SUPREME COURT OF QUEENSLAND

CITATION:	*Baker v Legal Services Commissioner* [2006] QCA 145
PARTIES:	**MICHAEL VINCENT BAKER** (respondent/appellant) **v** **LEGAL SERVICES COMMISSIONER** (applicant/respondent)
FILE NO/S:	Appeal No 9533 of 2005 SC No 9619 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against order of Legal Practice Tribunal
ORIGINATING COURT:	Legal Practice Tribunal
DELIVERED ON:	5 May 2006
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2006
JUDGES:	McPherson and Jerrard JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – APPEAL AGAINST DECISION OF LEGAL PRACTICE TRIBUNAL – where tribunal ordered appellant's name be removed from the roll of legal practitioners – whether solicitor acted dishonestly in claiming to be entitled to fees – whether finding of guilt of professional misconduct should be disturbed – whether wrongful charging of professional fees and disbursements where none properly chargeable and dishonest rendering of account constituted professional misconduct – where firm's conduct misleading and deceptive – where solicitor aggressively and remorselessly pursued unsophisticated and inexperienced clients for fees conceivably owed – where tribunal ordered respondent practitioner pay costs – whether withdrawal or failure of some charges warranted an apportion of the quantum of costs – whether "exceptional circumstances" exist such as to defeat the mandatory requirement of s 286(1) of the *Legal Profession Act* 2004 (Qld) CONTRACT – PARTICULAR PARTIES – SOLICITOR AND CLIENT – RETAINER – where terms of retainer "no

win no fee" – circumstances where solicitor entitled to unilaterally terminate retainer – breach or repudiation – circumstances where solicitor entitled to charge professional fees – whether solicitor entitled to claim fees for work done before frustrating event – whether client liable in restitution for work done of which the client takes advantage after discharge of retainer

Legal Profession Act 2004 (Qld) s 286

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498, cited
Appleby v Myers (1867) LR 2 CP 651, cited
Attorney-General v Bax [1999] 2 Qd R 9, cited
Baker Johnson v Jorgensen [2002] QDC 205, cited
Bluck v Lovering & Co (1887) 35 WR 232, cited
Cachia v Isaacs (1985) 3 NSWLR 366, considered
Caldwell v Treloar (1982) 30 SASR 202, considered
In Re Continental C & G Rubber Co Pty Ltd (1919) 27 CLR 194, cited
Cutter v Powell (1795) 6 TR 320, cited
Re Elfis & Somers (OS 270 of 1981) 7 May 1982 (Qld Sup Ct, unreported), cited
Gamlen Chemical Co Ltd (UK) v Rochem Ltd [1980] 1 WLR 614, cited
Gange v Sullivan (1966) 116 CLR 418, cited
ex p Maxwell (1955) 72 WN NSW 333, considered
Meehan v Jones (1982) 149 CLR 571, cited
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221, cited
Planche v Colburn (1831) 8 Bing 14, cited
R v Lindsay [1963] Qd R 386, cited
State Rail Authority of New South Wales v Codelfa Construction Pty Ltd (1982) 150 CLR 29, considered
Sumpter v Hedges [1898] 1 QB 673, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418, cited
Underwood, Son & Piper v Lewis [1894] 2 QB 306, cited

COUNSEL: P J Davis SC with him E J Longbottom for the appellant/ respondent
A J MacSporran SC for the respondent/ applicant

SOLICITORS: Russell & Company for the appellant/ respondent
Brian Bartley & Associates for the respondent/ applicant

[1] **McPHERSON JA**: Michael Vincent Baker, the practitioner and a member of the firm of solicitors Baker Johnson, appeals against a decision of Moynihan SJA, sitting with Mr K Horsley and Dr S Hayes as the Legal Practice Tribunal, that the appellant's name be removed from the local roll of legal practitioners. The appeal arises out of findings at the hearing of a series of charges made against him by the Legal Services Commission, for whom Mr MacSporran of Senior Counsel appeared before us on the appeal and at the hearing of the charges. It is convenient to identify the charges by reference to the client involved in each case, even though there were

in some instances more than one charge, or else alternative charges one or more of which may also have been found to have been proved. In saying this, I should add that, in the case of one client Mr Allan-Lowther, his Honour found that the charge (no 15) was not made out; and that in respect of charges 17 and 18 (using insulting and offensive language), there was no contest at the hearing, those charges being held to constitute unprofessional conduct in each instance. About these matters there is no issue on this appeal.

[2] **The retainers**. As regards the other four individual clients in respect of whom charges were made and proved against the appellant practitioner, the findings against him turn to some extent on the nature and terms of the retainer under which he or his firm were engaged by the particular client. It therefore becomes desirable at the outset to reiterate the legal nature of a solicitor's retainer from his client to act on behalf of his client in conducting litigation for the client, and the right to charge professional fees for work done in the course of so acting. Such a retainer is simply a contract for professional services in return for remuneration. It is therefore governed by the ordinary principles of the law of contract subject to any special terms agreed by the parties or imposed by statute or otherwise by law.

[3] In the case at least of a retainer in respect of relatively uncomplicated litigation, such a contract is entire; that is to say, the solicitor is, apart from any agreement to the contrary, bound to do what is necessary to institute (or defend) the action and to bring it to a conclusion before becoming entitled to payment of any of his professional fees, as distinct from outlays made on behalf of his client in the course of the litigation. This has been settled law for some two centuries or more. See, for example, *Bluck v Lovering & Co* (1887) 35 WR 232, 233, and the authorities cited there and in *Underwood, Son & Piper v Lewis* [1894] 2 QB 306, 311-312, 314; *Gamlen Chemical Co Ltd (UK) Ltd v Rochem Ltd* [1980] 1 WLR 614, 624; *Re Elfis & Somers* (OS 270 of 1982) 7 May 1982 (Qld Sup Ct: unreported); and *Cachia v Isaacs* (1985) 3 NSWLR 366, 376, 377. Characterising the contract as entire also has the consequence, as those and many other decisions show, that the solicitor is not entitled to unilaterally terminate the retainer unless there is what is sometimes described as "reasonable cause" or "just cause", involving a breach or repudiation of the retainer by the client: *Underwood Son & Piper v Lewis* [1894] 2 QB 306, 314. In circumstances such as those, the right of the solicitor, like anyone else, to recover his professional costs or fees for work done before termination of the retainer or contract rests on a quantum meruit, or, as it would now be described, in restitution: see *Planché v Colburn* (1831) 8 Bing 14.

[4] There may on occasions be differences about the applicability of the rule governing entire contracts in the case of retainers for some types of litigation, but not in the case of relatively uncomplicated litigation at common law. As to each of the four clients in respect of whom charges succeeded against the practitioner, the retainer here was of the latter kind. That this was so is confirmed by the terms of each of the retainers, which was made expressly on the footing of "no win no fee", or more expansively, that no fee would be chargeable or charged until the litigation was brought to a successful conclusion. The contract of retainer was therefore "entire" within the meaning of that expression as used here, except to the extent that there may have been specific provisions to the contrary in the individual retainer agreements.

[5] **Mr Nutley**. The first charge against the practitioner concerned a retainer received from Mr Keith Nutley. He had previously consulted a firm of Richard Ebbott & Co, solicitors, about a claim against his former medical practitioner Dr Sykes for negligently failing in time to diagnose and treat a carcinomous condition of his face, as a result of which Mr Nutley alleged he was compelled to undergo surgery on 4 October 1991. Some time after a plaint claiming damages was issued in 1993 and amended in April 1996, those solicitors received an offer from solicitors for the defendant Dr Sykes to settle the action on the footing that each party pay his own costs. The offer was accompanied or followed by a written opinion from a specialist surgeon Dr Del Hinckley in April 1997 to the effect that it was impossible to say whether or not the lesions removed in October 1991 had existed for any specified length of time or that the indication for surgery of a widespread nature was present until "some months" before the surgical treatment in October 1991; and further that, even if earlier non-operative treatment had been received, widespread excisional surgery would have still been required in this area. On the strength of this opinion, the firm of solicitors then acting for Mr Nutley, who had been unable to obtain expert medical evidence in support of his claim, recommended that he abandon the claim on the terms offered.

