SUPREME COURT OF QUEENSLAND

CITATION:	*Council of the Queensland Law Society Inc v Roche* [2003] QCA 469
PARTIES:	**THE COUNCIL OF THE QUEENSLAND LAW SOCIETY INCORPORATED** (applicant/appellant/cross-respondent) **v** **STEPHEN FRANCIS ROCHE** (respondent/cross-appellant)
FILE NO/S:	Appeal No 3263 of 2003 Charge No 88
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Solicitors' Complaints Tribunal
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2003
JUDGES:	de Jersey CJ, McMurdo P and Williams JA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal and cross-appeal dismissed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY ORDERS – SUSPENSION – where practitioner acting for client under retainer – where practitioner sought to execute new retainer involving blended rates – where no evidence that practitioner advised client to seek independent legal advice – where client executed new retainer – where practitioner charged client high fees under new retainer – whether fees charged under new retainer constituted gross overcharging – whether practitioner committed breach of fiduciary duty to client – whether practitioner should have been suspended *Queensland Law Society Act* 1952 (Qld), s 48 *Queensland Law Society Rule* 1987 (Qld), r 90 *Briginshaw v Briginshaw* (1938) 60 CLR 336, approved *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, approved *Law Society of New South Wales v Moulton* [1981] 2

	NSWLR 736, considered *Maguire and Tansey v Makaronis* (1997) 188 CLR 449, approved *New South Wales Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116, approved *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, considered
COUNSEL:	D J S Jackson QC, with D G Clothier, for the appellant/cross-respondent A J Morris QC for the respondent/cross-appellant
SOLICITORS:	Brian Bartley & Associates for the appellant/cross-respondent Gilshenan & Luton for the respondent/cross-appellant

[1] **de JERSEY CJ**: The appellant brought two charges against the respondent solicitor. The first alleged he had failed to discharge his fiduciary obligations to his client, Mr Lionel Arthur, in relation to making a retainer agreement dated 12 October 2000 between Mr Arthur and the respondent's firm Shine Roche McGowan. The second alleged the respondent had been guilty of gross overcharging.

[2] The Solicitors' Complaints Tribunal conducted a six day hearing. The Tribunal comprised Ms C Endicott, as Chairperson, Mr P Mullins as its practitioner member, and Dr J Lamont as the lay member. The Legal Ombudsman, Mr J Nimmo, was in attendance.

[3] The Tribunal found that each charge had been established, although, in relation to the second charge, not in all the particularized allegations. The respondent was held guilty of professional misconduct. The Tribunal ordered that the respondent be suspended from practice for 12 months. That means he cannot for that period practise, or be employed in any capacity in a practice, unless with the appellant's leave (r 90, *Queensland Law Society Rule* 1987).

[4] The appellant contends that the Tribunal erred in not accepting the evidence establishing the second charge as comprehensively particularized, and that the name of the respondent should in any event have been struck from the roll. By cross-appeal, the respondent challenges the Tribunal's approach to the evidence on each charge, and in the event of his success in that challenge, he seeks a review of the penalty imposed.

[5] The charges arose out of the respondent's firm's retainer to act for Mr Arthur on a "no win, no fee" basis in pursuing a claim for damages for injuries sustained at or shortly after birth by his daughter Amanda. Mr Arthur first retained the respondent's firm in August 1996. He signed a formal retainer agreement in November 1998. That agreement provided for the payment of fees to the firm on a graduated hourly rate, from $250 per hour for partners and accredited personal injury specialists to $100 per hour for paralegals. The firm could charge additionally for care and consideration, a supplement not to exceed 30 per cent. The firm was authorized to increase the hourly rates by no more than 10 per cent once per year, and then only after giving Mr Arthur 30 days' advance notice of the proposed new rate.

[6] The circumstances of the execution of a second retainer on 12 October 2000 constitute the first of the problems. That agreement provided for a substantial increase in the fees chargeable, to $300 per hour applicable to all the partners and employees of the firm, together with the 30 per cent premium. The following may be drawn from the findings of the Tribunal. The respondent called Mr Arthur into his offices to discuss a mediation of the claim scheduled for December 2000. The respondent had not foreshadowed that he intended to invite Mr Arthur to sign a new retainer, and he did not ask Mr Arthur to bring his copy of the first retainer to the meeting. As the respondent then appreciated, Mr Arthur was in financial difficulties, he was anxious to continue with his daughter's claim, and he wanted the respondent's firm to take on a similar claim in respect of his son. When faced with the suggested increase in fees, Mr Arthur was of the view (erroneously) that most of the legal costs had already been incurred, so that the proposed increase would have little overall effect on the amount payable in respect of his daughter's claim. That was not so. The respondent knew that approximately half of the work carried out in the matter was done by paralegals, an aspect of significance because under the proposed new arrangement, the amount chargeable for their work per hour would increase threefold. The matter was put to Mr Arthur on the basis that the respondent would agree to take on Mr Arthur's son's claim at $300 per hour, rather than the $500 per hour his firm would ordinarily by then be charging, but only if Mr Arthur agreed to the higher rate of $300 per hour in respect of the daughter's claim.

