SUPREME COURT OF QUEENSLAND

CITATION:	*Winn v Boss Lawyers Pty Ltd* [2019] QCA 275
PARTIES:	**JULENE WINN** (appellant) **v** **BOSS LAWYERS PTY LTD** ACN 143 136 645 (respondent)
FILE NO/S:	Appeal No 2903 of 2018 Appeal No 8249 of 2018 QCAT No 33 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act* General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2018] QCAT 54; [2018] QCAT 233 (Carmody J)
DELIVERED ON:	29 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2019
JUDGES:	Philippides and McMurdo JJA and Henry J
ORDERS:	**In appeal number 2903/18:** **1. Leave to appeal grounds 6, 7 and 8 refused.** **2. Appeal dismissed.** **3. The appellant will pay the respondent's costs of the appeal to be assessed on the indemnity basis.** **In appeal number 8249/18:** **1. Appeal dismissed.** **2. The appellant will pay the respondent's costs of the appeal to be assessed on the standard basis.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where the appellant applied to QCAT to set aside a costs agreement with the respondent law firm and the respondent brought an unsuccessful strike-out application for which parties were ordered to bear their own costs – where the appellant brought an interlocutory application for a correction of this costs order and a stay of the final order pending determination of the correction application, and was

unsuccessful – where the application to set aside the costs agreement was ultimately dismissed – whether the tribunal ought to have allowed the interlocutory application – whether the tribunal ought to have set aside the appellant's costs agreement with the respondent

Legal Profession Act 2007 (Qld), s 328, s 468
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 43, s 135, s 149

Bell Lawyers Pty Ltd v Pentelow (2019) 93 ALJR 1007; [2019] HCA 29, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
Winn v Boss Lawyers Pty Ltd [2017] QCAT 356, cited
Winn v Lynch Morgan Lawyers [2019] QCA 178, cited

COUNSEL: The appellant appeared on her own behalf
B T Cohen (*sol*) for the respondent

SOLICITORS: The appellant appeared on her own behalf
Bartley Cohen Litigation Lawyers for the respondent

[1] **PHILIPPIDES JA:** I agree with the reasons of Henry J and the orders proposed by his Honour.

[2] **McMURDO JA:** I agree with Henry J.

[3] **HENRY J:** The appellant, Ms Winn, retained the respondent, Boss Lawyers, a firm of solicitors, to represent her in litigation. She initiated a proceeding before the Queensland Civil and Administrative Tribunal, applying to set aside her costs agreement with Boss Lawyers. Her proceeding before a judicial member of the tribunal was unsuccessful.

[4] These reasons are concerned with two of her appeals to this Court in connection with the proceeding below. The first, appeal number 2903/18, is against one of the tribunal's interlocutory judgments. The second, appeal number 8249/18, is against the final judgment.

History of litigation below

[5] Ms Winn filed an application to set aside her costs agreement with Boss Lawyers. Boss Lawyers applied to strike out the application. The strike out application was heard on 18 January 2017 and refused in a judgment delivered on 31 January 2017. That judgment ordered that the parties bear their own costs of the strike out application.

[6] An oral hearing of the appellant's application to set aside the costs agreement commenced on 29 March 2017. It was adjourned part-heard to 3 May 2017.

[7] On 27 April 2017 Ms Winn filed an application for a stay of her application until the assessment of the respondent's costs had been completed. She sought but failed to procure the consent of the respondent to a consent order staying the application.

[8] On 2 May 2017 at 4.24 pm Ms Winn emailed the tribunal, stating, inter alia:

> "I am unable to attend the Tribunal tomorrow due to a referral for a necessary medical specialist's appointment and 3 May 2017 the available date.
>
> On 27 April 2017 I lodged an application for a stay of this proceeding until an assessment of costs has been completed – M1752/17 in Magistrates Court."[1]

[9] The email went on to explain, in a way which was irrelevantly critical of Boss Lawyers, that they had not agreed to consent to the stay. It requested that the tribunal stay the proceeding.

[10] Ms Winn directed a further email to the court on the morning of 3 May 2017 at 8.06 am. That email requested that its content be provided to the presiding judicial officer before the hearing. It stated, inter alia:

> "I have to attend Holy Spirit Northside Hospital today. The appointment was made by telephone.
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> The appointment relates to a current medical condition.
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> I will provide the medical certificate to the Tribunal when it is given to me after I have attended."[2]

The email again went on to include irrelevant criticism of the respondent.

[11] Ms Winn failed to attend on 3 May 2017. The learned presiding judge was to later state in reasons published 12 October 2017:

> "The applicant did not attend on 3 May 2017 without any warning or explanation…"

[12] Ms Winn disagrees with that description. She perceives her emails did provide warning of and explanation for her non-attendance. Regrettably the emails were sent so late and with so little accompanying information as to provide no useful warning. Nor did they explain why an adjournment had not been earlier sought or what circumstances, if any, compelled Ms Winn's belatedly announced choice to attend a medical appointment in preference to attending the listed hearing.

