the principal of the law firm Winning and Sorsensen;

1.2 In November 2002 the Queensland Police Service and Australian Crime Commission undertook a joint investigation in relation to the activities of members of the Rebels Motorcycle Club, Rockhampton Charter.

1.3 On 22 May 2003, officers of the Queensland Police Service and Australian Crime Commission obtained a series of search warrants pursuant to the provisions of the *Police Powers and Responsibilities Act* to be executed on 23 May 2003 on 10 alleged members of the Rebels Motorcycle Club including:

(a) Brendan O'Brien;

(b) James O'Brien.

1.4 On 22 May 2003, at approximately 11.20pm, the respondent contacted Mr James O'Brien and said words to the effect of:

(a) *"Mate this is fuckin urgent. I've been runnin' around tryna find everybody. I can't get a phone number mate. I've got some good drum that the coppers are gonna raid all the rebels in Rockhampton at five o'clock in the morning."*

1.5 On 22 May 2003, at approximately 11.31pm, the respondent contacted Mr James O'Brien and said words to the effect of:

(a) *"Yeah, so you know like get if they get rid of bongs particularly, fuckin' cash because they'll steal the cunt"*

(b) *"It would be lovely if they came up with fuckin nothing ... u/i ... get rid of fucking bongs, fuckin cash ... Anything ... everything, ya know."*

[15] There was some challenge at this hearing by the LSC as to whether the O'Briens and other members of the Club were the respondent's clients when he contacted them on 22 May. The Chief Magistrate at the committal accepted that they were. The respondent said in cross-examination that he had acted for members of the Rebels Motorcycle Club from early 2002. As at 22 May 2003 he was engaged in advising Brendan O'Brien's daughter in respect of offences with which she had been charged and was giving continuing advice to Brendan O'Brien about a

neighbouring property. The respondent had acted for members of the Rebels Motorcycle Club previously which he described in his affidavit as follows

> "12. Prior to 22nd May 2003, I had acted for both Brendan and James O'Brien. I had also acted for other members of the Rebels Motorcycle Club. In particular, I had acted in relation to matters arising out of previous searches conducted by Police at properties occupied respectively by the two O'Brien's and other members of the Club. At those previous searches things had been seized which after considerable time and expense had been returned by Police. In particular, the sum of approximately $32,000 was seized from the premises of Mr Brendan O'Brien in early 2002 as being suspected of being the proceeds of crime but which was returned some months later."

[16] It is likely that members of the Rebels Motorcycle Club and, in particular, Brendan and James O'Brien would have considered the respondent "their" solicitor and that the respondent saw them as his client so that the solicitor/client relationship is sufficiently established. That relationship carries with it the duty of the solicitor to protect the clients' interest.[14] And it was that duty which informed his decision to contact them about the police raid.

[17] The respondent's evidence about the "tip off" was that

> "11. I did not know and nor could I have known the subject warrants had, in fact, been issued.
> 12. [quoted above].
> 13. Information came to me on 22nd May 2003 that a search was to be conducted. I passed the information on to my clients because they had an interest in learning of the impending search.
> 14. I had never attended at the residences of the O'Brien's or other members of the club.
> 15. I had no knowledge of any illegal contraband at the residence of the O'Brien's or other members of the club."[15]

The respondent was not cross-examined about this evidence and no other evidence contradicted it. It should, therefore, be accepted.

[18] The respondent left a message for James O'Brien who contacted him about 11.20pm by telephone. The respondent accepts the conversation as taped by police part of which is set out in the particulars to Charge 1 and which he sets out in full in his affidavit. The respondent says of this conversation

> "24. Whilst I am very embarrassed about my language on this occasion I believe I acted in the interests of my clients thus creating, at its highest, a possibility that a Police investigation may have been compromised. I maintain I did

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14 *Groom v Crocker* [1939] 1 KB 194 per Scott LJ at 222.

15 Affidavit of Douglas John Winning filed 5 September 2008.

> not act unlawfully in passing the information I received onto my clients and consequently did not breach my duty to the administration of justice. I consider that if I did not pass on the information I received to my clients I would have breached my duty to my clients."[16]

The respondent explained that he used the coarse language that he did to communicate more readily with his clients, although, as the other charges show, at least during the period of those charges, he was not adverse to using such language in conversations with others, particularly when angered.

[19] There is no evidence about how the respondent came by the information about the impending police raid notwithstanding his statement to James O'Brien that "an insider" provided it. The reasons of the Chief Magistrate, when dismissing the charge, which are before the Tribunal, reveal that police learnt that Brendan O'Brien knew of the raid before the respondent had been able to communicate that information and called off the search at the O'Briens' premises although searches were made of premises occupied by other Club members.

[20] The LSC contends that tipping off his clients of an impending police raid and advising them to get rid of any incriminating evidence impacts upon effective law enforcement and the fair administration of justice. The LSC submits that this conduct jeopardised the very legal system the respondent was bound to protect and administer and thereby breached his professional obligation to act in the interests of the administration of justice. The LSC contends that the respondent allowed "his concern for his clients' interests to conflict with his duty to the interests of the administration of justice. The respondent has essentially entered the arena and set aside his professional independence."[17] The LSC submits that this is a serious example of professional misconduct.