[7] The Tribunal found that the respondent failed to draw Mr Arthur's attention to the provisions of the first retainer which limited the capacity of the firm to increase the fees payable, failed to provide an estimate of the likely impact of the proposed increase on the fees payable overall, and failed to advise Mr Arthur that he should obtain independent legal advice before signing the new agreement. The respondent thereby failed to afford Mr Arthur "the opportunity to make an informed decision with respect to a contract which fundamentally affected his rights," amounting to "serious breach of his fiduciary duty." If sustainable, that amounted to a very serious instance of professional misconduct, resting in the respondent's preferring his own interest to that of his client.

The cross-appeal on the first charge

[8] I deal now with the Tribunal's finding that the respondent did not advise Mr Arthur of his right to obtain independent legal advice. Mr Arthur gave evidence that he could not recall whether or not the respondent gave such advice. The respondent also gave such evidence, while adding that he believed he had given such advice. Contemporaneous notes of the relevant meeting taken by another solicitor present made no mention of such advice. In these circumstances, the respondent contends the Tribunal's finding was not supported by evidence, or was made inconsistently with the onus or standard of proof.

[9] The Tribunal proceeded on the basis that the onus of proof rested on the appellant, and correctly addressed itself as to the standard of proof on the balance of probabilities in the context of *Briginshaw* (1938) 60 CLR 336. The Tribunal accepted Mr Arthur as a truthful witness, and preferred his evidence, in areas of difference, to the respondent's. It likewise preferred to rely on documentary evidence where the respondent's oral testimony differed.

[10] The evidence on the point was left in the state where the Tribunal rejected the respondent's evidence that he believed he advised Mr Arthur of his right to seek independent advice. That provided sufficient foundation for the subsequent finding that the respondent had not given the advice, bearing in mind that it concerned an important matter on which one would expect an experienced solicitor to have a recollection one way or the other; and that given the importance of the matter, had such advice been given, one would reasonably have expected reference to it in the other solicitor's diary note of the meeting.

[11] It may be arguable it fell to the respondent to establish that he gave the requisite advice. See *Maguire and Tansey v Makaronis* (1997) 188 CLR 449, 466. But it is not necessary to determine whether that is so in this disciplinary context, in view of what I have said in the preceding paragraph.

[12] Mr Morris QC, who appeared for the respondent, separately pointed out that it was no part of the case against the respondent that had Mr Arthur been advised of his right to obtain independent legal advice, he would have sought it. It was not however necessary for the appellant to go to that length in order to establish professional misconduct. It was the failure to give the advice which in this case formed the gravamen of the ethical breach.

[13] The Tribunal described this as a serious breach of fiduciary duty, and observed that the respondent's "conduct did not come close to an acceptable standard for the carrying out of his fiduciary duty." That was plainly right. It was as I have noted a case of the respondent's preferring his own interest over that of his client. Otherwise he would, as duty bound, have given the respondent "full and frank disclosure" (*Law Society of NSW v Foreman* (1994) 34 NSWLR 408, 435) of all of the relevant information – as covered above, and have invited him to seek independent advice, in order to ensure that the respondent's decision in the matter was fully informed.

[14] Mr Morris also submitted that the evidence could not reasonably support a finding that the respondent "deliberately refrained" from giving the advice. The Tribunal did not however express such a finding. The findings it did express were amply justified on the evidence accepted.

The second charge

[15] To aid a proper understanding of what follows, it is necessary that I set out, in full or almost so, the rather lengthy particulars of this charge of gross overcharging.

"Particulars

(a) The practitioner was at all material times the partner in the Firm with responsibility for the matter;

(b) Following settlement of the matter in December 2000 upon the basis that the defendant paid to the plaintiff the sum of $2 million (inclusive of statutory charges and refunds) plus costs to be assessed on the standard basis, the Firm rendered its account to Arthur dated 2 April 2001 in the sum of $573,444.15 ("the account") which amount comprised:

Firm's professional costs (including $24,535.54 GST)	$350,000.00
Barristers' fees (including $8,247.50 GST)	$125,235.50
Medical and other report fees (including $3,141.78 GST)	$ 58,722.57
Other disbursements (including $2,373.84 GST)	$ 39,486.08
	$573,444.15

As at 2 April 2001, the value of time recorded by the Firm in respect of work carried out in the matter amounted to approximately $280,000.00. A premium of 25% was applied to arrive at the figure of $350,000.00 charged to Arthur.

(c) In September 2001, Arthur was charged the further sum of $45,000.00 for preparation by Hartwell & Graham, costs assessors, of an itemised bill of costs.

(d) The Firm's professional costs of $350,000.00 were charged at a level which was substantially in excess of:

(i) Professional costs claimed in an itemised bill prepared on behalf of the Firm by Hartwell & Graham (excluding costs related to preparation of the itemised bill and assessment thereof) amounting to:

$161,670.36 on the standard basis (which amount included an allowance of 50% for care and consideration)

$226,572.50 on an indemnity basis (which amount included an allowance of 75% for care and consideration).

(ii) Professional costs and disbursements recovered on the standard basis in the sum of $160,000.00;

(iii) Professional costs and disbursements calculated on an indemnity basis and agreed with the Public Trustee acting on behalf of Amanda Maree Arthur in the sum of $240,000.00;

(iv) The professional costs which would have been payable pursuant to the first retainer.