[13] The hearing was adjourned to 23 August 2017. On 21 July 2017 that resumed hearing date was vacated and the part-heard hearing listed to resume on 30 August 2017.

[14] The respondent failed to attend on 30 August 2017, having two days earlier emailed a request for an adjournment on medical grounds. Those circumstances were summarised by the learned presiding judge in his reasons delivered on 12 October 2017:[3]

> "[9] The parties were notified that the oral hearing of the application to set aside the costs agreement would resume part-heard at 2.00pm on 30 August 2017.

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1 AR p 77.
2 AR p 90.
3 *Winn v Boss Lawyers Pty Ltd* [2017] QCAT 356.

> [10] Both parties were required to attend at that time in person and were advised that if either failed to do so the tribunal may proceed to make orders in their absence.
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> [11] They were also informed of the possibility of being represented by an agent or appearing by remote conferencing at the hearing by completing, filing and serving the standard forms at least five working days before the hearing recommenced.
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> [12] On 28 August 2017, two days before the scheduled hearing date, the applicant emailed the respondent (and copied in the QCAT registry) seeking adjournment for two weeks on the ground that she was unable to prepare or attend as, due to ongoing health issues, hospital appointments were scheduled for the 29 August 2017 and 4 September 2017. An attached doctor's certificate stated she was unfit to appear until 14 September 2017. Attached to the certificate was a set of instructions to patients from a skin cancer clinic about post-biopsy care. A new hearing date of 15-17 September or 26 September 2017 was proposed.
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> [13] The respondent failed to respond to the email or consent to an adjournment. The applicant informed the registry by email at 1.00pm on 28 August 2017 that the respondent was being unreasonable, but she did not propose appearing by agent or even by telephone.
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> [14] The tribunal convened at 2.00pm on 30 August 2017. The respondent appeared in person and was represented. True to her word the applicant did not attend.
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> [15] In the circumstances the applicant's emails to the respondent were treated as an application to vacate or adjourn the hearing date."

[15] On 30 August 2017 the tribunal reserved its decision as to the adjournment and the costs sought by the respondent for costs thrown away on 3 May 2017 and 30 August 2017.

[16] On 12 October 2017 the tribunal delivered its reasons.[4] The reasons included adverse comments about the appellant's conduct. These included fair criticisms about the absence of adequate supporting information regarding her medical unfitness and her limited regard for the need to avoid preventable delay of tribunal proceedings.[5] The criticisms included the following:

> "[73] For a practising barrister the applicant has acted shamefully, disrespectfully and discourteously in conducting litigation in the tribunal. …
>
> [77] She is very egocentric and preoccupied with her own needs and perceived interests."

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4 Ibid.

5 Ibid [72]–[77].

[17] Those criticisms overstated the gravity of Ms Winn's known conduct. They were likely born of the tribunal's frustration at Ms Winn's conduct foisting the choice upon the tribunal of having to decide whether to adjourn or dismiss the application without being adequately informed of the full circumstances behind her non-appearances. Ms Winn's conduct had, objectively, exhibited a degree of disrespect and discourtesy and preoccupation with her own needs. Her conduct had that quality because it failed to meet the court's needs through seeking timely adjournments and providing adequate information in support of her non-appearances. In the ordinary course it is reasonable to expect someone trained as barrister would have insight into such failures. However, Ms Winn was acting for herself and not in her professional capacity and there was insufficient information available to know whether Ms Winn's insight had been compromised by her personal circumstances. The known information did not support the observations that Ms Winn was egocentric or had behaved shamefully.

[18] Despite the learned presiding judge's criticisms of Ms Winn, his Honour concluded she should be given one more chance to appear and present her case. The tribunal listed the resumption of the hearing for 15 November 2017 and ordered Ms Winn pay Boss Lawyers costs thrown away for 3 May 2017 and 30 August 2017, fixed at $1,947.49 each. The substantive merits of those costs orders are not the proper subject of an appeal to this Court.[6]

[19] Ms Winn subsequently applied to the tribunal for a correction of its costs order of 12 October 2017 and for a stay of its order pending determination of the correction application. Those applications were heard on the papers.

[20] On 21 February 2018 the tribunal delivered its reasons, ordering the refusal of the stay application and the dismissal of the correction application. Ms Winn appeals that interlocutory decision in appeal number 2903/18.

[21] The parties subsequently agreed to the balance of the part-heard substantive proceeding, which had been adjourned part-heard back on 29 March 2017, being heard on the papers.

[22] On 4 July 2018 the tribunal delivered its reasons, ordering the application be dismissed. The appellant appeals that final decision in appeal number 8249/18.

CA 2903/18 appeal against interlocutory judgment

[23] In her appeal against the interlocutory judgment of 21 February 2018 Ms Winn's grounds of appeal are:

> "1. The Tribunal denied procedural fairness in making incorrect findings adverse to the applicant without notice and without giving the applicant opportunity to make submissions as to why such incorrect findings should not be made;

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6 If they were, attention would likely have fallen upon two potential problems with those orders. The first would be that on 3 May 2017 Mr Harley, a solicitor of Boss Lawyers, appeared for Boss Lawyers. Their entitlement to costs in such a situation is questionable, possibly dependent upon incorporation as a legal practice, given the High Court's recent decision in *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007, 1020. The second potential problem would be that on 30 August 2017 the solicitor from another firm who then represented Boss Lawyers was not expressly given leave to appear. Section 43 *Queensland Civil and Administrative Tribunal Act* required him to have the tribunal's leave to represent Boss Lawyers in the proceeding.