[6] It was in these circumstances that Mr Nutley, accompanied by his wife, on 3 September 1997 consulted the practitioner for a second opinion about his prospects of success in the claim against Dr Sykes. The practitioner was provided with a copy of Dr Hinckley's letter, but was nevertheless optimistic about Mr Nutley's prospects of success in the action saying it was an open and shut case and that "we will beat these bastards". In late 1999 he obtained the opinion of another medical expert Dr Needham. Unfortunately, Dr Needham essentially confirmed the opinion of Dr Hinckley that an earlier diagnosis of Mr Nutley's condition would not have avoided the need for the surgery he underwent in October 1991, and that, even if it had been carried out, it would not have made any significant difference to Mr Nutley's position. On the strength of this opinion, counsel advised that the prospects of success in the action were "virtually nil". At a conference shortly before trial was due in April 2000, the action settled on the "walkaway" basis earlier proposed by the solicitors for the defendant Dr Sykes. In essence, the outcome in that regard confirmed the advice by Nutley's former solicitors that his claim was not enforceable.

[7] The practitioner or his firm Baker Johnson had before settlement in March 2000 incurred, or so they claimed, a substantial amount in the way of professional costs which it was then asserted Mr Nutley was liable to pay. Whether Mr Nutley was legally liable for them depended on the letter dated 4 September 1997 from Baker Johnson in which the terms of retainer are set out. After referring to the initial consultation with the practitioner held on the previous day in which Mr Nutley had asked that the firm take over conduct of the matter, the letter proceeded:

> "We note that you would have us take over the matter on a speculative basis so far as our professional costs are concerned and that you will meet all outlays as and when they are incurred.
> *Subject to you at all times providing us with accurate information/facts* we will take over the conduct of the matter and be paid our professional costs on the successful conclusion by us of he same."

The italicisation is mine. Despite these terms, the firm of Baker Johnson on 31 July 2000 forwarded a letter claiming to be "entitled" to "reimbursement" for their professional costs for which a memorandum of account was enclosed which, besides outlays, included professional fees amounting to $7,533.32. On 9 November 2000 Mr Nutley made the complaint to the Law Society out of which the present charge arises. As amended it is that the respondent practitioner "dishonestly charged professional fees to Keith Nutley in circumstances in which no fees were properly chargeable".

[8] On behalf of the appellant practitioner, Mr Davis SC, who appeared with Ms Longbottom of counsel, submitted that the charge contained three elements: (1) that the practitioner charged professional fees to Mr Nutley; (2) that no professional fees were chargeable; (3) that those charges were made dishonestly. On appeal the first of these elements was not contested, but the other two are. Whether professional fees were properly chargeable depends on the interpretation of the two paragraphs quoted above from the practitioner's letter of 4 September 1997. In his uncontradicted affidavit evidence, Mr Nutley said that at the meeting on 3 September the practitioner had agreed that the firm would conduct the action on a "no win no fee" basis; but that is, in any event, the effect of the expression that the firm would "be paid our professional costs on the *successful* conclusion by us of the same", and no dispute arises about this aspect of the retainer.

[9] The area of dispute on appeal concerns the meaning and contractual significance of the italicised term "Subject to you at all times providing us with accurate information/facts …". Mr Davis SC contended that it meant that if Mr Nutley provided any information or facts that were not accurate, the firm became entitled to claim professional costs even if they had not (as undoubtedly was the case) brought the matter to a successful conclusion. He further submitted that Mr Nutley had provided a fact or information that was inaccurate.

[10] I am quite unable to read the retainer in the sense contended for. To do so would be to interpret the italicised introductory words beginning "subject to", not simply as a warranty by Mr Nutley that all information provided by him would be accurate, but as entitling the firm to maintain a claim to full professional fees if that warranty was breached in any way. According to ordinary contractual principles the provision in question is not susceptible of such an interpretation. But, even if it were in truth a warranty, breach of it would give rise on the part of the firm not to a claim in debt for the professional fees but only for the loss or damage flowing from that breach. Such damages, if any, would be measured by the significance of the breach in causing the loss sustained, which might be great or little, but which almost certainly would not be precisely quantifiable in the amount of the fees claimed and said to be owing. In that respect, it might be thought perhaps to resemble the converse case of an assertion of incidental negligence or misconduct on the part of a solicitor in carrying out his instructions, which does not serve to deprive him of his right to professional costs unless it renders his work "useless" to the client: cf *Cachia v Isaacs* (1985) 3 NSWLR 366, at 377.

[11] In any event, I am far from thinking that the words in question are capable of being understood as an affirmative warranty by Mr Nutley about the accuracy of his instructions. In Australia contractual provisions in the general form of that in the present case ("subject to …") are commonly construed as conditions subsequent

authorising either party, or at least the party for whose benefit they are inserted, to a right to terminate the contract if the condition is not fulfilled: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 440-441; *Gange v Sullivan* (1966) 116 CLR 418, 429, and many other decisions in which that case has been followed, including *Meehan v Jones* (1982) 149 CLR 571. The subject provision in the retainer here has a similar effect. If fulfilled, it enabled the firm to elect to bring the retainer to an end before successful completion of the action, which, being an entire contract, they would not otherwise have been entitled to do. The italicised term said and did nothing to confer on the firm a right to their professional costs already accrued or incurred before that election was exercised.

[12] In pursuing the submission that the provision under discussion conferred on the firm a right to the fees notified in the letter of 31 July 2000, Mr Davis SC referred to the contents of para 2 of that letter. Speaking of the firm's having taken over the matter from Richard Ebbott & Co, the letter proceeds:

> "We confirm that we were prepared to conduct this matter on a speculative basis on the assumption that your instructions at all times were correct and accurate *and further that any medical evidence that we were able to obtain would be in support of your case*."

Again the italicisation is mine. As to this, his Honour concluded that it was never part of Nutley's retainer that it included a provision in the terms of the italicised part of that paragraph of the letter.

[13] Mr Davis contended on appeal that it did no more than state the effect of what had been agreed perhaps by elucidating its meaning. I do not accept this view, but instead I agree with his Honour's conclusion. There is nothing in the retainer as it is stated in the letter dated 4 September 1997 that resembles the italicised term about medical evidence. It is not to be found in it. It goes considerably further than mere elucidation, specification or particularisation of something more general, but involves an attempt to add a new term and one which, it may be added, is by no means clearly or precisely expressed. What is meant by saying that "*any* medical evidence that we were able to obtain *would be in support of your case*"? Would Mr Nutley be in breach of the condition if the firm obtained an expert medical opinion that did not in fact support his claim? If so, such evidence was in fact obtained when Dr Needham advised in 1999 that earlier diagnosis of Mr Nutley's condition would not have avoided the need for surgery on 4 October 1991 of the kind of which he complained. It was something that was already known from Dr Hinckley's letter of 1997. Yet, when Dr Needham's confirmatory opinion was received, the firm did not then elect to terminate the retainer, but instead on 31 July 2000 put forward the claim to be entitled to charge professional fees even though the action had not been brought to a successful conclusion.

[14] For the reasons already given I consider that there was never any such entitlement to professional fees, which was the view reached by Moynihan SJA in his reasons. It was submitted, however, that the firm was justified in asserting, as it did in the letter of 31 July 2000, that the medical evidence "from your GP's file notes … did not substantiate your allegations or instructions …"; and that this amounted to a breach of the condition contended for in the letter of 31 July 2000 or that of 4 September 1997. A perusal of the notes, which are exiguous, of the "GP" (meaning Dr Sykes) showed only that on the relevant dates when Mr Nutley saw

him, there was no record of any mention in the consultation to the area of his face of which he was complaining. That is explicable as being due simply to the fact that Dr Sykes made no record of what was said about it. It would no doubt have formed a credibility issue for determination by the judge at trial of the action if it had not been settled; but it is impossible to regard the mere absence of a reference to the topic in the relevant file notes as the equivalent of not providing accurate information or facts. On this issue the notes are completely neutral. They do not demonstrate that Mr Nutley had given the firm information that was not accurate.