(e) From 12 October 2000 until finalisation of the matter, the Firm calculated its fees in respect of the matter at an hourly rate of $300.00 (plus GST) plus a premium of approximately 25% in respect of all items of work performed by any member or employee of the Firm, whether or not legally qualified and whether or not the work required the application of any legal skill;

(f) The account included substantial amounts charged in respect of items of work of a clerical or secretarial nature involving no legal skill in respect of which no charge should have been made. Particulars of the staff members performing such clerical and secretarial work and the charges recorded by them in the Firm's time recording system (which recorded charges, increased by a premium of approximately 25% applied to those recorded charges formed the basis of the account) are as follows:

[21 names, and amounts aggregating $129,929.41 omitted]

(g) The Firm adopted the practice of recording as the basis for its charge to Arthur, items of work for which no charge could properly be made, particulars of which are as follows:

(i) Attempts to make telephone calls, but which calls were unanswered;

(ii) Attempts to telephone persons who were unavailable to take the call and for whom messages were left to return the call;

(iii) Photocopying of an account received by the Firm;

(iv) Drawing a form requesting the Firm's accounts department to draw a cheque in respect of an account;

(v) Diarising an appointment;

(vi) Telephoning Directory Enquiries or using the telephone directory in order to obtain a telephone number;

(vii) Searching for documents and files in the Firm's possession which were unable to be located readily;

(viii) Typing of formal letters by staff performing secretarial duties;

(ix) Arranging accommodation for counsel;

(x) Internal telephone calls and emails;

(h) The practices particularised in subparagraphs (f) and (g) were in breach of the Firm's second retainer agreement which provided by clause 4(a)(iii) as follows:

"(iii) You acknowledge we will incur various administrative expenses (eg. initial interview equipment (sic), file opening processes) while performing the work. You also acknowledge that, in the event that we are entitled to charge you for the work, we will also charge you for these administrative expenses in the form of a fixed "File Administration Fee" of $395.00, inclusive of GST. Apart from the file administration fee, we will not charge you for word processing, receptionist and general administration (eg. filing on your file) work performed for you."

(i) In the alternative to (f), (g) and (h) the amounts charged by the Firm as particularised in subparagraph (f) were grossly excessive;

(j) The rate of $300.00 (plus GST) plus approximately 25% premium charged by the Firm subsequent to 12 October 2000 in respect of items of work performed by solicitors was excessive because the firm relied substantially upon Mr Levy SC to perform work (in respect of which Mr Levy charged fees) which would ordinarily be within the competence of solicitors professing expertise in medical negligence matters and justifying such hourly rate by reference to such claimed expertise;

Particulars of the Firm's claim to expertise

The second retainer agreement (by clause 4(a)) provided:

"(a) Rates charged

(i) We charge for work performed on the basis of time occupied in completing the task at the rate of $300.00 per hour. This rate recognises:

(1) Our many years experience conducting personal injury litigation.

(2) Our method of operation that requires that our personal injury teams work solely on personal injury claims and are therefore fully dedicated to knowing the laws and tactics relating to personal injury claims.

> …
>
> Particulars of the Firm's reliance upon counsel
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> (i) The Firm obtained from Mr Levy SC regular advice … during the period 18 October 2000 – 18 December 2000;
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> (ii) Drafting of correspondence by counsel;
>
> (iii) Counsel's fees charged by Mr Levy SC in respect of the period 18 October 2000 – 21 December 2000 amounted to the sum of $33,000.00 approximately plus $3,300.00 GST."

[16] The respondent conceded that he was the person responsible for determining the charges to be made. The basis on which the Tribunal determined this charge unfavourably to the respondent concerned charges levied for work done by paralegals. The charge of $300 per hour, for paralegals, was described by the Tribunal as "unusually high". Those persons carried out about half of the work done on the file. A substantial amount of that work was of "a fairly mundane nature." The Tribunal gave examples of that, including, as notable examples, 12 minutes of charged-for time spent wrapping a box of chocolates to be given to a reporting doctor's secretary by way of thanks for facilitating the correcting of a report, and another 12 minutes spent discussing arrangements for the purchase of the gift – for which momentous engagements the respondent was on my calculation billed $156. The Tribunal expressed the following conclusions:

> "No fairminded practitioner would be justified in charging his or her client at what the Tribunal regards as an unusually high rate across the large number of hours involved including the significant time on the mundane matters of the kind described. As to quantum of the rate and as to the hours involved, the amount charged by the practitioner for the work done by paralegals amounts to gross overcharging of a substantial kind. The overcharging was substantial by reason of the fee rate having increased effectively from $100.00 an hour plus care and consideration of approximately 25% (say $125/hour) to $300.00 an hour (GST inclusive) plus 30% uplift for paralegals' work and it is also substantial because of the number of hours of paralegals' work charged for. The Tribunal finds Charge 2 proved.
>
> The Tribunal finds that the time charges made for paralegals' work were substantially above what any reasonable solicitor would contemplate as being a proper charge. The Tribunal cannot accept that any solicitor acting properly toward his or her client could have charged for the time spent by unqualified staff at the rate charged by the practitioner over the extensive time involved. The Tribunal finds that the practitioner's proved conduct in this regard as amounting to professional misconduct."

[17] The appellant challenged the Tribunal's approach to the issues particularized above, and especially, its having dealt with them separately rather than cumulatively. It is nevertheless necessary to consider the Tribunal's approach to each of the particularized issues.

Quantum of charges

[18] Mr Arthur's daughter's claim was settled in December 2000 at $2 million plus costs to be assessed on the standard basis. The respondent's firm rendered an account dated 2 April 2001 which included $350,000 for its professional costs. That was determined by adding to the value of the recorded time spent on the file, which was $280,000, a premium of 25 per cent, to reach $350,000. The total of the account, including Counsel's fees, outlays and other disbursements, was $573,444.15. Mr Arthur was charged $45,000 additionally for the preparation by the costs assessors of the itemized bill of costs, leading to a total bill of $618,444.15.