[21] It is not without significance that despite extensive researches by the Legal Services Commission staff, Mr Farr was unable to produce any recorded case to support those propositions, that is, that there is a positive duty on a legal practitioner to assist the police in criminal investigations in respect of his client or, at the least, a duty not to frustrate a police investigation. There is no allegation that the respondent acted unlawfully by his conduct, nor could there be, in light of the dismissal of the criminal charge. Under the *Police Powers and Responsibilities Act* 2000 it is an offence to obstruct a police officer in the execution of that officer's duties[18] and s 140 of the *Criminal Code* makes it a crime for a person to attempt to obstruct, prevent, pervert or defeat the course of justice. This was the offence with which the respondent was charged unsuccessfully. Accordingly, insofar as the respondent was a member of the public he had not acted unlawfully.

[22] Before turning to the respondent's duty as a legal practitioner, the ambit of the expressions "the course of justice" or "the administration of justice" should be

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16 Affidavit of Douglas John Winning filed 5 September 2008.

17 Written submissions paragraph 37.

18 s 790.

considered. *The Queen v Rogerson*[19] concerned a charge of conspiracy to pervert the course of justice against the defendants (one of whom was a police officer) which arose out of an alleged agreement to fabricate evidence which had, as its object, the frustration or diversion of a police investigation into the possible commission of a crime. In the course of their reasons for judgment the members of the High Court expressed the view that "the administration of public justice" encompasses the exercise of jurisdiction by courts and tribunals[20] and that police investigations do not, of themselves, form part of the course of justice.[21] Deane J noted:[22]

> "Police enquiries do not, of themselves, constitute 'the course of justice' for the purposes of the offence of perverting the course of justice. It is necessary, in a case involving alleged conduct to divert or frustrate police inquiries, to identify some actual or potential relationship between the alleged conduct and some pending, probable or possible curial proceedings whose course the accused intended to pervert. It is true that one can point to statements in the cases emphasising the closeness of the connexion between police investigations and pending, probable or possible curial proceedings in relation to the subject matter of those investigations (81). The closeness of that connexion may, in some circumstances, found a conclusion that conduct aimed at frustrating or misleading police investigations was directed to perverting the course of justice in pending or possible future court proceedings. Nonetheless, such statements should not be permitted to divert attention from the fact that the offence of conspiring to pervert the course of justice involves conspiring to pervert the course of justice in curial proceedings."

[23] Accordingly, frustrating a police investigation by conduct not falling within s 790 of the *Police Powers and Responsibilities Act* cannot be described as perverting or preventing the course of justice or the administration of justice without some additional factor tying the impugned conduct to criminal proceedings actual or contemplated.

[24] What, then, may be derived from the authorities about the ambit of a legal practitioner's obligations in circumstances where the practitioner learns of a likely raid on his client's premises?[23] It is a further circumstance that the practitioner does not know that any property likely to be the subject of a criminal charge is at the premises but, if there is, gives advice to his client to remove it. Mr Farr identified a number of duties which a legal practitioner owes, largely in the context of proceedings in court or concerning legal proceedings which have been instituted. They are not relevant for the purposes of considering Charge 1.[24] The LSC

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19 (1991) 174 CLR 268.

20 Per Mason CJ at 276; Brennan and Toohey JJ at 283-4; McHugh J at 304-5.

21 Mason CJ at 276; Brennan and Toohey JJ at 283-4; Deane J at 293; and McHugh J at 303 and 310.

22 At 293-4.

23 As a legal practitioner he would, it may be assumed, understand that police would have a search warrant for particular premises.

24 For a discussion of those duties see *Rondel v Worsley* [1969] AC 191 per Lord Reid at 227 and following. For a discussion of the professional dilemmas which may arise from too close an association with the client which Mr Farr seemed to suggest was a fault in the respondent, see *NSW*

contends that the respondent's conduct "jeopardized the very legal system he was bound to protect and administer".[25] Mr Davis submits that as our criminal justice system is adversarial, to a practitioner acting for a person against whom allegations of criminal conduct have been, or may be made, "the QPS [Queensland Police Service] is the 'adversary' ".[26] And there is, within the bounds of the law, no obligation to refrain from frustrating a police investigation. As examples, Mr Davis refers to a lawyer's advice to his client to exercise that person's right to silence; or to resist a police search of premises not authorised by a valid search warrant. In each case the police investigation has been frustrated.

[25] As Dal Pont observes:[27]

> "As a participant in the administration of justice and the legal system, the lawyer must foster respect for the law and its administration."

Where a lawyer becomes aware that a client is engaging in unlawful conduct, the lawyer must, of course, eschew any involvement in that conduct whether by assisting or being seen to condone that activity.[28] Many of the examples arising in the cases concern advice by legal practitioners about fraud and tax evasion, but of interest to the present charge is a reference by Dal Pont to a ruling given by the Law Society of the Australian Capital Territory in 1985.[29] A legal practitioner requested to act in a matter involving premises about which the practitioner has heard unsubstantiated rumours that the premises are being used for or are about to be used for illegal or unlawful purposes is entitled to disregard such rumours. The ruling also provided that the practitioner remains entitled to accept instructions to act in the matter even if, by virtue of the rumours, the practitioner forms the belief that the premises were being used for such purpose. However, if the practitoner knows or receives instructions that the premises are being used for an illegal or unlawful purpose, he or she cannot act in any way so as to further that purpose.

[26] It is unarguable that a legal practitioner who assists in the criminal action of a client will be criminally responsible for those acts as a party to the offence or can be convicted of a criminal conspiracy.[30] The mere giving of advice in the course of a retainer is ordinarily insufficient to attract criminal sanction. As Dal Pont notes[31] Street CJ in *R v Tighe & Maher*[32] identified the dividing line as follows:[33]

> "[I]n the course of [a solicitor's] practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest, and he is not called upon to sit in judgment

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Bar Association v Livesey [1982] 2 NSWLR 231, although it should be noted much of the impugned conduct arose from "direct briefing."