2. The Tribunal erred in refusing to provide reasons for the quantification of the costs ordered on [12 October][7] 2017;

3. [Not pursued]

4. The Tribunal denied procedural fairness in failing to conduct an oral hearing of the application for correction of the order filed on 24 November 2017;

5. [Not pursued]

6. The Tribunal erred in refusing to correct the order for costs of $1,947.49 for 3 May 2017 and $1,947.49 for 30 August 2017 when there is no evidence to support such order;

7. The Tribunal erred in basing its refusal to correct the costs of $1,947.49 for 3 May 2017 on findings that are contrary to the evidence that:

   (i) there was no appearance or hearing on 3 May 2017;

   (ii) costs for 3 May 2017 are stated as incurred from 9 to 31 May 2017;

   (iii) the costs from 9 to 31 May 2017 relate to a different application;

   (iv) legal costs are claimed for a receptionist's appearance on 3 May 2017 and clerical activities between 9 and 31 May 2017;

   (v) the order was obtained by miscalculation/misrepresentation.

8. The Tribunal erred in basing its refusal to correct the costs of $1,947.49 for 30 August 2017 on findings that are contrary to the evidence that:

   (i) the respondent had not obtained leave to be legally represented and a solicitor appeared for the respondent on 30 August 2017;

   (ii) the respondent did not submit argument or evidence in support of that or any other amount;

   (iii) the order was obtained by miscalculation/misrepresentation."

[24] Grounds 6, 7 and 8 appear to involve questions of fact or of mixed law and fact. Section 149(3)(b) *Queensland Civil and Administrative Tribunal Act* provides in respect of an appeal of the present kind to the Court of Appeal that, "an appeal … on a question of fact, or a question of mixed law and fact, may be made only if the party has obtained the court's leave to appeal". Section 468(4) *Legal Profession Act* 2007 (Qld) excludes the application of s 149 to a decision of the tribunal exercising its jurisdiction under the *Legal Profession Act* 2007. On one construction, identified in *Winn v Lynch Morgan Lawyers*,[8] that exclusion might be confined only to an exercise of jurisdiction under the *Legal Profession Act* concerning complaints and discipline. However, the application to correct the costs order did not require any

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7 Incorrectly included in the ground as 30 August.

8 [2019] QCA 178 [2].

exercise of jurisdiction under the *Legal Profession Act*. It follows leave is required in respect of grounds 6, 7 and 8. Those grounds are without merit because, for reasons explained hereunder, they do not target the actual decision under appeal. I would therefore refuse leave to appeal those grounds.

[25] It is important to appreciate that the judgment appealed against is not the judgment awarding costs delivered on 12 October 2017 but the judgment delivered on 21 February 2018. The latter judgment related to an application for a correction of the costs order of 12 October 2017 and a stay of that order pending the determination of the correction application. It appears the correction application below was actually pursued as a de facto means of challenging substantive aspects of the judgment of 12 October 2017, including the inaccurate observations of Ms Winn's conduct identified above. The appeal grounds, and argument advanced in support of them, suggests a similar motivation.

[26] The application for correction necessarily relied upon s 135 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) which relevantly provides:

> "**135 Tribunal may correct mistake**
>
> (1) The tribunal may correct a decision made by it in a proceeding if the decision contains –
>
> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of a matter, person or thing mentioned in the decision; or
>
> (d) a defect of form.
>
> (2) The tribunal may act under subsection (1) on the application of a party to the proceeding or on its own initiative. …"

[27] In his judgment delivered 21 February 2018 the learned primary judge correctly observed this provision is a statutory manifestation of what is known as the slip rule.

[28] The judgment of 21 February 2018 reveals the appellant's arguments in the correction and stay applications went to allegedly substantive errors. They did not go to a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation or misdescription, or a defect of form. Grounds 2, 6, 7 and 8 are therefore misconceived because they do not relate to a failure to correct a slip of the kind with which s 135 is concerned. Rather they relate to allegedly substantive failings in the judgment of 12 October 2017, a judgment which was not appealed. Those alleged failings were beyond the province of a s 135 application. It follows grounds 2, 6, 7 and 8 must fail.

[29] It remains to consider the complaints, in grounds 1 and 4, of a denial of procedural fairness. There is no substance to either complaint.

[30] Ground 1 complains there was a denial of procedural fairness in making adverse findings without notice. Those "findings" were repetitions in bland summary of observations which had already been made in the reasons for judgment of 12 October 2017. They included the assertion Ms Winn had failed to attend the hearing of 3 May 2017 without reasonable explanation or excuse but not the unsupportable observations made in paragraphs [73] and [77] of the judgment of 12

October 2017. Those short observations were purely an incident of reviewing the history of the proceeding. The nature of the application did not ground any expectation of an entitlement to re-litigate and be heard about the conduct attracting the observations.