[19] In substantial contrast, the standard assessment came in at $161,670 and the indemnity assessment at $226,572. The evidence showed that the amount actually recovered on the standard basis was $160,000 and that the indemnity assessment agreed with the Public Trustee stood at $240,000.

[20] The Tribunal observed these discrepancies did not "necessarily" establish gross overcharging, because the purpose of the exercise carried out by the costs assessors was different from the legitimate motivation for the sending of the account. While it is true that a solicitor is not bound to charge a client no more than would be assessed on the indemnity basis, one would nevertheless hope that such assessments would provide a reasonable view of the broad bounds within which recovery might reasonably be sought. But the Tribunal said only that these discrepancies did not "necessarily" establish gross overcharging. It was correct in noting that the focus must rest on the bill as delivered.

[21] Mr Jackson QC, for the appellant, submitted that the Tribunal thereafter overlooked the vast discrepancy between those amounts of approximately $620,000 as billed, and $240,000, the indemnity assessment agreed with the Public Trustee. That discrepancy does suggest a bill redolent of massive overcharging, and it may be that the Tribunal could usefully have adverted expressly to that aspect when dealing with penalty. But the terms in which the Tribunal expressed its findings leave no doubt but that the Tribunal appreciated the exorbitant extent of the charges levied.

Para 2(f) particulars

[22] These particulars concerned substantial amounts charged for non-legal, secretarial type work performed by non-lawyers. The amount at issue was $129,929. The Tribunal observed that the second retainer specifically contemplated such charging, and that "a solicitor can properly have some work done by unqualified staff and nonetheless charge for that work." Those observations were correct. The charges made for this work were apparently not irrelevant to the basis upon which the Tribunal ultimately found against the respondent, in relation to exorbitant charging overall for work done by non-lawyers.

Para 2(g)

[23] This concerns charging for work for which no charge should allegedly have been made, such as unsuccessful attempts to make telephone calls. The Tribunal took the view that it could not be satisfied, acknowledging *Briginshaw*, "that the time charges made for these items were substantial." The appellant challenged this by reference to a billing guide. The Tribunal was however in a better position than this court to make an overall assessment on this matter, an assessment in which it is not shown plainly to have erred.

Para 2(h)

[24] The appellant alleged that charging separately for the work particularized in para 2(g) above was inconsistent with cl 4(a)(iii) of the second retainer agreement, which provided:

> "(iii) You acknowledge we will incur various administrative expenses (eg. initial interview equipment (sic), file opening processes) while performing the work. You also acknowledge that, in the event that we are entitled to charge you for the work, we will also charge you for these administrative expenses in the form of a fixed "File Administration Fee" of $395.00, inclusive of GST. Apart from the file administration fee, we will not charge you for word processing, receptionist and general administration (eg. filing on your file) work performed for you."

[25] The Tribunal did not regard the reference to "administrative expenses" as sufficiently clearly embracing the items of work referred to in para 2(g) of the particulars, and said that the respondent was "probably" entitled to charge additionally for those items. The Tribunal again made reference to *Briginshaw*. Again, there is no sufficient reason demonstrated why this court should depart from the Tribunal's approach

Para 2(j)

[26] This alleged that the flat rate of $300 per hour for work carried out by solicitors was excessive because of the firm's reliance, for the completion of work which would ordinarily be done by solicitors, on counsel. While the Tribunal found that the firm did rely "heavily" on counsel, that reliance, it considered, was not excessive, and "not to an extent to which charging for the solicitors' own time at the agreed blended rate constituted in itself gross overcharging." Mr Jackson QC referred us to exchanges between the respondent's firm and Counsel, but I felt they left the matter inconclusively from the appellant's point of view. No ground has been demonstrated why the court should take a different view from that taken by the Tribunal.

Generally

[27] The appellant submitted that the Tribunal was wrong to deal with the particulars respectively. But it was obliged to make findings on each of the matters particularized. It has made a reasonable response to them. Insofar as the ultimate finding was limited to the charging made in respect of the work of the paralegals, there is no reason to conclude that the Tribunal drew no worthwhile background

from the contrast between the amount of the bill rendered and the amounts resulting from the assessments. While the Tribunal has said – and correctly, that the assessment did not "necessarily" establish gross overcharging, it is difficult to imagine the Tribunal entirely excluded the extent of that contrast from its subsequent overall assessment.

[28] The respondent challenged the Tribunal's approach to the second charge in two respects – first, for failing to deal with the respondent's evidence that there were costs which could have been billed but were not; and second, for failing to address more particularly the complexion of the respondent's dereliction in relation to the overcharging.

[29] As to the former, it does not lie in the respondent's mouth to reply, to a finding that the charges he did specifically levy were grossly excessive, that there were others he chose to forego. Levying grossly excessive charges to this extent amounts to professional misconduct whether or not other charges for work have been foregone.

[30] As to the latter, it sufficed for a finding of professional misconduct that the respondent was found personally responsible for the charging which was made. Any further more precise characterization of his approach would potentially have gone only to penalty.

[31] I would dismiss the challenges mounted by both the appellant and the respondent to the basis on which the Tribunal found the respondent guilty of professional misconduct.