[15] The second of the three elements in the charge was therefore established and the judge was correct in deciding that it was. On the proper (and I may say obvious) construction of the retainer contained in the letter of 4 September 1997, the fees claimed were not owing. I turn now to the third element identified by Mr Davis, which is whether the charging of these fees was dishonest.

[16] As a general proposition, it is plainly dishonest to charge for something which you know is not owing. If the person to whom the charge is directed pays the amount charged or claimed, it would ordinarily constitute the offence of obtaining by false pretences, which under s 408C(1)(b) of the Criminal Code amounts to fraud. No one can say that fraud is not dishonest. And if the charge or claim is made but does not succeed in producing payment, it constitutes an attempt to obtain, which is also a criminal offence and also dishonest. Of course, in many cases the person who is making the claim or charge may honestly believe that he is entitled to the amount claimed, in which event and quite apart from s 22(2) of the Code, his claim will not be "dishonest" within the meaning of s 408C(1)(b). In the present case, the practitioner before the Tribunal was plainly putting forward some such claim to have acted honestly in claiming to be entitled to the fees. His problem on appeal is that his Honour did not believe him.

[17] His Honour said that essentially he accepted Mr Nutley's account of events where it differed from the practitioner's. Mr Nutley, it may be noted, was not cross-examined at the hearing and his evidence was not contradicted, whereas the practitioner was, so that his Honour had the advantage of seeing and hearing him give evidence. In the course of his reasons, his Honour specifically mentioned various matters of fact leading to his conclusions. One was that at the time the action was set down for trial in March 2000, a solicitor Mr Percival, who was then handling the matter in the firm, told Mr Nutley that he would have to sign an agreement that he was liable for the firm's professional costs. Mr Nutley signed but protested. Ultimately, he received from the firm the letter dated 31 July 2000, previously referred to, claiming an entitlement to those costs calculated at $7,533.32. The practitioner denied writing or signing this letter or authorising Percival either to send a final account or to describe it, as the letter did, as a "memorandum of account". However, in cross-examination it emerged that the office file contained a draft in the same terms as the letter in fact sent to Nutley. The draft bore a notation in the practitioner's hand saying "this is fine". Plainly, therefore, the practitioner had, contrary to his evidence, authorised the sending of the letter and the accompanying account.

[18] Another circumstance on which his Honour relied in reaching his conclusion was the attempt to incorporate in the original written retainer a term or terms that did not appear on it. This related to the assertion in the letter of 31 July 2000 that

"any medical evidence … would be in support of your case". His Honour found (para 95) that it was never a term of the retainer and the practitioner knew it to be so. He also pointed out that when the practitioner responded to Mr Nutley's complaint to the Law Society, he asserted that Nutley had told him that there was medical evidence available that would support his version of the events. This was inconsistent with his own action in seeking advice from Dr Needham and with his knowledge that the previous solicitors Ebbott & Co had advised that the claim was not a viable one. His Honour's finding (para 95) that it was never a term of the retainer that further medical evidence would be found was challenged on the ground that the issue was not a matter of legal interpretation of the retainer but of what the practitioner honestly thought of it. But the sting in para 95 was that his Honour found that the practitioner must have known it was not part of the retainer. We were promised a reference to a statement in the practitioner's cross-examination that he viewed the retainer in the way that was put forward. It was not provided; but the fact is that his Honour found against the practitioner on this question, and did so as a matter of credibility. In my opinion he was justified in doing so. The finding of guilt on charge 1 (Mr Keith Nutley) should not be disturbed.

[19] **Mrs Jorgensen**. The second series of charges concerning a client named Mrs Jorgensen were the subject of charges 2, 3, 6 and 7, of which charges 2 and 7 were proved. Somewhat against her inclination or better judgment, Mrs Jorgensen was prevailed on by an employed solicitor of the firm to retain the firm in an action against her employer arising out of a workplace injury sustained in 1995. Charge 2 is that the practitioner wrongfully charged professional fees and disbursements in circumstances in which none was properly chargeable or they were in excess of what was chargeable. Again it was a term of the retainer in this case that the action would be conducted on a "no win no fee" basis with the further qualification, if relevant here, that the litigation was to be at "no cost to me". A week before trial the claim was settled on 6 March 2000 on terms that the insurer reimbursed $9,324.23 to WorkCover and paid a further $10,000 to or on account of Mrs Jorgensen. When, in reliance on the "no win no fee" agreement, Mrs Jorgensen refused to pay, a bill of costs for $19,699.65 was rendered by the firm. She was then sued in the magistrates court for $8,951.05 after taking account of the $10,000 received which the firm claimed and retained. When the proceedings in the magistrates court were dismissed, the firm appealed to the District Court, where the appeal was dismissed by McGill DCJ for reasons which his Honour gave on 26 July 2002.

[20] In his reasons agreeing in this respect with the magistrate, his Honour said (para 18) that he did not consider that an outcome could properly be characterised within the meaning of the retainer "as a 'win' from the point of view of the [client] unless the [client] actually recovers something herself". It was, his Honour considered, a succinct way of saying that "the client will not have to pay the solicitor other than from the proceeds of the claim … The effect is that the client will not have to pay anything out of the client's own pocket". His Honour went on to consider the significance of a written authority to act, which the client was later compelled by the firm to sign. His Honour held it was "directly inconsistent" with the "no win no fee" retainer, and decided that it could not be relied on by the firm. He then proceeded to hold that the firm's advice to settle was "bad" advice, and that, in recommending to the client a settlement that was financially disadvantageous to the client, the firm was "plainly in breach of its fiduciary duty to the client". It involved the firm in placing its own interest ahead of the interest of

its client and doing so without disclosure to the client. Whether in fact the plaintiff could have succeeded in obtaining more than the settlement figure, she was never advised that the firm proposed to take all the proceeds of settlement and then charge her for more in defiance of the terms of the retainer.

[21] On this appeal, Mr Davis SC accepted that Judge McGill was correct in his reasons on the appeal to him. He did not challenge the decision because, he conceded, his Honour's reasoning was "clearly right" in the context of a settlement "when there can't possibly be a discharge of the fiduciary obligations of the solicitor to advise the client to take that particular settlement, which for financial reasons does nothing more than expose her to a solicitor's bill". This, said Mr Davis, left only the question whether the charging by the solicitor of a fee in breach of that fiduciary duty amounted to professional misconduct.

[22] Moynihan SJA concluded that the practitioner was guilty of professional misconduct in charging fees and disbursements where none was properly chargeable. The practitioner had claimed that he was not concerned in the firm's file with respect to Mrs Jorgensen's claim and that he did not see it. He was, however, the partner of Baker Johnson who was designated in respect of the file and who dealt with it as shown by the bring-up notations on the file. His Honour did not accept the practitioner's evidence that he had nothing to do with it and did not see it; but considered it "highly probable" that the decision to sue for the fees in the magistrates court and the consequent appeal to the District Court was taken with his knowledge or indorsement. That inference was plainly justified. His Honour held that charges 3 and 6 were not, but that charge 7 was, proved. It related to the practitioner's permitting proceedings to be instituted and pursued against Mrs Jorgensen. It was covered by his Honour's finding on the practitioner's responsibility for the institution of those proceedings, which his Honour described as "unmeritorious". Mr Davis SC conceded that if the decision on charge 2 stood, the decision on charge 7 followed that outcome. The findings should not be disturbed leaving only the question of whether the conduct amounted to professional misconduct. On his Honour's analysis it did and no reason is shown to justify interfering with that conclusion.