25 Written submissions para 36.

26 Written submissions para 34.

27 GE Dal Pont *Lawyers' Professional Responsibility* 3rd ed (2006) at 423 citing *Re B* [1981] 2 NSWLR 372 at 382 per Moffitt P.

28 Dal Pont *ibid*.

29 ACT Law Society Ruling "Illegal or Unlawful Use of Premises" (17 June 1985) in Dal Pont 424 footnote 14.

30 Dal Pont 425.

31 At 425.

32 (1926) 26 SR(NSW) 94.

33 At 108-9.

> beforehand upon his client's conduct, nor, because he does his best for him as a solicitor within proper limits, is he to be charged with being associated with him in any improper way. In acting for a client, a solicitor is necessarily associated with him, and is compelled to some extent to appear as if acting in combination with him. So he may be, but combination is one thing and improper combination, amounting to conspiracy to commit a crime or a civil wrong, is another thing ..."

[27] If the conversations with James O'Brien are stripped of their coarse language what remains is a conversation in which the respondent tells O'Brien that he has reliable information that police were intending to raid the premises of members of the Club at 5am the following morning and, accordingly, they should get rid of any utensils used for smoking unlawful drugs and any cash (to be implied: if there are any). There is no allegation that the information was unlawfully obtained by the respondent, nor that the respondent knew that utensils of the kind described were on the premises although it would be fanciful to suppose that the respondent did not suspect their presence. Against the background of the previous police seizure of a significant sum of money which took some time to be returned after it was established not to be derived from the proceeds of crime, the advice about the cash is not remarkable. It is the actions of the respondent not the language in which he expresses his advice which are the subject of Charge 1. When the actions are reduced to their elements the LSC has not satisfied the Tribunal to the requisite standard[34] that the conduct "violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession"[35] such that it "had the potential or tendency to bring the legal profession or Queensland justice system into disrepute". Nor does it constitute unprofessional conduct. As to the first limb of Charge 1 that his conduct was in breach "of his duty to the administration of justice", no duty in the context of the facts alleged has been made out.

[28] The respondent is not guilty of Charge 1.

Charge 2 (3 November 2003 – Complaint of Gormley)

[29] The charge alleges:

> "2. That on 3 November 2003, when addressing His Honour Mr Brennan during the course of Magistrates Court proceedings in which the respondent was acting on behalf of the defendants, the respondent used language in relation to the police prosecutor, Acting Senior Constable Gormley, which:
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> (a) was offensive and insulting to Acting Senior Constable Gormley, and/or

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34 Section 649 enacts the *Briginshaw* test that the standard of proof is on the balance of probabilities and the degree of satisfaction required varies according to the consequences for the legal practitioner.

35 *Adamson v Queensland Law Society* at 507.

(b) was discourteous to Acting Senior Constable Gormley; and/or

(c) had the potential or tendency to bring the legal profession and/or criminal justice system into disrepute.

Particulars

2.1 On 3 November 2003 the respondent was appearing on behalf of four defendants in respect of criminal proceedings in the Rockhampton Magistrates Court before His Honour Mr Brennan.

2.2 The police prosecutor in the proceedings was Acting Senior Constable Gormley.

2.3 During the course of the proceedings the respondent made the following comments to or about Acting Senior Constable Gormley:

(a) '*Well isn't it in the name of the Racecourse Motorcycle club? You are telling lies again'* (Transcript p39 ln 39)

(b) '*Well, it's dishonest – it's systematic dishonesty. He knows the account is in the name of the Racecourse Motorcycle club, so he puts to the witness that it's in the name of the Rebels.*' (Transcript p39 ln 44-50)

(c) '*There has been covert dishonesty in the whole preparation of this case and I put that on the record.*' (Transcript p40 ln 13-15)

(d) '*And I regard this man as being unethical ... Totally unethical ... He has told me lies on the phone*' (Transcript p 40 ln 20;22)"

[30] The respondent explains the background to the exchange with Acting Senior Constable Gormley. Acting Senior Constable Gormley has not sworn an affidavit disputing this account. On 3 November 2003 the respondent appeared in the Mackay Magistrates Court on behalf of four defendants. The defendants had been charged with selling liquor, carrying liquor for sale and exposing liquor for sale without, in each case, a licence or permit, and of being in possession a sum of money suspected of being tainted property. The respondent and the prosecutor had had previous telephone conversations about the forthcoming trial. They discussed the documents which the prosecutor would be tendering. The respondent told the prosecutor that he wanted to be provided with copies of the documents which the prosecutor proposed to tender and the prosecutor agreed to do so. Subsequently the respondent received by facsimile about 10 pages of documents from the prosecutor. As a consequence of the earlier conversation the respondent understood that they were the only documents which the prosecution proposed tendering at the trial. The

respondent's instructions prior to trial were that all accounts received by the defendants had been raised in the name of Racecourse Motor Cycle Club.

[31] In the course of exchanges with the Bench the prosecutor conceded that the document then being shown in cross-examination to the witness had not been previously disclosed or offered to be disclosed. The prosecutor had put to the witness that the invoice was in the name of Rebels Motorcycle Club. The respondent deposed:

> "32. I believed the prosecutor was putting to the witness things that were inconsistent with documents in his brief and it was quite open for me to make allegations of dishonest and unethical behaviour."[36]

During the exchanges between the respondent and the prosecutor the Magistrate chided the respondent for his insulting language to the prosecutor.