[31] There is no substance to ground 1 because the present appeal is not an appropriate vehicle to challenge the incorrect findings about Ms Winn's conduct in the judgment of 12 October 2017. As it happens, the above review of the history of the matter has vindicated Ms Winn to the extent of identifying the components of those findings which were incorrect.

[32] Ground 4 complains there was a denial of procedural fairness in failing to conduct an oral hearing of the application for correction. The hearing of the correction application and its accompanying application for a stay was determined on the papers pursuant to s 32 *Queensland Civil and Administrative Tribunal Act* which relevantly provides:

> "**32 Proceeding by remote conferencing or on the papers**
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> …
>
> (2) The tribunal may, if appropriate, conduct all or a part of a proceeding entirely on the basis of documents, without the parties, their representatives or witnesses appearing at a hearing. …"

[33] It is in the nature of an application for correction pursuant to s 135 that it could readily be explained by written submissions. In the normal course it would be uncontroversial to determine such an application on the papers.

[34] It would have been apparent from the written submissions that the applicant was seeking something quite different than a correction of the character contemplated by s 135(1). Oral argument could not have altered the misconceived nature of the application. Determining the application on the papers involved no denial of procedural fairness.

[35] The appellant has failed in respect of each of her grounds of appeal against the interlocutory decision. Leave to appeal grounds 6, 7 and 8 of Appeal 2903/18 should be refused and Appeal 2903/18 should be dismissed.

CA 8249/18 appeal against final judgment

Grounds

[36] Ms Winn's notice of appeal against the judgment dismissing her application to set aside the costs agreement lists 13 grounds. Grounds 5 and 6 were not pursued. Some of the grounds, particularly grounds 1, 11 and 12, involve mixed questions of law and fact. Whether that distinction is academic in light of s 468 *Legal Profession Act* was not fully argued.[9] In the circumstances I would proceed to determine the appeal without reaching a concluded view on whether leave is required in respect of some of the grounds.

[37] The grounds do not lend themselves to a coherent analysis of the application below. It is simplest to first consider the merits of the matter generally, without specific reference to grounds. That exercise will shorten the ensuing discussion of the individual grounds.

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[9] See paragraph [24] above.

Consideration of merits

[38] The final judgment below was concerned with Ms Winn's application to set aside her costs agreement with Boss Lawyers in respect of Federal Court proceedings listed for 23 March 2016.

[39] Under cover of letter dated 15 March 2016, Boss Lawyers wrote to her, enclosing a client agreement, explaining it was an offer which could be accepted in the manner stated in the client agreement. The letter also enclosed a costs disclosure statement. The covering letter stated, inter alia:

> "Our best estimate is that preparation and appearance at the hearing on 23 March 2016 will cost approximately $5,000 plus GST for our costs and an additional $5,000 for the briefing of appropriately qualified counsel (total of $10,000)."[10]

[40] The client agreement attached to the letter of 15 March 2016 included the following "Specific Conditions":

"

5.	Agreed work to be performed	1. Prepare a brief to counsel for appearance at the hearing of the matter on Wednesday, 23 March 2016. 2. Appear on your behalf with counsel at the hearing of the matter on Wednesday 23 March 2016. 3. Appear on your behalf with or without counsel on any further hearings or interlocutory proceedings in the matter.
6.	Basis for charging	Time charging based on a 5 minute unit of time
7.	Persons who will perform work and their hourly rates (exclusive of GST)	Mark Harley, Partner $440 Luke Walker, Lawyer $300 Paralegal $150
8.	Current hourly rates (Excludes GST of 10%)	Partners $440 Lawyers $300 Paralegals $150
9.	Fees and costs required to be paid into trust in advance	$10,000.00 (see Clause 8 of the General Conditions for our trust account details)
10.	Estimate of fees and costs	$10,000.00 to $60,000.00 plus GST (see clause 8 of the General Conditions).

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(emphasis added)

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10 AR p 44.

[41] Clause 8 of the General Conditions, referred to at clauses 9 and 10 of the Specific Conditions, stipulated that the estimate of fees and costs "should not be considered to be a fixed quote or cap". It explained that the fees and costs "may be higher or lower" than the estimate, "depending on the time taken to complete the matter, the complexity of it and other factors". The Specific Conditions also noted:

> "This is an offer to enter into a costs agreement pursuant to Part 3.4 of the Legal Profession Act (Queensland) 2007. You may accept this offer in writing (by signing and returning this Agreement), or by conduct. Conduct which will indicate an acceptance of the agreement includes:-
>
> (a) giving us instructions after receiving this document;
>
> (b) allowing us to continue working on a matter after receiving this document, without expressly advising us that you no longer wish to retain us pursuant to the terms of this Agreement."[11] (emphasis added)

[42] In the upshot, Boss Lawyers withdrew on the morning of 23 March 2016. Ms Winn proceeded self-represented and was unsuccessful at both hearings.