[23] **Ms Robertson**. The third client in respect of whom a charge of professional misconduct was found proved was a Ms Robertson (charges 9 and 10). She was involved as a pedestrian in a motor accident in which she sustained personal injury and property damage about which she consulted the firm, whom she retained. On 24 July 1996 she filled in a questionnaire and signed a client agreement concerning the payment of fees. Essentially that was the only occasion on which she consulted the firm. The next time she heard from them was when she received a letter from the firm dated 13 October 1999. It advised that they had now discovered they had also been retained by Mr Friedman, who was the other driver, in relation to the same vehicle collision. They said they had done so "unwittingly", but Ms Robertson first learnt of Baker Johnson from a card which was given to her at the accident scene by a tow truck operator. Nothing turns on this, but it may be surmised that the truck operator also provided the same card to Mr Friedman, who in consequence consulted the same firm of solicitors. The practical upshot was that, as the letter of October 1999 said, having placed themselves in a position of conflict, it was not now possible for the firm to act for either party in connection with this matter. The

letter named three other firms on the Gold Coast, to one of whom, Attwood Marshall, Ms Robertson transferred her instructions.

[24] By letter dated 23 February 2000, the firm forwarded to Ms Robertson an account in respect of the personal injury claim and foreshadowed a further account in connection with the property damage claim. In respect of the former the account was initially for an amount of $496.95, and for the latter of $181.50, totalling in all $678.45. That was the amount claimed in an account rendered by the firm on 30 March 2000. In a further account dated 11 May 2000 the amount in respect of the personal injuries claim had escalated to $852.95. In a bill in taxable form forwarded on 23 July 2001, the amount arrived at for the personal injuries claim was fixed at $1,312.57. In November 2001 the firm issued a plaint in the magistrates court claiming $1,829.20, representing a total of $1,312.57 for work and outlays on the personal injury claim, and $516.63 for the property damage claim. Ms Robertson complained to the Law Society about it.

[25] Charge 9 alleged that the practitioner had wrongfully charged professional costs and disbursements to Ms Robertson in circumstances where none was chargeable. Charge 10 was that the practitioner had dishonestly rendered an account to her which was not in accordance with the retainer entered into with Ms Robertson. His Honour found that both charges were made out and that each of them constituted professional misconduct. Whether any fees were chargeable to Ms Robertson, and in what amount, depends in the first instance on the written client agreement dated 29 July 1996 considered in the context of the general law of contract.

[26] The written agreement in this instance includes in cl 3(a) a provision that, so far as material, for all professional work done by the firm the client agrees to pay "fees … together with all outlays and other charges **upon the successful conclusion of the work undertaken** …". Clause 7(i) states that accounts will be issued "upon completion of the matter/judgment or settlement of the action". Clause 11 provides:

> "(ii) The Firm may terminate this agreement and cease to act for the client for lawful cause or if …".

There follows a series of alphabetically numbered subclauses specifying various acts by the client amounting, in substance, to breaches of contract. They are of no particular relevance here. Clause 11(iv) provides:

> "(iv) If this agreement is terminated by the Firm … the Firm is entitled to all outstanding fees and costs up to the termination.".

[27] The terms of the retainer do not displace, but plainly confirm the general rule that professional fees for litigation are not chargeable until the matter (or in this case perhaps matters) is concluded and, in the light of cl 3(a), "successfully" concluded. In that respect it does not differ from the "no win no fee" agreement made by the firm in the cases of Nutley and Jorgensen. The only departure from the general rule is contained in cl 11(ii) and cl 11(iv). The latter entitles the firm to all *outstanding* fees and costs up to termination. It is, to my mind not perfectly clear that a fee is "outstanding" in terms of cl 11(iv) if it has not become due and payable at or prior to termination. The fees here were not due and payable when the firm discovered the conflict of interest and then advised Ms Robertson of it on 13 October 1999. Mr Davis urged that we should not read cl 11(iv) in this way, submitting that it fell to

be interpreted in the context of cl 11(ii), which conferred on the firm a power to terminate this agreement for "lawful cause".

[28] In substance his Honour accepted this view of the contract saying (para 148) that in the circumstances the firm had no option [but] to act as it did, and in para 149 of the reasons that, "although a practitioner who terminates for good cause, as occurred here, is not precluded from seeking payment of a fee ... the charge should only be made in respect of items of work which will not need to be duplicated by the new solicitor". However, I am with respect not able to agree that the contract here was terminated by the firm for just cause under cl 11(ii), or that the client was liable for work not needing to be duplicated. The discovery that the firm was acting for both parties in the prospective litigation produced the inevitable result that it became unlawful, or certainly improper, for the firm to continue acting for either party in the matter. Neither client could have insisted that the firm continue to act for him or her. It became impossible for the firm to do so. In that way, the contract of retainer with Ms Robertson became impossible of performance. Both she and the firm were discharged by frustration from their obligations to perform it. But this was the consequence not of the firm's decision to terminate it, but of the operation of the rule of frustration of contracts, which takes effect independently of any action by the parties. The retainer was frustrated when the conflict of interest arose or was discovered irrespective of, and before, the notice relying on cl 11(iv) was given on 13 October 1999.

[29] This raises the question of whether or not the firm was entitled to claim fees for work done before the frustrating event occurred. It falls to be determined according to the general law of contract. On the strength of a passage in Dal Pont, *Lawyers' Professional Responsibility*, (2nd ed, 2001) at 54, that a solicitor who determines a retainer for just cause is entitled to recover his fees to date, his Honour concluded that there may have been some fees due from Ms Robertson to the firm for work done by the firm prior to the termination notice given on 13 October 1999. The principle of law applicable in such circumstances was laid down in *Appleby v Myers* (1867) LR 2 CP 651. It is that, when by force of a supervening event for which neither party is responsible an entire contract becomes impossible of performance, both parties are discharged from further performance, but the performing party is not entitled to payment for the work done because it was never completed. It is, said Blackburn J in that case (LR 2 CP 651, 659), "a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither".

[30] It may be accepted that, to the extent that one party has before discharge done work of which, after the discharge of the contract by frustration, the other party takes the benefit the latter may be liable in restitution for that benefit or its value. Mr MacSporran SC agreed that the Robertson case was conducted before the Tribunal here on the basis of the passage in Dal Pont. It is, however, one matter to say that a solicitor may be discharged from his retainer whenever "just cause" exists or arises; it is another to say that he thereupon becomes entitled under a contract of retainer that is entire to recover fees for the work done. The decisions on which Professor Dal Pont relies do not in my respectful view support such a conclusion. They are *ex p Maxwell* (1955) 72 WN NSW 333, at 337; *Cachia v Isaacs* (1985) 3 NSWLR 366, at 377-378; and *Caldwell v Treloar* (1982) 30 SASR 202, at 209. The first two decisions were concerned not with the right to recover fees where the

retainer work has not been completed but with the question whether the solicitor is discharged from his retainer by the happening of such circumstances. The South Australian decision related to a case not of an uncomplicated action at common law like this, but of a retainer in respect of a series of matters in the administration of an estate over a lengthy period of time. It was held not to attract the rule governing entire contracts.

[31] It may be asked why a solicitor should be compelled to forego charges for work done under a retainer which, through no fault on his part, has been brought to an unexpected and premature end. It may equally well be asked why in the same circumstances the client should be obliged to pay for it. The answer lies in the character of a contract to do work on a "no win no fee" basis. In that respect it resembles to some extent a "no cure no pay" agreement for salvage services in Admiralty in which no payment is recoverable unless the salvage efforts are successful: cf *Kennedy's Civil Salvage* (4th ed), at 335. If you make an agreement like that, you are stuck with it. The analogy between the risks of litigation and the perils of the sea may not be wholly inappropriate.

[32] It may be accepted, as it was in this instance, that the client will be liable in restitution for work done of which the client takes advantage after discharge of the retainer. There are statements in *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 supporting the existence of such a principle, which explains his Honour's reference to "items of work which will not need to be duplicated by the new solicitor". Several comments are apposite. One is that the question is not whether some work has been done that there is no need to duplicate, but whether in fact the client received and made use of the benefit of that work. See *Sumpter v Hedges* [1898] 1 QB 673, 676. Attwood Marshall succeeded to the firm's retainer, but it is not clear precisely what items of work, if any, were made use of by them, and on what terms. A letter dated 23 February 2000 from Baker Johnson observes that there has been no correspondence from those solicitors to obtain the firm's records "which are held in connection with the matter". The implication at that stage is that no use was made by Attwood Marshall of any work the firm had done for Ms Robertson. Ordinarily the integrity of the "no win no fee" retainer is preserved by the two firms agreeing that on completion of the matter the fees due to the former will be paid out of the proceeds of litigation, if any, coming to them, or at least that they will notify their predecessors of that event. Whether that in fact occurred here it is not, on the evidence, possible to say. The material in the record is not sufficient to enable a conclusion to be reached that anything was due to the firm from the client on this or any other basis.