The ethical approach

[32] Before turning to the question of penalty, I offer the following additional views emerging from the circumstances of this case.

1. The circumstance that a solicitor's right to exact certain charges is enshrined in an executed client agreement will not necessarily protect the solicitor from a finding of gross overcharging. For example, as here, the client may not have given his or her "fully informed consent" to the agreement; or the very extent of the particular charges may itself evidence inexcusable rapacity. It is repugnant to think of a solicitor withholding detail from a client, precedent to an agreement, to the solicitor's advantage and the client's disadvantage.

   It is useful to refer here to some statements made in the New South Wales Court of Appeal in *Foreman*, per Kirby P (p 422):

   > "Litigants look to this Court, ultimately, to protect them from over-charging by legal practitioners where this is so high as to constitute professional wrongdoing. The courts of other Australian jurisdictions have begun to deal determinedly with gross over-charging by legal practitioners where this is proved to amount to professional misconduct … No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging

> where it goes beyond the bounds of professional propriety. Time charges have a distinct potential to result in overcharging …"

and per Mahoney JA (p 437):

> "… if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgment in entering into them."

2. The extent to which a solicitor need explain to his or her client a prima facie unusual basis of charging may depend on the extent to which that basis is unusual. Should it be proposed, for example, as in this case, and one would hope very unusually, that the time of a non-legally qualified paralegal, performing essentially secretarial or administrative tasks, be chargeable at rates approaching those appropriate to an employed solicitor or partner, then one would expect some compelling explanation: has, for example, the charge out rate been set appreciably lower than that which would usually apply to a partner, reflecting appropriately the mix of professional/non-professional work, in the interests of convenience to the client? It would be unprofessional, as happened in this case, to set a high, across-the-board rate, albeit less than a commandable partner rate, which resulted in a windfall because of the high proportion of non-qualified work to be accomplished.

3. A careful explanation should ordinarily be offered for what have, in this case, been termed "blended" rates. A client would usually be astonished to think he or she had to pay for the solicitor's secretary or clerk at the same rate as for the solicitor. Cases like this one should cause careful clients to be circumspect about entering upon blended fee arrangements. A solicitor proposing such an arrangement should offer a most careful justification for what is proposed, to assure the client he or she is not being disadvantaged, and to inform the client appropriately so the client may make the requisite fully informed decision whether or not to agree to the proposal.

   As observed by Gleeson CJ in *New South Wales Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116, 126, "to allow a simple, flat, hourly rate as the basis for charging for anything, of whatever character, done by any solicitor of whatever seniority and experience in relation to the matter, is difficult to justify." I add, even more so, where the rate extends to work done by employees without legal qualification.

4. Major criteria which ultimately inform the professionalism of the law are integrity, and as concomitants, honesty and reasonableness. A degree of recklessness may unfortunately have entered this field in recent times in the

case of some practitioners. How, as instances, could it be conceived, as professional, to require recompense from the client, on a timed basis, for unsuccessfully seeking to telephone someone, for time spent unsuccessfully searching a file, and as mentioned above, for steps taken to express thanks for assistance? The legal profession must realize that to maintain its perceived professionalism, its practices must be seen as those appropriate to a profession, and not those of a run-of-the-mill commercial enterprise. There is, in short, a large role for discretion and conservative moderation, characteristics not evident in this unfortunate case.

Penalty

[33] The Tribunal expressed the following reasons for suspending the respondent from practice for 12 months:

> "The practitioner is one who has made an admirable contribution to the legal profession and to the wider community through his involvement in the Australian Plaintiff Lawyers Association and other community work about which he has given evidence before this Tribunal.
>
> This confirms the Tribunal's impression of him when he gave evidence before the Tribunal, that he is a person of integrity and one who was frank and honest in his evidence before the Tribunal.
>
> The Tribunal can be confident that, generally speaking, he is frank and honest in his dealings with clients and other practitioners. Character evidence called before us today supports that impression.
>
> The subject matter of these two charges represents a serious error of judgment on the practitioner's part. He has not, however, been found guilty of a continuing or serial misconduct but rather two incidents, one of a breach of fiduciary duty and the other of gross overcharging. These were two very serious errors of judgment which occurred in relation to the same matter.
>
> It was suggested that the practitioner should not be made a scapegoat in a situation where there is genuine confusion in the legal profession about the proper remuneration or basis of charging for difficult matters like the one, the subject matter of this case, which was a difficult medical negligence case involving a plaintiff with cerebral palsy, but there should have been no confusion on the practitioner's part about his fiduciary duty to his client.
>
> If there is doubt in the profession about the appropriateness of blended rates of charges, then that may well ameliorate the significance of the second charge, but still it was a serious error of judgment. Given our view about Mr Roche's honesty and integrity, we have confidence that he will learn a valuable but painful lesson as a result of these serious errors of judgment.

> We accept that Mr Roche is a person who will be prepared to learn and adjust his professional behaviour accordingly, after an appropriate period of suspension.
>
> We have a duty to protect the public, but we are confident that the practitioner will act in future in a professional manner. He is not a practitioner who has demonstrated any permanent unfitness to practice by reason only of these two very serious errors of judgment. It is not appropriate therefore that he be struck off the Roll.
>
> We do need to send a message to the profession that in securing client agreements, solicitors have a serious duty not to advance their own interests over their clients' interests. The breach of fiduciary duty here was compounded by the gross overcharging which occurred.
>
> We will send appropriate messages to the profession by imposing an appropriate and serious penalty and we will thereby fulfil our duty as a Tribunal to protect the public.
>
> Given the serious nature of these two errors of judgment which amount to serious misconduct, we believe the appropriate penalty is a suspension for a period of 12 months from today."