When the respondent was shown the invoice bearing the name "Rebels Motorcycle Club" he immediately apologised in these terms:

> "I apologise to my friend for calling him a liar."[37]

The prosecutor accepted that apology, but subsequently complained to the Law Society.

[32] The charge alleges that the language was offensive, insulting and discourteous and had the potential or tendency to bring the criminal justice system into disrepute. As Lord Reid observed in *Rondel v Worsley*[38] "every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case." Against the background of dealings between the prosecutor and the respondent about disclosure the indignation of the respondent was understandable. The respondent accepted in cross-examination in this hearing that a more measured manner of dealing with the issue would have been to intervene, explain to the Bench the problem, and seek to inspect the document. If, as the respondent had reason to believe, the prosecutor was attempting to trick the witness in some way or trap him in some admission some protest was called for. As it turned out, that was not the case and the respondent immediately apologised. An advocate needs to be very confident of his ground before embarking upon forceful expressions against an opponent because an allegation that an opponent is lying or is engaging in systematic dishonesty is a particularly grave imputation on that person's professional standing. Unfortunately in the heat of the exchange against the background of the relationship between the prosecutor and the respondent over the documents the respondent permitted himself the indulgence that he did. The language was offensive, insulting and discourteous not just to the opponent but also troubling to the Bench. Such comments can have

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36 Affidavit of Douglas John Winning filed 5 September 2008.

37 Transcript of Magistrates Court hearing p 42 being exhibit DJW 2 to the affidavit of Douglas John Winning filed 5 September 2008.

38 [1969] 1 AC 191 at 227.

the potential to diminish the community's respect for the administration of justice.[39] However in this case the Tribunal is not persuaded that the comments tended or had the potential to bring the legal profession or the criminal justice system into disrepute given that an apology was offered immediately once the true facts were understood by the respondent so that any person in the courtroom who heard the disparaging words would have heard the apology.

[33] The respondent is not guilty of Charge 2.

Charge 3 (May 2004 – Complaint of DPP)

[34] The charge alleges:

> "3. That on a date unknown between 9 May 2004 and 15 May 2004 the respondent used language in his communications with Mr Paul Bannister, which was:
>
> (a) grossly offensive and insulting; and/or
>
> (b) displayed a lack of professional courtesy to a fellow legal practitioner and Crown prosecutor; and/or
>
> (c) had the potential or tendency to bring the legal profession and/or criminal justice system into disrepute.
>
> ***Particulars***
>
> 3.1 On a date unknown between 9 May 2004 and 15 May 2004, in the course of a telephone conversation with Mr Paul Bannister, a Crown Prosecutor employed by the Office of the Director of Public Prosecutions, concerning the respondent's client Dowrick, the respondent said to Mr Bannister words to the effect that he was '*nothing but a cunt, a fucking cunt*'.

[35] Mr Bannister swore an affidavit in these proceedings and gave his evidence by telephone since he was outside Australia and not conveniently able to come to Brisbane. He was in charge of the Rockhampton office of the Office of the Director of Public Prosecutions between 2003 and 2004. At that time the majority of Legal Aid work in Rockhampton was carried out by a solicitor, David Mills, or the respondent and his partner. Mr Bannister said in cross-examination that he had a good working relationship with the respondent up until an incident at the Oxford Hotel concerning his abuse of Mr Mills. The respondent denies this and says that they did not enjoy a good professional relationship. Without describing the particulars provided by the respondent[40] it seems reasonably likely that they did not enjoy a cordial relationship, professionally or otherwise.

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39 *R v Felderhof* (2004) 235 DLR (4th) 131 at paragraph 83 per Rosenberg JA.

40 Affidavit of Douglas John Winning filed 5 September 2008 at paragraphs 45-48.

[36] The respondent deposes that he was acting for a man named Dowrick who was due to appear in the Supreme Court at Rockhampton on serious drug charges. He had indicated a plea of guilty at an early stage. Mr Bannister telephoned the respondent on his mobile phone whilst the respondent was at the home of friends for an evening meal. Mr Bannister, in oral evidence, suggested that the time was in the vicinity of 6 o'clock, whereas the respondent deposes that it was between 7.30 pm and 8 pm when he was about to sit down to dinner. According to the respondent, Mr Bannister raised with him that Dorwick had a charge of possessing a dangerous drug pending in the Rockhampton Magistrates Court relating to methylamphetamine. Mr Bannister challenged the respondent about the charge remaining in the Magistrates Court rather than in the Supreme Court. The respondent said he told Mr Bannister that that charge was still in the Magistrates Court because the prosecution had not averred a specific quantity in the charge, the drugs had not then been analysed, nor had the prosecution elected to bring the charge in the Supreme Court. The respondent deposes that Mr Bannister accused him of manipulating the legal system to make things look better for his client at sentence in the Supreme Court. Mr Bannister denies he made that accusation. According to the respondent he was anxious to bring the call to an end because his meal was ready while Mr Bannister said he wanted to sort the matter out. The respondent then lost his temper and said:

> "Look Paul, will you fuck off".

The respondent then terminated the telephone call. Mr Bannister asserts that the respondent spoke the words set out in the charge.

[37] The respondent agrees that it was not appropriate to use the language he says he did to Mr Bannister but says that it was well into the evening; Mr Bannister had made allegations against him; and he was anxious about his own facing charges. Even if Mr Bannister had accused the respondent of manipulating the system, the language used by the respondent on his own account, which the Tribunal accepts, was unprofessional. But in a private telephone conversation between lawyers whose professional life was in the criminal jurisdiction it could not be concluded that those comments had the potential to bring the legal profession or the criminal justice system into disrepute and does not amount to professional misconduct as described in *Adamson* or unprofessional conduct or practice.