[33] What is clear is that in charging Ms Robertson a total of $1,829.20, for which the firm brought the proceedings in the magistrates court, Baker Johnson charged her for items to which they were not entitled and which, as his Honour found, the practitioner knew they were not entitled. Indeed, it is obvious to anyone that, for the few items of work for which charges might perhaps have legitimately been made, an amount of $1,312.57 for work and outlays in taking instructions on the initial consultation, carrying out a computerised or CITEC traffic search, and preparing and despatching a notice under s 37 of the Motor Accident insurance legislation, was grossly overstated, to say nothing of the further amount of $516.63 for costs on the property damage claim, of which there is no evidence at all.

[34] Mr Davis SC submitted that, however small the amount properly chargeable was in comparison to that charged, there was nevertheless something chargeable, and that the Commissioner had therefore failed to prove its complaint that the practitioner had "wrongly charged professional costs … where *none* were chargeable". In my view, for the reasons given, nothing was chargeable. But, in any event, that the charge is not to be understood as Mr Davis suggests can be shown by reference to decisions on indictments charging the stealing of a particular sum or sums of money or other items, as to which it is proved at trial that only a lesser amount or fewer items have been stolen. The rule, on which countless juries have been directed and convicted in Queensland, is that on such an indictment the accused may be convicted of stealing the smaller amount or number of items. See *R v Lindsay* [1963] Qd R 386, 400-401, where the authorities are referred to in the reasons of Hart J, with whom Philp J agreed. It would be astonishing if a different rule prevailed in charges like these, in which the proceedings are not criminal in character. It is not suggested that the practitioner or his legal representatives were misled in the conduct of the defence to charge 9 by the variance in the evidence as between the amount alleged to have been charged by the firm and any amount that was due. In my view, his Honour was correct in finding that the practitioner had wrongfully charged costs and disbursements, and that remains so whether none or only some small amount was properly chargeable.

[35] Charge 10 in relation to Ms Robertson was that of dishonestly rendering an account of the firm's professional fees that was not in accordance with the retainer, in that it charged all professional fees at the hourly rate of $280, whereas some of the work on the personal injury file was carried out by employees of the firm who were not professionally qualified. His Honour found this charge to have been proved. In doing so he characterised as "evasive and duplicitous" the practitioner's attempts in evidence before the Tribunal to rely on cl 11(ii)(b) of the client agreement as a basis for terminating the agreement. This finding related to the practitioner's efforts at the hearing to distance himself from any active conduct or role in relation to the file. The truth was, as his Honour found, otherwise.

[36] When the firm was preparing to take court proceedings to recover the amounts claimed totalling $1,829.20, a costs assessor was engaged to prepare a bill in taxable form. In a memorandum dated 24 June 2001 addressed to the practitioner, she asked him to look at the files before instituting proceedings remarking that she "didn't know whether we will get away with the client agreement or [that?] half the work was done if she [Ms Robertson] decides to engage a solicitor to look at the bill". Commenting on this, Shane Alexander, a solicitor employed by the firm, recorded his view in an internal memorandum dated 11 July 2001 to the practitioner:

> "She's probably right on the property damage file. We will get screwed if we attempt to get that sort of money out of our client. We have no client agreement. There is also very little by way of correspondence except telling her to go to someone else."

[37] The practitioner took a close interest in the proceedings against Ms Robertson. Another internal file memorandum dated 29 October 2001 from him to an employee solicitor of the firm directs that a plaint be drawn to recover the fees from her, but "to speak to him first". The firm had some difficulty in locating her present address in order to serve her. The practitioner instructed his secretary to telephone the hospital where she was believed to work and to obtain Ms Robertson's residential

address by pretending that the firm acted for her and had lost contact with her. At the hearing he acknowledged that he was not then acting for her. He could not say "what was in my mind" when telling the secretary to ring. In his reasons his Honour commented that the practitioner ignored his obligations to his client when telling his secretary to make the telephone call.

[38] In my opinion, it is nothing to the point to say that some time elapsed between despatching to Ms Robertson the bill in taxable form in July 2001 and the instruction on 29 October 2001 to recover the amount of the bill. The magistrates court proceedings issued on 16 November 2001. From then until July 2002, steps were taken at the practitioner's instigation to locate and serve Ms Robertson. His Honour concluded that it was "highly likely" that the practitioner was aware of the concern raised by the file notes of 24 June 2001 and 11 July 2001, but chose to ignore the reservations they contained. If there was anything exculpatory in the course of events or the steps that were taken in and about recovering the amount of the bill, the practitioner did not place it before the Tribunal. His Honour was correct in rejecting the practitioner's claim at the hearing that he knew "nothing about the figures" involved in the claim. He was justified in drawing the inferences that he did in finding charges 9 and 10 proved and that they each amounted to professional misconduct.

[39] **Mrs Hajistamoulis**. In the case of this client, charge 14, which was found to be proved, was that the practitioner failed adequately to supervise the conduct of a solicitor or solicitors employed by the firm in that he failed to adequately supervise the drafting and sending of a letter dated 30 May 2001 to the Law Society. That letter responded to a letter dated 24 May 2001 from the Society seeking an explanation of the complaints made by Mrs Hajistamoulis.

[40] There is no doubt that the letter of 30 May 2000 contained information that was false or misleading. It asserted that the firm had not agreed to conduct or carry on litigation of a claim on a "no win no fee" basis but on the footing she would be paying for everything. The retainer arose from the client and her husband having seen an advertisement that the firm would act in litigation on a "no win no fee" basis, with nothing to suggest that other conditions applied qualifying that term. After sending her new solicitors a bill of costs for $3,723.16, of which $2,374.86 was for professional fees and $122.60 for GST, the firm sued the client in the magistrates court for the amount of the bill.

[41] His Honour found that the retainer agreed to was on a "no win no fee" basis and that the oral and written material supported the evidence to that effect of the client and her husband. On any view of it, the conduct of the firm in the matter was misleading and deceptive. However, the issue was whether the practitioner had failed to adequately supervise the solicitor or solicitors who sent the letter dated 30 May 2001 which contained the misleading statements. The letter at its top left hand corner bears the initials of the practitioner MVB along with those of the employed solicitor responsible for it. According to the common conventions applicable to business correspondence, it would ordinarily be assumed that the partner whose initials appeared on the letter was the individual who was writing or taking responsibility for the letter.

[42] However, the evidence before the Tribunal was that the firm did not order its affairs on the conventional basis expected to prevail in such matters. Instead, it followed a practice of placing the practitioner's initials on all the firm's files involving matters of a litigious character, irrespective of the fact that, as was the case here, the litigation was being conducted at the firm's Springwood office, which was not where the practitioner personally practised. The correspondence including the Law Society's letter of 24 May 2001 was directed personally to the practitioner's partner Mr Johnson at the firm's Brisbane office, and there was no evidence that the practitioner saw or was aware of the Society's letter or the firm's response to it dated 30 May 2001. The complaint and the correspondence responding to it were dealt with by Mr Johnson in conjunction with a solicitor named Briggs employed by the firm.

[43] It comes as a surprise to learn that there are firms of solicitors who treat a letter of complaint from the Law Society with such indifference as not to consult other partners about it. Mr Johnson provided an affidavit in support of the practitioner's character. In it he deposes to the practitioner's "intrinsic" and "absolute" honesty, and his insistence each month on seeing every file "under his control" and keeping clients "totally up to date" in respect of their matters. However, this affidavit was not tendered to the Tribunal until the decision on the charges was given. On the element of responsibility for the charge, Mr Johnson could not be cross-examined about the firm's surprising practice as regards correspondence with the Law Society because the affidavit in question was tendered after the decision on liability and as going simply to the issue of the sanction to be imposed.