[43] Ms Winn was invoiced $14,013.20 by Boss Lawyers.[12] The invoice provided a detailed description of the units charged. The invoice entries included the initials of those who performed the work, with rates charged for Mr Harley, Mr Walker and paralegals, matching the rates stipulated in clause 7 of the specific conditions.

[44] The invoiced work included an abundance of communications between lawyer and client, communications with the court, the drafting of outlines of submissions, an amendment of an outline of submissions, communications with and settling a brief to counsel and the preparation of draft orders.

[45] It will be recalled an oral hearing of the appellant's application to set aside the costs agreement commenced on 29 March 2017. It was adjourned part-heard and eventually the parties agreed to the balance of the proceeding being heard on the papers.

[46] The hearing on 29 March 2017 commenced at 9.41 am and concluded at 4.12 pm (with breaks occurring as the day progressed). The Auscript transcript of the hearing consists of 189 pages, which is a lengthy record for a one day hearing. Ms Winn takes issue with the accuracy of some aspects of the transcript but no error of determinative significance has been identified.

[47] At the hearing Ms Winn appeared for herself and Mr Harley, a solicitor of Boss Lawyers, appeared for his firm. Ms Winn gave evidence, with her filed material serving as her evidence in chief and Mr Harley cross-examining her. Mr Harley gave evidence with his firm's filed material serving as his evidence in chief and Ms Winn cross-examining him. Ms Winn's period in the witness box spans 63 pages of transcript. Mr Harley's period in the witness box spans 107 pages of transcript. While the cross-examination of Mr Harley did not finish it is clear Ms Winn had a prolonged and ample opportunity to cross-examine him.

[48] Despite the length of the transcript, the "evidence" it records mainly consists of argumentative exchanges about issues of no or dubious relevance. Much of the

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11 AR p 45.

12 AR pp 58-61.

written material before the tribunal was of similarly limited relevance. It is obvious Ms Winn and Mr Harley struggled, when cross-examining and being cross-examined, to let go of many minor or irrelevant issues about which they disagreed. At times they were critical of each other. The learned presiding judge repeatedly tried to return the focus of the parties to the material issues but enjoyed little success.

[49] Ms Winn applied below for the setting aside of "the costs agreements of 15 March 2016". Her application alleged:

> "The costs agreements, individually and together, are not fair or reasonable, are misleading and uncertain and are in breach of the requirements for cost disclosure/cost agreement of *Legal Profession Act 2007*."[13]

[50] Shorn of its irrelevancies Ms Winn's case was founded on her attempt to cast a conversation, in which she and Boss Lawyers discussed them acting for her, as a concluded oral agreement regarding costs.

[51] She argued that there were two purported costs agreements, contending the first agreement was partly manifested by the covering letter of 15 March 2016 and the second agreement was the client agreement enclosed by that letter. She argued the covering letter confirmed an oral agreement struck over the telephone about the basis upon which Boss Lawyers would act on her behalf. Ms Winn argued pursuant to the alleged oral agreement that costs to prepare and litigate the matters listed for 23 March 2016 would be fixed at $5,000, though curiously her adoption of the covering letter seemed to acknowledge it was agreed there may be a further $5,000 for briefing of counsel. She also argued the oral agreement bound Mr Harley of Boss Lawyers to be the sole solicitor who would act for her. Mr Harley's position was that there was no oral agreement and rather there was only an initial discussion in which they discussed Boss Lawyers acting.

[52] Ms Winn's factual assertions about the reaching of an agreement as to costs at times morphed into an unrealistic opinion about the legal character of what occurred. For example, she asserted the covering letter confirmed an earlier oral exchange, ignoring that letter's content and reference to and enclosure of the client agreement and costs disclosure statement. The letter's content was inconsistent with the existence of an earlier completed agreement and inconsistent with the notion the letter could be severed from the annexures to which it referred.

[53] The power sought to be invoked by the application is contained in s 328(1) *Legal Profession Act* 2007 (Qld), which provides:

> "**328 Setting aside costs agreements**
>
> (1) On application by a client, the Supreme Court or the tribunal may order that a costs agreement be set aside if satisfied the agreement is not fair or reasonable."

[54] It is inherent in the judge's reasons, albeit not explicitly stated, that he correctly rejected the argument there were two costs agreements. It is clear from the content of the covering letter and the client agreement and costs disclosure that they together constituted a single offered agreement.

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13 AR p 34.

[55] The learned primary judge concluded Ms Winn accepted the client agreement by conduct. Boss Lawyers' invoiced work included various written and oral communications with Ms Winn between 15 and 22 March 2016, making it obvious Ms Winn allowed Boss Lawyers to continue its work for her. Her conduct compelled the conclusion she accepted the client agreement.