[34] As will have been seen, the essentials of the Tribunal's approach to penalty were these. The respondent committed two serious errors of judgment. He was otherwise a good solicitor who is a person of integrity and honesty. The two problems occurred in relation to the same matter. The Tribunal was confident he would learn from those mistakes, such that after 12 months suspension he could be expected to act in a professional manner. Those reasons ex facie disclose no particular error of principle on the part of the Tribunal.

[35] The purpose of the penalty imposed in these situations is protection of the public. Mr Jackson QC and Mr Clothier, who appeared for the appellant, submitted in writing that there was no basis upon which the Tribunal could confidently have expected the respondent to act professionally after a 12 month suspension. Counsel relied for that submission on the very serious nature of the breaches, and the respondent's failure to acknowledge the wrongfulness of his approach. Counsel rightly pointed out the fundamental character of the breach of fiduciary duty, and the Tribunal's characterization of the overcharging as "grossly inconsistent" with the respondent's professional obligation.

[36] On the other hand, Mr Morris QC stressed, among other considerations, that the respondent had not previously been the subject of any adverse disciplinary finding (he has been in practice since his admission as a solicitor in 1987), that these breaches related to the one case and the one client, that the Tribunal made no adverse finding in relation to the respondent's honesty, and that Mr Arthur retained his confidence in the respondent's professional capacity. (Prior to the hearing, the respondent made a substantial refund – the amount of $147,000, to Mr Arthur.)

[37] Mr Jackson orally submitted that the Tribunal's view as to the respondent's honesty was not justified because of two circumstances. First, there is the Tribunal's

rejection of the respondent's evidence that he believed he had advised Mr Arthur to seek independent advice whether or not he should enter into the second fee agreement. Second, there is the Tribunal's expression of concern about the respondent's "repeated denial" that he had offered to take on a claim in respect of Mr Arthur's son at the rate of $300 per hour as a form of inducement to Mr Arthur to agree to the elevation of the rates applicable to the daughter's claim. As to the first of those matters, I accept Mr Morris's submission that the respondent should be regarded not as having been dishonest, but as having engaged in a process of erroneous reconstruction. As to the second, having read the relevant evidence given before the Tribunal, I am satisfied that any significance of the point was limited to semantics.

[38] Mr Jackson then emphasized what he submitted was the respondent's lack of appreciation of the wrongfulness of his conduct. It is true that before the Tribunal, the respondent appeared not to appreciate that Mr Arthur's consent to the second fee proposal was not "fully informed", and that he was under an obligation to refund a substantial sum to Mr Arthur. Those exchanges occurred in the course of a lengthy hearing in which the Tribunal had a substantial opportunity to observe the respondent's demeanour both while giving evidence and not giving evidence. While a lack of awareness in a solicitor of the nature of his or her obligation to the client will generally be regarded as demonstrating unfitness to practise (cf. *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 740, 748), the extent of the particular misapprehension needs to be considered, and this Tribunal was not precluded by what transpired here from taking the view that the respondent's honesty and integrity would ensure that following the period of suspension, he would not commit further breaches of professional responsibility. The flavour of the respondent's approach before the Tribunal reflected a level of indignation at his being pursued by the appellant notwithstanding his apparent view that he was performing a valuable public service in conducting this sort of litigation (medical negligence), claimed to be on a basis which was in fact unprofitable. The respondent was entitled to defend himself, obviously, and with professional futures at stake, it is understandable that such defences may be attended by a degree of passion. I expect the Tribunal took the view that to the extent the respondent declined before the Tribunal to concede the appellant's position, that was a product of understandable defensiveness, and that given the lesson which will undoubtedly have been learned from the substantial period of suspension imposed upon him, it would be reasonable to expect that his basic honesty, integrity and intelligence would ensure there were no recurrence of professional misconduct upon his return to practice.

[39] That approach of the Tribunal renders it very difficult for this court now to accede to the appellant's submission and impose the more stringent penalty of striking off. As I have said, this court lacks the Tribunal's extensive advantage in having heard and observed the respondent over that period, and there is otherwise no particular reason for now doubting the reasonableness of that particular conclusion reached by the Tribunal. It may be acknowledged that a 12 month suspension for an experienced and successful solicitor in active practice as a partner of a major firm would be inevitably burdensome for the solicitor and his or her dependants, although it is not the effect on the practitioner which is of particular relevance: protection of the public is the relevant consideration in this respect. In the end, the court should not on the materials before us gainsay the Tribunal's advantage in

confidently reaching that assessment of the respondent, which in turn justified the order for a substantial period of suspension rather than an order for striking off.