[44] It is difficult to believe that the timing of the affidavit or its tender was entirely a matter of coincidence. The fact is, however, that, if either of the partners of the firm was guilty of a failure to adequately supervise the drafting and sending of the letter dated 30 May 2001 to the Society, it was, on the evidence not the practitioner but Mr Johnson. He was not the one charged with the conduct in question. It follows in my respectful opinion that the practitioner could not be found guilty of the unprofessional conduct charged in count 14. The finding and the decision on that charge against the practitioner must therefore be set aside. It only remains for the future instruction of the profession to say that, in the case at least of a firm with only two or a few partners like Baker Johnson, the excuse that it was the other partner who dealt with a complaint from the Law Society will not be so readily accepted hereafter. A system will have to be instituted in such firms to ensure that something as serious as a complaint having the potential to produce a charge against a member of the firm is considered by all partners of the firm before a response to it is sent.

[45] **Sanction**. The charges in counts 17 and 18 of use of offensive and insulting language, which were held to amount to unprofessional conduct, were not contested on appeal. In the result, the practitioner has, for the reasons given, succeeded in his appeal against the charge of unprofessional conduct in charge 14 only in respect of Mrs Hajistamoulis. This leads to the question whether, because of it, the sanction imposed in respect of all the proved charges ought to be revised by this Court on appeal, and whether in any event it was too harsh overall. That sanction was that the name of the practitioner be removed from the local roll.

[46] It is accepted that the criterion by which professional misconduct falls to be judged is whether the conduct violates or falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competency: *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498, 507. It is also 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: cf *Attorney-General v Bax* [1999] 2 Qd R 9, 23. In determining the sanction to be applied the Tribunal or Court is entitled to take account of the persistence with which the conduct has been pursued and the degree of candour displayed by the practitioner in the course of the disciplinary hearing. Judged by these criteria, the practitioner does not emerge at all favourably from the encounter.

[47] In the case of Mr Nutley, the practitioner took on a person who he knew had been reduced to living on a pension by the personal cataclysm that had befallen him. He had already received advice from his previous solicitors that his claim would end in failure. The only basis on which he was able to litigate was a "no win no costs" basis. Ignoring the previous advice, the practitioner encouraged his client's hopes and, when they proved false, he proceeded to advance the specious claim that Mr Nutley had breached a term of the agreement. Faced with the bill for costs that the practitioner was determined to pursue against him, Mr Nutley filed his own application in bankruptcy.

[48] Mrs Jorgensen was an unwilling litigant who, despite her having made a "no win no costs" agreement, ended up being confronted by a substantial claim for costs from the firm in circumstances in which the firm, in breach of their duty, advised settlement and in doing so preferred their own financial interests to hers. They pursued their claim against her, as his Honour said, "remorselessly" to the extent even of appealing from the magistrates court to the District Court, when a moment's reflection would have revealed the oppressive nature of the claim being made in the circumstances in which it arose.

[49] It is a debatable question whether the case of Ms Robertson presents more or less serious features than those in the case of Mrs Jorgensen. In a matter in which, through no fault of hers, she received no apparent benefit from the retainer, the firm, with the practitioner's approval, pursued her to the point of issuing proceedings against her in the magistrates court. When they were unable to locate her in order to serve her, the practitioner instructed his secretary to practise a false subterfuge on Ms Robertson's former employer in order to obtain her address, a matter of which his Honour made specific mention as providing a small but significant insight into the practitioner's professional attitudes or the lack of them.

[50] In addition or in furtherance of the matters mentioned by his Honour, there are several respects in which the practitioner's conduct as revealed in these charges and the evidence about them impresses me most unfavourably. One is his unduly aggressive response to clients who fail to pay what he conceives is due to the firm irrespective of the reservations of other practitioners around him. The culture that emerges is that a claim for fees is made, and, if not immediately paid and irrespective of the reason why it is not, it is then remorselessly pursued and the amount is escalated on each occasion when a further account or bill for the same matter is sent to the client. Another aspect of the conduct in these cases is, as his

Honour observed, that the clients were all in poor financial circumstances and were unsophisticated persons inexperienced in legal matters. The methods adopted by the practitioner were in my view intended to cow them into submission by relentless demands upon them even if they were not due. He used his authority, position and facilities as a solicitor and partner in the firm in order to overwhelm them. The firm's letterhead prominently displays a logo of a rhinoceros. This symbol of animal aggression was, as it proved, arrayed not only against opponents of the firm's clients but against the clients themselves if they dared to defy him. His Honour correctly described the practitioner as treating the complainants "shamefully" by ignoring their interests or subordinating them to the interests of the firm or his own.

[51] In his written responses to the clients' complaints and in his evidence in the proceedings against him, the practitioner showed a notable want of that form of candour expected of a solicitor confronting such serious charges. He persisted before the Tribunal in assertions that were shown to be false: for example, in the Nutley matter, denying that he authorised use of the description "memorandum of fees" or the sending of the letter containing that expression, when the draft letter in the office file carried a notation in his handwriting saying "this is fine"; in the Jorgensen matter, by asserting that the proceedings and the appeal to the District Court were taken without his knowledge or indorsement; and in his efforts to distance himself from active involvement in the Robertson file. His Honour was disposed to reach a similar conclusion in respect of the response to the Hajistamoulis letter from the Law Society. I have arrived at a different conclusion as regards that matter simply on the basis of the lack of evidence against him of his personal involvement.

[52] Even without the adverse finding in respect of that matter, I consider that the remaining findings and conclusions of guilt justify removal of the practitioner's name from the local roll. It is true that he has now practised for some 30 years without previously facing charges of this kind. But the charges of which he was found guilty are serious, and the way in which his conduct has been pursued persuades me that the Tribunal's order was correct. It was not an isolated occurrence of overcharging but behaviour that was systematic down to and including the hearing, which involved findings of dishonesty in at least three charges and of unprofessional conduct in four. To this I would add my agreement with his Honour's observation that there is a serious question whether the practitioner has a genuine appreciation of the impropriety of his conduct and its consequences for the clients, the legal profession and the public interest at large.

[53] I would not disturb the order that the practitioner's name be removed from the local roll.

[54] **Costs**. The Tribunal ordered that the respondent practitioner pay the applicant Commissioner's costs to be assessed on a standard basis. The submission was made before us that there ought to have been an apportionment of the costs of the proceedings having regard to the Commissioner's failure on some of the charges decided by the Tribunal and his withdrawal or failure to pursue some of the others. Section 286(1) of the *Legal Profession Act 2004* provides that a disciplinary body (which includes the Tribunal):

"must make an order requiring a person whom it has found guilty to pay costs, including the costs of the commissioner … unless the disciplinary body is satisfied exceptional circumstances exist."

Subsections (2) to (7) of s 286 are as follows:

"**286 (2)** A disciplinary body may make an order requiring a person whom it has not found guilty to pay costs, including costs of the commissioner and the complainant, if the disciplinary body is satisfied that –

(a) the sole or principal reason why the proceeding was started in the disciplinary body was the person's failure to cooperate with the commissioner or a relevant regulatory authority; or

(b) there is some other reason warranting the making of an order in the particular circumstances.

(**3)** Without limiting subsection (2), a disciplinary body that makes an order under section 284 may make a further order requiring an Australian legal practitioner, in relation to whom the order under section 284 relates, to pay costs in relation to the order.

(4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that –

(a) the Australian legal practitioner or law practice employee is not guilty; and

(b) the body considers that special circumstances warrant the making of the order.

(5) An order for costs –

(a) may be for a stated amount; or

(b) may be for an unstated amount but must specify the basis on which the amount must be decided.

(6) An order for costs may specify the terms on which costs must be paid.

(7) In this section –

guilty means guilty of unsatisfactory professional conduct or professional misconduct, or of misconduct in relation to a relevant practice, as mentioned in section 280(1) or 282(1)."