[56] Once that conclusion was reached Ms Winn's application met two insurmountable obstacles. The first was that, even if there had been some earlier oral agreement about the basis upon which Boss Lawyers would act, its terms were superseded by her acceptance by conduct of the client agreement. This made a factual dispute as to whether there had been such an earlier oral agreement academic. The second obstacle was that the meaning of the covering letter and the client agreement and costs disclosure it attached was clear. Section 328(2)(e) did permit the tribunal to have regard to "the circumstances and conduct of the parties in the matter after the agreement was made". This may have assisted avoidance of the general rule against using surrounding evidence in aid of interpretation of an unambiguous contract.[14] However, broadly speaking, the evidence of the circumstances and conduct of the parties in the matter after the agreement was made went to whether the work for which Ms Winn was charged was required and was provided pursuant to the agreement. It was not relevant to the decision whether the agreement was fair or reasonable.

[57] The content of the documents constituting the agreement was not misleading, uncertain, unfair or unreasonable. To the contrary, the documents were seemingly unremarkable examples of the documentary means by which a law practice may seek to comply with Part 3.4 *Legal Profession Act* 2007 (Qld) and thus ensure their costs are recoverable. The documents did not breach the requirements of that Act.

[58] Boss Lawyers' obvious awareness of those legislative requirements also exposes the inherent implausibility of them reaching a concluded oral agreement about costs with Ms Winn when she earlier discussed retaining them.

[59] The learned primary judge reasoned:

> "[53] The costs estimate was not uncertain and did not take unfair advantage of the applicant. There was no agreement to cap the fee payable at $5,000. Billing $14,013.20 in reliance on the terms of the costs agreement was not unreasonable nor undisclosed. I find no evidence to support the applicant's claims of non-disclosure and no indication of relevant unfairness or unreasonableness in the circumstances and conduct of the respondent or its representatives before, when or after the agreement was made. Contrary to her case, the billed amount was well within the (admittedly wide) range of costs identified in writing before the applicant's acceptance in continuing to use the respondent's services. There is no basis for finding that the disclosed information was inaccurate and inadequate to enable the applicant to decide whether to retain the respondent.
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> [54] On the contrary, it fully complied with the regulatory regime.

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14 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

> [55] I reject the applicant's assertions that the respondent breached any payment preconditions such as that Mr Harley would work on the file personally and appear at the hearing and that no fees for the junior solicitor (Mr Walker) were payable. The estimate of costs was based on Mr Walker's disclosed rate of $300 per hour.
>
> [56] Whether any billed items are excessive or impermissible are assessment not enforceability questions but there is no evidence that any less would have been charged by another firm under common law principles. …
>
> [57] Briefing counsel was not a changed circumstance having an upward effect on costs. It was within the agreed scope of works and costs estimate.
>
> [58] The respondent's untimely withdrawal from the record was not a foreseeable circumstance that could have been addressed before it arose.
>
> [59] The balance of the application, affidavit material and submissions focus on alleged performance breaches and "gross" overcharging unrelated to fairness or reasonableness issues.
>
> [60] The application is therefore dismissed."[15]

[60] Those conclusions and the dismissal of the application were unsurprising. His Honour evidently perceived Ms Winn's motivation for her application was her belief she had been over-charged. Much of what Ms Winn advanced and argued on her application was relevant to whether she was properly charged as distinct from whether the costs agreement was liable to be set aside as unfair or unreasonable. His Honour correctly noted the extent of charging was an assessment issue, not an issue going to whether the costs agreement is unfair or unreasonable.

[61] On the whole of the evidence the correct and inevitable outcome was the dismissal of Ms Winn's application.

Approach to grounds

[62] Turning to Ms Winn's discrete grounds of appeal, her submissions addressed some grounds collectively. It is convenient to deal with the grounds in the sequence and groups used by the appellant.

[63] In light of the above consideration of the merits, a number of Ms Winn's submissions are so obviously irrelevant to the grounds and or unsustainable as to require no further consideration in now dealing with each ground.

Grounds 1 and 12 – Procedural unfairness in making adverse findings

[64] Grounds 1 and 12 are:

> "1. The Tribunal denied procedural fairness to the applicant in making incorrect findings adverse to the applicant's interests

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15 AR pp 29-30.

without giving the applicant notice that it intended to make such findings and without giving the applicant an opportunity to make submissions as to why no such adverse findings should be made; …

12. The Tribunal denied procedural fairness to the applicant in making incorrect findings adverse to the applicant's interests in the judgment of 31 January 2017 without giving the applicant notice that it intended to make such findings and without giving the applicant an opportunity to make submissions as to why no such adverse findings should be made…"

[65] The allegedly incorrect adverse findings referred to in ground 1 are said to be in paragraphs [35], [38] and [51] of the reasons.

[66] Paragraphs [35] and [38], which appeared as part of a brief chronology of events under the sub-heading "The litigation history", stated:

"[35] The applicant failed to attend the rescheduled hearing on 3 May 2017 without explanation and the matter was adjourned to 23 August 2017. …

[38] The applicant unreasonably failed to appear at the hearing and an order that the applicant pay the respondent's costs thrown away totalling $3,894.98 for both the 3 May and 30 August 2017 was made."

[67] A footnote to paragraph [38] further stated:

"Further details regarding the circumstances surrounding the hearings of 3 May and 30 August 2017 and the sufficiency of the applicant's explanations for non-attendance can be found in *Winn v Boss Lawyers Pty Ltd* [2017] QCAT 356."