[40] In the broadly comparable case of *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, the Full Court of the Supreme Court of the Australian Capital Territory dealt with two solicitors who practised in that Territory, specializing in personal injuries claims, under the name Watling Roche. They are in fact the respondent's brothers. It was found that pursuant to client agreements drawn on a "no win no fee" basis, they charged grossly excessive fees, which were, additionally, "arbitrary when compared with the work actually done and the degree of difficulty of it" (p 145). In many cases they charged $325 per hour, which the court noted (p 148) "could be justified for the work of a highly skilled professional lawyer," adding, however, that "applying that rate to *all* staff, professional or not, [was] simply outrageous." They were also found guilty of impropriety in procuring clients to enter into agreements authorizing grossly excessive charging – somewhat akin to the first charge in this case. Those solicitors acknowledged the impropriety of their conduct, changed their form of client agreement, and offered to establish a fund to provide restitution to their injured clients. The court said (p 152):

> "We accept that the compensation offered to clients overcharged by the solicitors is a significant mitigatory factor. It acknowledges that the solicitors have some, albeit belated, realization that they have behaved disgracefully in exploiting their clients as they did."

For what the court described as "an exercise in calculated greed" which "[exposed] the legal profession to disrepute" (p 153), the solicitors were suspended for 18 months.

[41] The misconduct of those solicitors extended over a substantial period and related to many clients. As the court said (p 150), gross overcharging was the "habitual practice" of those solicitors, "it was not an isolated instance." That distinguishes their situation from that of the present respondent so far as the material before the Tribunal reliably disclosed his position.

[42] On the other hand, a concerning feature of this respondent, distinguishing his position from that of those other solicitors, is his apparent lack of contrition, and the absence of an acknowledgement of his wrongdoing. But then one must give due weight to the view of the Tribunal that the respondent was basically honest and that with the salutary lesson of this suspension behind him, he could confidently be expected to conduct himself appropriately. No doubt the relevant authorities will be astute to monitor his approach very carefully when the suspension is lifted. Finally, there is the support this respondent gains from the attitude of Mr Arthur. While that attitude may be explained at least in part by the refund already made, and perhaps Mr Arthur's dependence on the respondent's firm in continuing to act in relation to the claim concerning his son, that attitude nevertheless carries some residual significance.

[43] There is no stipulation for equivalence of approach from jurisdiction to jurisdiction, although generally comparable treatment is desirable, absent any point of significant difference between the professional requirements and public expectations within the respective jurisdictions. Overall, there is in my view reasonable parity between the

12 months suspension imposed upon this respondent and the 18 months suspension visited upon the partners of Watling Roche.

[44] It should however be unequivocally affirmed that the respondent's conduct exhibited an intolerable rapacity, and a blinkered, self-serving approach to the discharge of his fiduciary duty. That he has avoided being struck off in no degree diminishes proper recognition of the reprehensible character of his professional misconduct. But as I have said, the court is in this case constrained to acknowledge the Tribunal's view, apparently reasonable, that the respondent has the substantial capacity to work beneficially in the public interest, and that the ultimate objective is not in this case condign severe punishment of the errant practitioner: it is the protection of the public. That should, on the Tribunal's supportable findings, be adequately served by the penalty imposed.

[45] I would accordingly dismiss the appeal and the cross-appeal. Should the parties wish to agitate the issue of costs, written submissions should be furnished promptly to the court.

[46] My inclination however would be to make no order as to costs. I indicate the following considerations basing that preliminary view. Neither party has succeeded in his or its challenge to the Tribunal's findings. Further, there was an element of public interest in the court's reviewing the penalty imposed in this particular case, especially given the expression of public interest in recent months in issues relating to "no win-no fee" litigation, and particularly the charging rates of solicitors in that field.

[47] The arrant greed of a few has harmed public perceptions of solicitors generally. What was said and done by the Tribunal, and its endorsement through this judgment, should help ensure that solicitors who may be tempted beyond proper, discreet, professional moderation will pull back. They may otherwise expect a salutary response from the Tribunal and, as necessary, the court. Insofar as there was, here, a suggested lack of clarity about what is ethically required of a solicitor in these situations, which I should say I find rather difficult to accept, it should now have been plainly dispelled, so that a defaulting practitioner will not hereafter be able to seek lenient treatment on that ground.

[48] **McMURDO P:** I have had the benefit of reading the Chief Justice's reasons in which the facts and issues raised in this appeal are clearly set out and with which I respectfully agree. Because of the public importance of this case, which deals with the appropriate conduct of legal practitioners when entering into costs agreements in speculative cases, I wish to make some brief additional comments. I will repeat only those facts necessary to explain my observations.

[49] The Solicitors Complaints Tribunal ("the Tribunal") found the respondent guilty of two counts of professional misconduct. The first was that he failed to discharge his fiduciary obligations to his client, Mr Arthur, in making the second retainer agreement with Mr Arthur on 12 October 2000. That agreement contained significantly more onerous terms for Mr Arthur than the original retainer agreement of 23 November 1998.

[50] The Tribunal found the following facts as to the first count. The respondent did not advise Mr Arthur of his right to obtain independent legal advice on the terms of the