[55] It was submitted on behalf of the practitioner that the Tribunal was wrong in construing s 286(1) as conferring no discretion but to order costs against a practitioner found guilty within the meaning of s 286(7), except where satisfied that "exceptional circumstances" exist. By reference to s 286(5), it was submitted that there is discretion to apportion the quantum of costs where, as here, each party has had a measure of success. Any other interpretation could, it was said, lead to absurd results; for example, a practitioner might be successful in defeating all but a single charge against him, which was relatively minor in the overall context of the time

and effort expended on it in comparison to all the other charges in which the practitioner was successful. Yet he would nevertheless be bound to pay all the costs of the whole proceedings even though only one or a few charges might have been proved.

[56] In my view, however, the criterion adopted in s 286(1) is whether the practitioner has been found guilty of one or more of the forms of misconduct specified in s 286(7). If he has, then an order requiring him to pay costs must be made against him unless the Tribunal is satisfied that "exceptional circumstances" exist. It is true that s 286(1) refers simply to "costs" and not to all the costs of the proceedings; but the latter is I consider its primary meaning in this context. Section 286(1) is not designed to confer or preserve the broad discretion over costs commonly found in statutory provisions conferring power to award costs. If it had been intended to do so, it could and would have been expressed to that effect. On the contrary, the mandatory rule imposed by s 286(1) is designed to follow unless the Tribunal is satisfied that exceptional circumstances exist that call for some other order to be made, either generally or in terms of an amount under s 286(5)(a) or (b) or against the Commissioner under s 286(4).

[57] The present was not such a case. Even though he succeeded in some of the charges against him, the practitioner was found guilty of some seven charges that resulted in the ultimate sanction being imposed upon him of removal from the roll. No exceptional circumstances existed to defeat the mandatory requirement imposed by s 286(1) that he pay the costs including those of the Commissioner. That being so, the Tribunal was required to make the order that was made in this matter. In any event, if his Honour had discretion, it was or would have been appropriately exercised by making the order he did.

[58] In my opinion the appeal against the orders made by the Tribunal, including the order as to costs, should be dismissed.

[59] **JERRARD JA**: In the appeal I have had the benefit of reading the reasons for judgment of McPherson JA, and the orders proposed by His Honour, with which I agree. I add these further remarks.

Mr Nutley's matter

[60] Mr Nutley had instructed Mr Baker that Mr Nutley had had a number of consultations with his general practitioner, Dr Sykes, on and from late 1987 up to and including 22 August 1990. The statement Mr Baker took from Mr Nutley on 11 February 1998 (the second such statement; Mr Baker was unable to locate the two tapes of an earlier interview in November 1997, and had to repeat it) recorded consultations from 1 September 1987 through to 17 July 1990. Mr Nutley got those dates from Medicare records, provided to Mr Baker.

[61] The statement Mr Baker took did not refer to consultations on the three dates which appeared in the amended plaint filed by Mr Nutley's previous solicitors. Those dates were 22 August 1990, 25 February 1991 and 2 April 1991. The amended plaint contended that Mr Nutley had seen Dr Sykes on those days seeking medical advice regarding the worsening condition of the skin irritation to his face and head.

[62] The statement taken from Mr Nutley on 11 February 1998 by Mr Baker asserted that when Mr Nutley saw Dr Sykes on 19 November 1987 Mr Nutley had raised the question of his skin cancer with Dr Sykes. The statement also records that Mr Nutley was having further problems with skin irritation by mid-1989, and was told by Dr Sykes that it was dermatitis. On one specific occasion (otherwise established to have been 22 August 1990) Mr Nutley expressed concern about a mole on the back of his right leg, which Dr Sykes told Mr Nutley was not malignant.

[63] The remainder of the correspondence, affidavit evidence, and oral evidence led before the Tribunal made tolerably clear that Mr Baker had assumed that the medical records kept by Dr Sykes would confirm that Mr Nutley had discussed the possibility of Mr Nutley having skin cancer with Dr Sykes in November 1987, and then again in 1999. In fact Dr Sykes' clinical notes did not record consultations about skin cancer on those dates, and recorded only the consultation on 22 August 1990 about possible cancer on the leg. Other than that, the notes recorded other reasons for the various consultations with Dr Sykes. However, the absence of notations about conversations concerning skin cancer does not establish that anything that Mr Nutley told Mr Baker was incorrect. It was common ground before the Tribunal that a Dr Gold had written a quite lengthy report about Mr Nutley's treatment for skin cancers by Dr Gold, addressed to Dr Sykes, and had sent that to Dr Sykes before Mr Nutley first consulted Dr Sykes in 1987. That being so, it seems probable that Dr Sykes and Mr Nutley did at least refer to the condition from which Mr Nutley suffered, and of which Dr Sykes (as the general practitioner whom Dr Gold understood Mr Nutley would be consulting) had already been told in writing by Dr Gold. The fact that nothing was recorded by Dr Sykes simply accords with Mr Nutley's own understanding, namely that in 1987 when he saw Dr Sykes he was not then suffering from any skin cancers. He had suffered from a considerable number of them over the previous years, all of which had been surgically removed, but as it happened had not obviously developed any in the three years in which he attended upon Dr Sykes.

[64] The other assumption which it is tolerably clear that Mr Baker made was that he would be able to obtain medical evidence to support the proposition that the skin cancers seen in September 1991 would have been evident, on careful inspection, at earlier dates. As it happened, Mr Baker was unable to obtain any specialist medical opinion to contradict that obtained by Dr Sykes, and the specialist opinion which was obtained from a Dr Needham was to the effect that it was impossible to say whether the carcinoma seen in September 1991 by another doctor would have been present by March 1991; and further that earlier diagnosis would not have avoided Mr Nutley requiring plastic surgery. That advice doomed the prospects of success against Dr Sykes.

[65] Having received that advice, Mr Baker advised Mr Nutley that "we may be able to negotiate some nominal damages that would at least cover your legal costs"[1], in a letter dated 28 February 2000. That last advice contains the vice identified by McGill DCJ in his judgment in *Baker Johnson v Jorgensen* [2002] QDC 205 at [27]; namely that when Mr Baker's firm entered on a "no win, no fee" retainer with Mr Nutley, the firm's solicitors had a fiduciary duty to advise him that it was better to settle on the basis that no damages were paid and each party bore their own costs,

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1 At AR 240.

than it was to accept a small sum as damages, which sum might be exceeded by the professional costs of the firm.

[66] Returning to the narrative, despite the express terms of Mr Nutley's retainer, Mr Baker required that Mr Nutley pay professional fees of $7,533.32, and other costs of $4,176.50, on the basis that Dr Sykes' file note and the specialist reports obtained "did not substantiate your allegations or instructions". With respect, that contention was inaccurate, because Mr Nutley's instructions, taken by Mr Baker, had only described attendances on Dr Sykes up to and including 17 July 1990, and the medical evidence Mr Baker obtained from Dr Needham accorded with the medical evidence supplied by Mr Nutley to Mr Baker (Dr Sykes' specialist opinion), namely that even if Dr Sykes and Mr Nutley had discussed Mr Nutley's skin condition on each and every visit by Mr Nutley, Mr Nutley could not find a specialist who would say the cancer removed in 1991 could have been detected in 1990. As an experienced lawyer Mr Baker must have known that he had simply been wrongly confident that he could get such a specialist's opinion, and must have known that it was unfair and dishonest to reproach Mr Nutley with having given instructions that had not been substantiated by Dr Sykes' file notes or Dr Needham's expert opinion. Mr Baker personally approved the sending of letters pressing Mr Nutley for payment of fees which Mr Baker knew Mr Nutley did not owe. Even after a complaint to the Law Society Mr Baker approved of the firm's persisting with a claim for those costs, and approved the baseless statement to the Queensland Law Society that Mr Nutley had indicated to Mr Baker that Mr Nutley had medical expert evidence available that would support Mr Nutley's version of events. As the Tribunal observed, that claim was inconsistent with Mr Baker's letter to Mr Nutley of 14 October 1997, which referred to the previous solicitor's belief that Mr Nutley did not have a viable claim with the medical evidence which had been obtained.