[38] The respondent is not guilty of Charge 3.

Charge 4 (3 June 2004 – Complaint of ACC)

[39] The charge alleges:

> "4. That on 3 June 2004 the respondent used language in his communications with officers of the Australian Crime Commission which:
>
> (a) was grossly offensive and insulting; and/or

(b) displayed a lack of professional courtesy to members of a law enforcement agency involved in the administration of the criminal justice system; and/or

(c) had the potential or tendency to bring the legal profession and/or criminal justice system into disrepute.

Particulars

4.1 On 3 June 2004, officers of the Australian Crime Commission executed a search warrant pursuant to the provisions of the *Police Powers and Responsibilities Act* on premises located at 244 Denision Street, Rockhampton at approximately 10.29am.

4.2 The respondent was present at the premises at the time of the execution of the search warrant.

4.3 Throughout the course of the execution of the search warrant, the respondent used offensive and insulting language in respect of the officers of the Australian Crime Commission."

[40] The respondent admits the grossly offensive nature of the language which he used during his interaction with police who were executing a search warrant at the business premises of his client, Brendan O'Brien.[41] The respondent seeks to put the exchanges in the context of a deep antipathy which had arisen between police involved in Operation Mayflower and the respondent whose clients were some of the targets of that operation. The respondent has identified numerous instances of harassment which he believed were instigated by those police. There is no affidavit in response denying those matters but they are collateral matters and it is unnecessary to say anything more about them. After the events the subject of Charge 4, the respondent was charged with public nuisance by police, found guilty by a Magistrate, fined but no conviction recorded on 11 September 2006. He appealed successfully.[42]

[41] The language used by the respondent was disgraceful and tended to bring the legal profession into disrepute. The respondent admits that it constitutes unprofessional conduct and, in the Tribunal's view is a serious example of unprofessional conduct.

[42] The respondent is guilty of Charge 4.

Charge 5 (15 June 2004 – Complaint ACC)

[43] The charge alleges:

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41 A copy of the transcript of the recorded conversation is exhibit DJW3 to the affidavit of Douglas John Winning filed 5 September 2008.

42 Decision of Botting DCJ 25 March 2008; reasons for decision of 16 May 2008 are exhibit DJW 4 to the affidavit of Douglas John Winning filed 5 September 2008.

"5. That on 15 June 2004 the respondent used language in his communications with an employee of the Australian Crime Commission which:

(a) was grossly offensive and insulting; and/or

(b) displayed a lack of professional courtesy to members of a law enforcement agency involved in the administration of the criminal justice system; and/or

(c) had the potential or tendency to bring the legal profession and/or criminal justice system into disrepute.

Particulars

5.1 On 15 June 2004, during the course of a telephone conversation with Carmel Hughes, a paralegal employed by the Australian Crime Commission, the respondent made certain remarks to Ms Hughes concerning Ms Kathleen Florian (the Manager of the Brisbane Office of the Australian Crime Commission) to the following effect:

(a) *"Tell that fucking bitch to stick her fucking petrol money up her fucking cunt"*.

5.2 On the same date, and during the course of a further telephone conversation with Ms Hughes, the respondent again made certain abusive remarks to Ms Hughes saying words to the effect of:

(a) *"fucking coppers"* and *"fucking filthy scumbag coppers who were corrupt"*.

[44] The respondent has explained the circumstances of his grossly offensive language on that occasion. The respondent was to give evidence before the Australian Crime Commission. He told the Commission's employee that he would drive to Brisbane from Rockhampton and would accept as expenses the equivalent amount of the cost of an airfare from Rockhampton to Brisbane return. Ms Hughes then took advice from a senior officer and then told the respondent that the Australian Crime Commission was prepared to pay $50 to cover his expenses. The respondent explains that he became infuriated at being offered $50 to cover the expenses associated with the round trip of approximately 1,350 kilometres. It was in that context that he used the offensive language the subject of the charge. He deposes that they spoke later and he apologised for his earlier outburst and they agreed that he would be paid an amount of $258 to cover travel and incidental expenses. The language was gross and ought not to have been used by a legal practitioner to Ms Hughes. It constitutes unprofessional conduct.

[45] The respondent is guilty of Charge 5.

Charge 6 (5 July 2004 – Complaint of DPP)

[46] This charge and Charge 7 occurred on 5 July 2004 while Charge 8 occurred on 6 August 2004. They all involve Mr Bannister and/or Ms Jolene Kitchener, a member of his staff, in some manner.

[47] Charge 6 alleges:

> "6. That on 5 July 2004, the respondent used language in his communications with Mr Paul Bannister which:
>
> (a) was grossly offensive and insulting; and/or
>
> (b) displayed a lack of professional courtesy to a fellow legal practitioner and Crown Prosecutor; and/or
>
> (c) had the potential or tendency to bring the legal profession and judicial system into disrepute.
>
> ***Particulars***
>
> 6.1 On 5 July 2004, whilst standing in the foyer of the Supreme Court at Rockhampton, the respondent had a conversation with Mr Bannister during which:
>
> (a) he made certain remarks to Mr Bannister concerning Ms Jolene Kitchiner, a clerk employed at the Office of the Director of Public Prosecutions to the effect that Ms Kitchiner was *"a fat fucking slut, a fat fucking listings clerk"*.
>
> (b) he verbally abused Mr Bannister and threatened him with physical violence by:
>
> (i) saying words to the effect that Mr Bannister was *"nothing but the village idiot"*;
>
> (ii) saying words to the effect *"lets take this outside then"* and then removing his coat.