[68] A similar ground was advanced in the above discussed appeal 2903/18. Once again, these were bland repetitions in summary of past findings, purely in the context of summarising the history of the litigation. These reasons have earlier identified why certain aspects of those findings were incorrect and to that extent vindicated Ms Winn. However, these were not fresh findings and did not figure at all in that part of the reasons dealing with the actual merits of the substantive application. They were not matters about which the substantive application, or the presiding judge's approach to considering the actual merits of that application, grounded a right to be put on notice or be heard.

[69] Paragraph [51] of the reasons did appear in that part of the reasons dealing with the actual merits of the substantive application, under the heading "Findings". It stated:

"[51] The applicant did not impress as a reliable historian of probable past events and to the extent of conflict I much prefer Mr Harley's account of disputed conversations and events over hers."

[70] The learned presiding judge did not specifically indicate what disputed conversations and events he was referring to, though it may readily be inferred the

most determinative disputed conversations and events were those canvassed in the above consideration of the merits of the matter generally.

[71] Ms Winn had ample opportunity to be heard, over and above giving evidence and having a prolonged opportunity to cross-examine Mr Harley. It was agreed the balance of the hearing would proceed on the papers. Ms Winn filed written submissions as well as submissions in reply.

[72] The nature of Ms Winn's extensive cross-examination of Mr Harley demonstrates she was well aware of divergences between her account and his. She well knew the learned presiding judge would need to consider the reliability of those respective accounts in considering whether an oral costs agreement was concluded. There was no denial of procedural fairness.

[73] Ground 12's complaint relates to the judgment of 31 January 2017 refusing Boss Lawyers' application to strike out Ms Winn's application. That is not the decision under appeal here. The ground goes to issues which are irrelevant to the appeal.

Grounds 2 and 3 – Complaint the respondent was legally represented without leave

[74] Grounds 2 and 3 are:

> "2. The Tribunal erred in failing to comply with the procedure required by s 43 of the *Queensland Civil and Administrative Tribunal Act 2009* for a party (the respondent) to be legally represented in the proceeding.
>
> 3. The Tribunal denied procedural fairness to the applicant in permitting the respondent to be legally represented without:
>
> (a) filing an application for leave to be represented;
> (b) notice to the applicant;
> (c) a hearing for determination of the issue;"

[75] Section 43 of the *Queensland Civil and Administrative Tribunal Act* relevantly provides:

> "**43 Representation**
>
> (1) The main purpose of this section is to have parties represent themselves unless the interests of justice require otherwise.
>
> (2) In a proceeding, a party –
>
> (a) may appear without representation; or
> (b) may be represented by someone else <u>if</u> …
>
> (iv) <u>the party has been given leave</u> by the tribunal to be represented." (emphasis added)

[76] Mr Cohen of Bartley Cohen Litigation Lawyers appeared for Boss Lawyers from 30 August 2017 and was also the author of the written submissions in respect of the eventual substantive determination of Ms Winn's application. There does not appear to be any record of the tribunal giving leave by 30 August 2017 for Boss Lawyers to be represented, although it is apparent from the transcript of that date that the court took no issue with Mr Cohen appearing. In any event, on 15 November 2017 the presiding judge gave directions including that:

> "The oral application for Boss Lawyers Pty Ltd to be legally represented is allowed."[16]

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16 AR p 209.

[77] That was part of the same set of directions which included orders for the filing of written submissions and an order that the tribunal would make its decision on the papers.

[78] Ms Winn's complaints raised in grounds 2 and 3 are obscure. If there was any error in not earlier giving leave expressly, it was obviously remedied by the direction on 15 November 2017. On the one hand Ms Winn asserts she was denied procedural fairness by being denied the right to be heard on the issue, yet her outline of argument in this appeal asserts that she was heard on the issue on 15 November 2017.[17] No transcript of that proceeding is available. Acknowledging that Ms Winn's own submissions involve a concession that she was heard on this issue, it is impossible to discern any denial of procedural fairness. If that denial is said to be that Mr Cohen had been permitted to appear for Boss Lawyers earlier than 15 November 2017, it is noteworthy that the upshot of any of those earlier appearances was the continued adjournment of the substantive application. To the extent Mr Cohen had any material contribution as a representative of Boss Lawyers in respect of the determination of the substantive application, it was at a time after leave for Boss Lawyers to be legally represented had been given.

[79] There is no substance to grounds 2 or 3.

Ground 4 – Error in permitting Mr Cohen to represent the respondent

[80] Ground 4 is:

> "4. The Tribunal erred in permitting the respondent to be represented by a legal representative who is a witness in the substantive matter subject of the application to set aside the costs agreements;"

[81] It was submitted Mr Cohen was in a position of conflict, yet he was not a witness in the substantive application with which the present appeal is concerned. Nor is he alleged to have previously acted for Ms Winn.

[82] Ms Winn's submissions have not exposed how there was any error in allowing Mr Cohen, as distinct from some other lawyer, to act as Boss Lawyers' legal representative.

[83] There is no substance to ground 4.