[67] In the circumstances the Tribunal was justified in the conclusion that Mr Baker had dishonestly charged professional fees to Mr Nutley in circumstances in which no fees were properly chargeable; and the further conclusion that Mr Baker's conduct was professional misconduct. It was dishonest to charge for what he knew was not owed, and to justify charging it by the specious claim that the client had misled him. In those circumstances, Mr Nutley's interest were placed well after Mr Baker's.

[68] The Tribunal remarked that lawyers have a position of special influence over clients in the conduct of the client's affairs and are obliged to serve and protect the client's interest at all times, assisting them to understand issues, their rights and obligations, so as to allow the client to give proper instructions; and to give due regard to a client's position of dependence on the practitioner. Additionally, practitioners must be scrupulous in putting the client's interest before their own. Mr Baker's conduct in Mr Nutley's affairs demonstrably failed to honour those obligations and duties, particularly when Mr Baker falsely accused his ex-client of giving unreliable instructions, in an attempt to justify charging fees.

"The Jorgensen matter"

[69] The same want of ethics was shown in the charges involving Mrs Jorgensen, of which it was agreed on the appeal the most important was count 2. That count charged that Mr Baker wrongfully charged professional fees and disbursements to Mrs Jorgensen in circumstances in which no fees or disbursements in excess of the sum recovered were properly chargeable. The facts are described in the judgment of McPherson JA. One disturbing feature of that matter is that a solicitor in Mr

Baker's firm persuaded Mrs Jorgensen to continue with her claim when Mrs Jorgensen had actually already abandoned it, and persuaded her to do so on the promise of "no win, no fee", and as stipulated by Mrs Jorgensen, at no cost to her. Mr Baker was not shown to know of the promise the revitalized litigation would be at no cost to her, but Mr Baker did know it was a "no win, no fee" retainer, and approved sending Mrs Jorgensen a bill for almost twice the $10,000 cash settlement she received. This was after the firm had taken the whole of that $10,000 for its fees and outlays. The Tribunal accepted that Mr Baker either instructed or endorsed the unmeritorious proceedings against his firm's former client, which included an appeal to the District Court when the Magistrate dismissed the claim for them, with the Magistrate remarking that the firm's conduct appeared to be misleading, inequitable, and bordering on unconscionable.

[70] Those are accurate descriptions of what Mr Baker specifically authorised. He must have realised that the $10,000 settlement had benefited only the firm, and that Mrs Jorgensen, would as McGill DCJ observed, have been far better served by an agreement that there be no damages and that each party pay their own costs. Had that occurred, Mr Baker's firm would have had no basis for a claim that Mrs Jorgensen was obliged to pay any of their professional costs.

[71] It is unnecessary in this appeal to decide whether McGill DCJ was correct in the view that an outcome cannot properly be characterised as a win from the point of view of the client unless the client actually recovers something herself. It is unnecessary to do so because neither party on the appeal challenged the correctness of that view, and in any event Mr Davis SC accepted during his submissions on the appeal that it was a breach of the fiduciary duty owed by the solicitor with the conduct of the matter not to advise Mrs Jorgensen in the terms recommended by McGill DCJ; that is, the solicitor was obliged to explain to her that it was better for her to put her interests before the firm's, and to accept an outcome in which she was under no obligation to pay any costs to the firm. Mr Davis SC also accepted that it followed that suing her for costs in excess of the small damages obtained, all of which had been swallowed by the firm, was itself conduct in breach of the fiduciary duty owed to Mrs Jorgensen. Far from being assisted to understand issues, with her interests put first, Mrs Jorgensen had her interests ignored and she was exploited for the firm's ultimate financial benefit.

[72] Mr Davis SC accepted that on the findings made by the Tribunal, the issue for determination on the appeal in the Jorgensen case was limited to whether or not Mr Baker's conduct as described, which was admittedly in breach of a fiduciary duty and a wrongful claiming of professional fees from Mrs Jorgensen, was professional misconduct. I am satisfied the Tribunal was justified in the conclusions that it was, namely that it violated or fell short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

The other counts

[73] I agree with McPherson JA in respect of the other counts. Counts 9 and 10 were made out, because Mr Baker saw the internal memos of 24 June 2001 and 11 July 2001 informing him that the professional costs which were then proposed to be charged to Mrs Robertson could not be justified; despite that advice he authorised her being charged even more, by a notation dated 29 October 2001.

[74] I also agree that it is appropriate for this Court hearing the appeal to amend the charges as foreshadowed by the senior counsel of the Commissioner, because the appellant was in no way misled during the hearing of the charges as to the real nature of the complaint against him. That was that excessive fees and costs were charged when a far smaller sum was known to be all that was due.

[75] I therefore consider it appropriate to consider charges 9 and 10 on the basis accepted by senior counsel for the Commissioner, (and irrespective of whether it is correct) namely that the practitioner's firm did have a right to charge Mrs Robertson some professional costs and for outlays, up to the date when the firm realised it could not act for her, since it was acting for another party. But the amount charged steadily grew, and no attempt was made to justify the figure Mr Baker approved for costs.

[76] Regarding count 14 (count 13 was dismissed) I agree with McPherson JA that the Tribunal was not entitled to find that Mr Baker was at fault in not having personally supervised the preparation of a letter which bore his initials; the evidence disclosed that the solicitor who drafted the letter discussed it with the firm's other partner, and it is unrealistic to expect that when one of two partners has approved the terms of a letter to the Law Society, the approval of the only other partner should also be first obtained. If anything the fault in not bringing that matter to Mr Baker for his personal attention lay with his partner and the solicitor who had drafted the letter, not with Mr Baker.

[77] Accordingly, I would allow the appeal in respect of those two counts, but otherwise dismiss it, and would let the removal order stand. Mr Baker simply too often overrode his clients' lawful rights and interests, in a way that brought shame upon solicitors as a profession.

[78] I agree with the orders proposed by McPherson JA.

[79] **DOUGLAS J**: I have had the advantage of reading the reasons published by McPherson JA and agree with them. In respect of the argument that the practitioner may have had a restitutionary claim for some payment from Ms Robertson, I wish to say something further.

[80] It is recognised in Mason and Carter, *Restitution Law in Australia* (1995) that, until the High Court rules otherwise, decisions such as *Cutter v Powell* (1795) 6 TR 320; 101 ER 573, *Appleby v Myers* (1867) LR 2 CP 651 and *Re Continental C & G Rubber Co Pty Ltd* (1919) 27 CLR 194 must be regarded as good law.[2] Such a review of the continuing authority of those decisions may occur and is attempted by those authors. They rely partly on a passage in the decision of Deane J, in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256, which recognised a quasi-contractual obligation to pay compensation for a benefit "which has been accepted" where an agreement has been frustrated. His Honour said that, in such a case, "it is the very fact ... that the genuine agreement is frustrated ... that provides the occasion for ... the imposition by the law of the obligation to make restitution".[3]

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[2] See at pp.480-483, para. [1231]. This "defect of the common law" was addressed partly by s. 1(3) of the *Law Reform (Frustrated Contracts) Act* 1943 (UK) in that jurisdiction; see the discussion in Burrows, *The Law of Restitution* (2nd ed., 2002) at pp. 359-372.

[3] See also the apparent recognition of the virtues of an approach based on restitution and unjust enrichment in the reasons of Mason and Wilson JJ at 227. See also *Halsbury's Laws of Australia* at [110-9905] and [370-2925].

[81] McPherson JA has pointed out that there is no clear evidence that Ms Robertson was unjustly enriched by having accepted the benefit of the work done by the practitioner's firm. Such an acceptance of the benefit provided is required for the success of a restitutionary claim.

[82] Even if the practitioner was entitled to charge a fee for work done before the termination of the retainer, on a restitutionary basis, the discrepancy between the amount claimed by his firm and the work done for which it might have charged was, in the circumstances outlined by McPherson JA, such as to justify the findings made by the tribunal.

[83] I agree that the appeal should be dismissed.