[48] The facts upon which this charge is based are contested. Jolene Kitchener (now Jolene Hill), was employed as a listings clerk in the Rockhampton Office of the Director of Public Prosecutions. The respondent had listed for sentence on 5 July 2004 a matter in the Supreme Court. A few weeks prior to that sentence he had telephoned the Office of the Director of Public Prosecutions to access some old depositions relating to a comparable sentence. The respondent, mistakenly it turned out, thought that the practice in Rockhampton was the same as the practice had been in Brisbane that once a case was completed the depositions were filed in the court as a public record and could be searched.

[49] On 5 July the respondent approached Ms Kitchener for access to the depositions. She told him to make his request in writing to Mr Bannister but the respondent remonstrated that the sentence was on that day. The conversation degenerated and became heated. Ms Kitchener denied that she said to the respondent "You work for a mob of Boongs" and that he was a "corrupt cunt", as the respondent asserted. He responded that she was "a fat slut" who had fallen off "too many bar stools". Mr Jeffrey Tull, who was then a field officer at the Aboriginal Legal Service was present and gave evidence before the Tribunal supporting the respondent's account of the exchange. The Tribunal accepts that Mr Tull reliably remembered the conversation. It was a slur that he was likely to recall. This exhange with Ms Kitchener is not the subject of this charge. The charge concerns what the respondent is alleged to have said about Ms Kitchener to Mr Bannister as discussed below.

[50] Later that day Mr Bannister challenged the respondent about his exchange with Ms Kitchener which became heated. He denies describing her to Mr Bannister as described in the charge but used other crude language. The respondent said he told Mr Bannister that "Jolene" needed pulling into line and that he, Bannister, did not set a good example when "you run around public bars behaving like a village idiot".[43] The respondent explained that he was referring to Mr Bannister's admitted previous behaviour in humiliating Mr Mills, a fellow practitioner, in a public hotel. Ms Kitchener was a good friend of Mr Bannister and had been involved in the aftermath of that incident.

[51] The conversation deteriorated into what was described by the respondent as a "slanging match". Mr Bannister started to walk down two flights of stairs between level 2 and level 1 of the court complex. As he did so, he said that he would take the matter further and the respondent invited him to do so. The respondent contends that as Mr Bannister was about to put his foot on the second flight of stairs he (the respondent) called out "You can take it outside now if you want to". The respondent deposes that he believed that Mr Bannister well understood that this was merely a quip because Mr Bannister responded "keep your coat on clown" or words to that effect.

[52] The Tribunal accepts the respondent's evidence that he did not follow Mr Bannister down the stairs so as to cause Mr Bannister to think that there was a threat or risk of a physical altercation. The respondent made the point that Mr Bannister was twice his size. The Tribunal is in no position to assess the relative physical attributes of the men because Mr Bannister gave his evidence by telephone but Mr Farr did not contend that this was incorrect.

[53] These exchanges were unseemly between the men who were professional colleagues and reflect the general discord which had grown up between them but the respondent's part does not constitute unsatisfactory professional conduct conduct. No other persons were present.

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[43] Affidavit of Douglas John Winning filed 5 September 2008.

[54] The respondent is not guilty of Charge 6.

Charge 7 (5 July 2004 – Complaint of DPP)

[55] The charge alleges:

> "7. That on 5 July 2004, the respondent used language at the bar table in the Supreme Court in Rockhampton which:
>
> (a) was grossly offensive and insulting; and/or
>
> (b) displayed a lack of professional courtesy to a fellow legal practitioner and Crown Prosecutor; and/or
>
> (c) had the potential or tendency to bring the legal profession or criminal justice system into disrepute.
>
> ***Particulars***
>
> 7.1 On 5 July 2004, and inside Court 5 of the Supreme Court at Rockhampton, prior to the commencement of proceedings, the respondent was seated at the bar table in the presence of other practitioners and members of the public.
>
> 7.2 In a conversation with another legal practitioner, the respondent said words to the effect:
>
> (a) *"Jolene is nothing but a fucking drunk"*
> (b) *"She falls off fucking bar stools every five minutes"*
> (c) *"Paul should stop listening to fucking coppers and use what's between his fucking ears"*
> (d) *"Most of the lawyers around here think that Paul is the fucking village idiot and they're right"*
> (e) *"I told him to come outside and sort it out right now"*
> (f) *"The problem is fucking coppers drinking with fucking Magistrates"*
> (g) *"Paul knows that he can't prove three of the six elements""*

[56] Majella La Praik was employed by the Rockhampton Office of the Director of Public Prosecutions as an instructing clerk in mid-July 2004. She was sitting at the Bar table waiting for court to begin at 3 pm on 5 July 2004. Also sitting at the Bar table was Ross Lo Monaco, a barrister, who was appearing for the respondent's client. There were one or two other persons associated with the court moving around at the time. The respondent sat down next to Mr Lo Monaco and said words to the effect of the words set out in Charge 7. The respondent's client was not then present. The respondent accepts that the conversation occurred much as was related by Ms La Praik but that it was a private conversation not meant to involve any other person. However, the respondent spoke in a sufficiently loud voice for the effect of it to be heard by Ms La Praik and perhaps others. It was inappropriate abuse of the

prosecutor, Mr Bannister, and of Ms Kitchener and, in the context, was unsatisfactory professional conduct. The inclusion of particular (g) is mystifying. It is an unexceptional comment.