Grounds 7, 8 and 9 – Failure to consider the applicant's evidence

[84] Grounds 7, 8 and 9 are:

> "7. The Tribunal erred in failing to apply the relevant principles to be applied in determining an application to set aside a costs agreement.
>
> 8. The Tribunal erred in failing to address the issue of the original written costs agreement for a fixed amount for the respondent's work to and appearance at the hearing, second costs agreement for a prospective matter for which the respondent was not engaged, his ceasing to act before the

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17 Appellant's amended written outline of argument in appeal 8249/18.

hearing and using the second costs agreement to bill costs in excess of the original costs agreement.

9. The Tribunal denied procedural fairness to the applicant in failing to consider:
   (a) each of the applicant's grounds of application;
   (b) the applicant's documentary evidence;
   (c) the applicant's submissions."

[85] The above consideration of the merits of the matter demonstrates an entirely orthodox approach to the determination of the application. The learned presiding judge was guided by relevant principle and expressly avoided his reasons being derailed by reliance on irrelevant considerations. Far from failing to address the issue identified in ground 8, the learned presiding judge clearly focussed upon it. Ms Winn's real complaint is he decided the issue against her. For reasons already explained, that decision was inevitable.

[86] There was no denial of procedural fairness in the learned presiding judge's approach to the applicant's grounds, documentary evidence and submissions. He was plainly conscious of the need to avoid many of the irrelevant considerations raised and to focus upon the relevant issues. He did so.

[87] There is no substance to grounds 7, 8 or 9.

Ground 10 – Failure to control conduct of the respondent

[88] Ground 10 is:

"10. The Tribunal denied procedural fairness to the applicant in failing to control the conduct of the respondent in the hearing and in cross-examination of him which resulted in that cross-examination and further oral hearing being abandoned."

[89] This ground's assertions of fact are unsustainable. The hearing transcript shows the hearing was adjourned because it could not be finished in one day, not because of any issue about propriety of conduct. There is no evidence to suggest the court's later decision to proceed on the papers, with the consent of the parties, involved any view on the court's part that it would not be able to control conduct at a continued oral hearing. It was a matter for Ms Winn whether she elected not to press for a continuation of an oral hearing.

[90] As to the hearing which did occur, Mr Harley and Ms Winn each complained about the conduct of the other during adjournments in the course of the hearing day. The presiding judge below declined to be drawn into assessing those complaints, reasonably taking the view that his concern was to ensure proper conduct when presiding. This was a wise course to take. The complaints had a tit for tat, petty quality about them and whatever may have occurred did not deter either Ms Winn or Mr Harley from the robust pursuit of their cases during each resumption of the hearing that day. His Honour only had limited success in confining Mr Harley and Ms Winn to legally relevant questions and responsive answers but he did not fail to control propriety of conduct in the hearing.

[91] There is no substance to this ground.

Ground 11 – Findings contrary to the evidence

[92] Ground 11 is:

> "11. The Tribunal erred in basing the decision on findings contrary to the evidence."

[93] The submissions advanced in this ground echo the underlying theme of argument advanced in support of grounds 7, 8 and 9. The conclusions of fact underpinning the learned presiding judge's ultimate decision were, as has been explained in the above consideration of the merits of the matter, clearly open to him. I respectfully agree with his factual conclusions on the evidence.

Ground 13 – Failure to award costs in the strike-out application

[94] Ground 13 is:

> "13. The Tribunal erred in failing, without proper reason, to award costs to the applicant/respondent to the respondent's application to strike out which was refused."

[95] The issues with which this ground is concerned, regarding costs of the strike out application, was not the subject of an appeal. The ground does not go to an issue which is relevant to this appeal.

Conclusion

[96] For the reasons given above, none of the grounds of appeal have been successful. Appeal number 8249/18 should be dismissed.

Costs

[97] Boss Lawyers seeks its costs in both appeals on the indemnity basis.[18]

[98] It is uncontroversial that costs in both appeals should follow the event and that costs would ordinarily be on the standard basis.

[99] In appeal number 2903/18 it was submitted for Boss Lawyers that costs should be ordered to be assessed on the indemnity basis because Ms Winn's grounds were so manifestly hopeless as to amply justify such an order. I agree. That misconceived appeal was against a different decision than the decision making of which its grounds substantively complained. It was unreasonable to have pursued such an appeal and Boss Lawyers should have their costs on the indemnity basis.

[100] Appeal number 8249/18 was not such an obviously unreasonable use of litigation, albeit that some of its grounds were misconceived. I would only order costs to be assessed on the standard basis in respect of that appeal.

Orders

[101] In appeal number 2903/18 I would order:

1. Leave to appeal grounds 6, 7 and 8 refused.
2. Appeal dismissed.

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[18] Respondent's written outline of arguments, in appeal number 2903/18 at [44] and in appeal number 8249/18 at fn 10.

3. The appellant will pay the respondent's costs of the appeal to be assessed on the indemnity basis.

[102] In appeal number 8249/18 I would order:

1. Appeal dismissed.
2. The appellant will pay the respondent's costs of the appeal to be assessed on the standard basis.