[57] The respondent is guilty of Charge 7.

Charge 8 (6 August 2004 – Complaint of DPP)

[58] The charge alleges:

> "8. That on 6 August 2004, the respondent used language in his communications with Mr Paul Bannister and Ms Jolene Kitchener [sic] which:
>
> (a) was grossly offensive and insulting; and/or
>
> (b) displayed a lack of professional courtesy to a fellow legal practitioner and Crown Prosecutor; and/or
>
> (c) had the potential or tendency to bring the legal profession and judicial system into disrepute.
>
> ***Particulars***
>
> 8.1 On 6 August 2004, whilst standing outside the Rockhampton office of the Director of Public Prosecutions, the respondent had a conversation with Mr Bannister in the presence of Ms Kitchiner during which:
>
> (a) he made certain remarks to Mr Bannister concerning Ms Kitchiner to the effect that Ms Kitchiner was *"a fat slut, a no hoper drunk ..."* and *"I don't want your staff calling my office – I don't want that fucking slut calling my office – we won't have black fella's in your court any more."*
>
> (b) when asked to leave the respondent verbally abused Mr Bannister and threatened him with physical violence by:
>
> (i) saying words to the effect that Mr Bannister was *"a grubby cunt"*;
>
> (ii) saying words to the effect that he wanted *"to have a go"* and then shaped up in a boxing stance."

[59] On 5 August 2004 the respondent received a detailed letter from the Law Society setting out the complaints the subject of, *inter alia*, Charges 6 and 7. On 6 August 2004 the respondent was in the foyer of the Rockhampton Office of the Director of Public Prosecutions. He gestured that he wished to speak to Mr Bannister and called him "a child" for complaining about the 5 July events. The respondent protested to Mr Bannister that Ms Kitchener had spoken inappropriately about his

Aboriginal clients. Ms Kitchener joined in the conversation and the respondent told her to "piss off" as the conversation was not with her. Mr Bannister said he put his hand on the respondent because he was concerned that he was making a move towards the door where Ms Kitchener was standing. Ms Kitchener agreed that the respondent made as if to move towards her. The respondent took exception to Mr Bannister putting his hand on him. Mr Bannister said that the respondent then pushed him in the chest and "shaped up". This the respondent denied, and Ms Kitchener said that she could not recall the respondent pushing Mr Bannister.

[60] Some altercation between the respondent and Mr Bannister occurred but the LSC has not adduced sufficient probative evidence to satisfy the Tribunal that unsatisfactory professional conduct occurred on that occasion.

[61] The respondent is not guilty of Charge 8.

Charge 9 (19 July 2004 – Complaint of DPP)

[62] The charge alleges:

"9. That on 19 July 2004, when addressing His Honour Mr Bradshaw during the course of Magistrates Court proceedings in which the respondent was the defendant, the respondent used language in relation to Ms Leanne Clare, Director of Public Prosecutions, which:

(a) was grossly offensive and insulting to Ms Clare; and/or

(b) were discourteous to Ms Clare; and/or

(c) had the potential or tendency to bring the legal profession and criminal justice system into disrepute; and/or

(d) were discourteous to the Court.

Particulars

9.1 During the course of his submissions to the Magistrate, the respondent referred to the Director of Public Prosecutions as follows:

(a) *"I take strong exception to this stupid woman, this Leanne Clare, putting this rubbish before a Court. I'm not a paedophile. I'm not a swimming coach. But my only avenue of redress is to come before these Courts."* (Transcript p5 ln5-10);

(b) *"And – can they get this stupid woman, this silly woman who is the Director of Public Prosecutions up here to argue it. I'm not a paedophile and I'm not a swimming coach. I'm a respected practitioner of the Court and we all*

> *know she was involved in grubby little deals to protect paedophiles. I just seek justice. I'm not a paedophile, I'm not a swimming coach".* (Transcript p9 ln 19-25)"

[63] The respondent accepts that he used the words set out in the charge. On 19 July 2004 the respondent was a defendant in the committal proceedings in the Magistrates Court in Rockhampton arising out of his conduct the subject of Charge 1. The respondent appeared on his own behalf. He accepts that the language was inappropriate and insulting to the then Director. By letter dated 19 April 2006 the respondent apologised to the Director. He wrote:

> "The statements I made could only be described as being grossly offensive and insulting to you. ... I offer my unqualified apology for my misconduct . May I wish you the very best for the future."[44]

[64] Such language from a legal practitioner in a public forum would be inexcusable. In submissions in a court it was likely to undermine the confidence of the public in a serious way in the administration of criminal justice in Queensland. It was professional misconduct notwithstanding the enormous pressure under which the respondent was labouring personally at the time.

[65] The respondent is guilty of Charge 9.

[66] **Fitness to Practice**

[67] The Tribunal has the benefit of a very detailed report from Dr Joan Lawrence, a consultant psychiatrist. She examined the respondent on 20 June 2008 at the request of his solicitors for the purpose of providing an independent psychiatric evaluation. Dr Lawrence explored in great detail the respondent's background and the pressures under which he was labouring at the time of these charges. As the respondent admitted frankly in his oral evidence on this hearing, he is an alcoholic but, as Dr Lawrence reported, his alcohol dependence problem is in sustained full remission which means that he has had a severe alcohol dependence over a number of years but it has been contained and controlled by the use of Alcoholics Anonymous strategies. Dr Lawrence noted that the respondent's pathology results were consistent with a history of abstinence over recent years and that there was no evidence of any adverse physical effects of alcohol abuse. Dr Lawrence accepted that during the period in which the charges occurred the respondent was sober and, accordingly, alcohol played no part in his inappropriate language use.

[68] Dr Lawrence concluded:[45]

> "In my opinion, Douglas Winning displays certain personality characteristics which would have their background in both genetic and early life experiences as described, particularly in relation to his relationship with his father in childhood and father's own problems at that stage. By nature and nurture, then the personality

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44 Exhibit DJW 7 to the affidavit of Douglas John Winning filed 5 September 2008.

45 At para 18.6 of her report.

> characteristics are consistent with Douglas Winning's own description of himself as a fighter, someone capable of anger, possibly with, at times, poor impulse control and with a strong inclination to maladaptive ways of expressing anger and anxiety. His use of language and abusive language as a means of communication would, as he suggests, be facilitated by the work that he does. His habit of using, at times, offensive and abusive language as part of communication, including the communication of anger is, in my view, probable. When aroused, it is highly likely he will resort to such language."

Dr Lawrence was given a detailed history from the respondent and continued:[46]

> "There is little doubt that Douglas Winning, during the period from 2003 to the present time, has been very angry as a result of perceived victimisation and injustice as well as the stress and anxiety of the various charges that he has faced as well as, perhaps, consequences of his own impulsive behaviour, for instance, through gambling."

[69] Dr Lawrence explored the possibility of some major psychiatric disturbance in the respondent underlying his apparent lack of judgment and disinhibited expressions of anger and inappropriate use of language during the period covered by the charges. She concluded:

> "There is no evidence whatsoever to suggest that any such condition existed. Thus, in my opinion, Douglas Winning's behaviour and his acknowledged inappropriate use of language is the result of the interaction of the circumstances in which he found himself, the anger/anxiety ('stress') that engendered in him and his innate and habitual ways of dealing with stress, including the maladaptive mechanism of gambling. There is no evidence that he was using the maladaptive mechanism of alcohol abuse at the time."

Dr Lawrence concluded[47] that he appeared to be in control of his alcohol dependence, his gambling problem and his stress levels. She noted that he was using appropriate coping mechanisms to deal with the stress from this hearing. Dr Lawrence considered that the respondent would benefit from the opportunity to maintain a close and trusting relationship with a mentor or professional person to whom he could relate and who could provide opportunities for discussion, to assist him in maintaining sobriety, and a more measured and thoughtful attitude to anger management and the management of his financial and other affairs.

[70] To that end Mr John Shaw, solicitor, who has been a member of the law firm Swanwick Murray Roche for 33 years in Rockhampton, is prepared to fulfil that role for the respondent. Mr Shaw is a very highly regarded Senior Counsellor with the Law Society and I express my appreciation to Mr Mullins for his advice as to the appropriateness of Mr Shaw's assistance. A sole practitioner does not have the benefit of readily available partners or colleagues to discuss problems arising in

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46 Paragraph 18.7 of her report.

47 Paragraph 18.10.1 of her report.

practice. It will be an order of the Tribunal that the respondent attends upon Mr Shaw as and when required for mentoring for a period of 12 months. He should then have established a practice of discussing professional issues with him which will be able to continue thereafter.

[71] The respondent also attended upon Dr Michael John, a clinical and forensic psychologist who practices in Rockhampton, to discuss the matters contained in Dr Lawrence's report. The respondent deposes that they had a lengthy meeting and he agreed that he would contact Dr John in the future as and when required.

Conclusion

[72] This application by the LSC has never been about the respondent's competence or honesty. Mrs Hill (Kitchener) said that she now has a good working relationship with the respondent in Rockhampton. Mr Farr does not contend that the respondent is not presently a fit and proper person to practice. Statements by practitioners and members of the Rockhampton community attest to the valuable contribution which he makes to that community.

[73] These matters are now well in the past. It is of great concern, particularly expressed by the lay panel member, Ms Keating, that events of 2003 and 2004 are only now being brought to a conclusion. I am assured by Mr Farr for the LSC that this and one or two other matters will conclude what might be regarded as "stale" complaints. Furthermore, there are some charges, namely those concerning conversations between Mr Bannister and the respondent which could have been dealt with less formally as there was clearly a breakdown in the professional relationship.

[74] The conduct of the respondent in expressing himself in the crude, vulgar, undisciplined way set out in the charges in respect of which he has been found guilty is not to be tolerated in a member of the legal profession. The findings in relation to each of the charges are as follows:

Charge 1	Not guilty.
Charge 2	Not guilty.
Charge 3	Not guilty.
Charge 4	The respondent is guilty of unprofessional conduct.
Charge 5	The respondent is guilty of unprofessional conduct.
Charge 6	Not guilty.
Charge 7	The respondent is guilty of unsatisfactory professional conduct.
Charge 8	Not guilty.

Charge 9 The respondent is guilty of professional misconduct.

Proposed Orders

[75] The Tribunal in consultation with Mr Mullins and Ms Keating proposes the following orders:

1. The respondent be publicly reprimanded in respect of the conduct in the charges for which he has been found guilty pursuant to s 456(2)(e) of the *Legal Profession Act* 2007.

2. The respondent seek advice as and when required from Mr John Shaw, solicitor, in relation to the respondent's management of engaging in legal practice pursuant to s 456(4)(i) of the *Legal Profession Act* 2007 for a period of 12 months.

Costs

[76] The parties may make written submissions within 14 days as to any costs orders.

Addendum

[77] When these reasons were published to the parties they sought and obtained orders to make submissions about sanction orders within the same period as for submissions on costs.