second client agreement when he knew Mr Arthur was in financial difficulties and was desperate to continue his daughter's case in which a mediation was scheduled in December 2000. Mr Arthur was anxious to have the respondent's firm take on the damages claim of his son, who, like his daughter, suffered brain injuries at about the time of his birth. The respondent knew these factors influenced Mr Arthur's decision to enter into the second agreement. The respondent would agree to take on the son's case at less than what he claimed was the usual fee rate of $500 an hour in speculative medical negligence cases, only if Mr Arthur agreed to the higher fee rates contained in the second agreement. The respondent did not provide Mr Arthur with the necessary information required to make an informed decision in these circumstances. Nothing had occurred prior to the signing of the second agreement that relieved the respondent's firm from its obligations to Mr Arthur to complete the retainer for his daughter's action under the first agreement. The Tribunal determined that the respondent's failure to advise Mr Arthur to obtain independent legal advice about the second agreement was a breach of his fiduciary duty.[1] In reaching this conclusion the Tribunal took into account that the respondent did not give written notice to Mr Arthur in advance of the meeting on 12 October 2000 that his firm intended to increase the fees to be charged nor provide a copy of the proposed schedule of increased fees and charges as he was required to do under cl 4(c)(iii) of the first agreement; advise Mr Arthur to bring a copy of the first agreement to the meeting so that Mr Arthur's rights under that agreement could be explained; provide a copy of the first agreement to Mr Arthur at the meeting; point out to Mr Arthur the relevant differences between the first and second agreements; discuss how the second agreement conflicted with Mr Arthur's rights under the first agreement nor give any estimate of the likely impact the proposed increase in hourly rates would have on the total fees charged. In fact, the first agreement offered Mr Arthur protection from the respondent's conduct on 12 October 2000,[2] importuning him to enter into the second agreement. Mr Arthur entered into this second agreement unaware that 50 per cent of the work would be done by paralegals; without independent legal advice he could not have known that the fees charged for paralegals under the second agreement were unusual.

[51] The Tribunal rightly concluded that these facts, which were all open on the evidence, demonstrated that the respondent's conduct was a serious breach of fiduciary duty and amounted to professional misconduct.

[52] The respondent was also found guilty of professional misconduct in grossly overcharging Mr Arthur. The Tribunal found that charging out paralegals at effectively $390 per hour[3] for many hours of work of "a fairly mundane nature" amounted to gross overcharging. Tasks charged at this rate included arranging medical appointments, sorting photocopies, making travel arrangements, and as the Chief Justice has mentioned, asking another staff member to purchase "a box of chocolates and a nice thank you card" for a doctor's secretary and then wrapping the gift. The charges made by the respondent's firm for work of this kind done by paralegals over such an extensive period were so far above those of any reasonable solicitor that they constituted gross overcharging and professional misconduct.

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1 This duty to advise was not satisfied by the mere inclusion in the second client agreement of cl 4 of the Schedule required by s 48(4) *Queensland Law Society Act* 1952 (Qld), advising Mr Arthur that he may obtain independent legal advice.

2 See cls 4 & 14 of the Agreement of 23 November 1998

3 Inclusive of GST

[53] These findings were again plainly open on the evidence. The appellant relied on a number of other additional particulars as constituting overcharging. Although the Tribunal did not find any of those particulars considered separately amounted to gross overcharging and professional misconduct, the Tribunal's findings in respect of them provided the relevant factual background to its ultimate finding of overcharging constituting professional misconduct.

[54] The respondent's firm obtained a positive outcome for Mr Arthur's daughter; the action was settled for $2 million including statutory charges and refunds, plus costs to be assessed on the standard basis.[4] In offering access to justice to those like Mr Arthur and his daughter, who could not otherwise afford to pursue their rights in the courts, firms such as the respondent's supply an important community service but only if they do not compromise legal professional standards. It is self evident that a firm of solicitors undertaking speculative medical negligence actions like that brought by Mr Arthur on behalf of his daughter carries a significant risk: the action involving years of work may not succeed with the result that, depending on the client agreement, the firm will not recover its own fees and may remain liable for some or all outlays. Under the client agreement here, outlays, including barristers' fees, expert fees, court fees, process servers' fees, travel and accommodation, postage and couriers, photocopying, telephone calls, faxes and so on were not to be paid by Mr Arthur if the action failed. In Queensland solicitors are prohibited from charging contingency fees.[5] It is nevertheless reasonable to expect that solicitors acting speculatively in actions comparable to that pursued by Mr Arthur on behalf of his daughter will charge their client at a substantially higher rate than otherwise to cover the considerable risks they carry and the reality that, at best, the payment of their own costs will be delayed. Healthy competition will inevitably mean some variation between the fees charged by firms in such circumstances. These fees must not, as the Tribunal recognised, go beyond the range of what would be charged by a reasonable solicitor in the circumstances. Mr Arthur was finally given a bill of costs for almost $620,000, of which $350,000[6] were the firm's professional costs,[7] and $125,235.50 were barrister's fees,[8] yet the professional costs and disbursements calculated on an indemnity basis were agreed at a mere $240,000. Even without the Tribunal's particular findings of gross overcharging, this disparity suggests that the fees charged by the respondent's firm were exorbitant and well outside those charged by any reasonable practitioner.

[55] The penalty of 12 months suspension from practice imposed on the respondent by the Tribunal was consistent with that imposed in the broadly comparable case of *Law Society of the ACT and Roche*,[9] although I observe that the Law Society of the ACT asked the court determining the matter at first instance only to suspend the respondents from the right to practise in the ACT; here the appellant has always contended that the appropriate penalty was to have the respondent's name struck

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4 Costs on the standard basis were agreed at $160,000

5 Section 48 *Queensland Law Society Act* 1952 (Qld)

6 Inclusive of GST

7 The respondent's firm later refunded $147,000 to Mr Arthur without admitting liability but only after the respondent became aware of Mr Arthur's complaint to the appellant and the appellant had sent him the draft charges it proposed to bring against him to have his name struck from the Roll of Solicitors of the Supreme Court of Queensland.

8 Inclusive of GST

9 (2002) 171 FLR 138

from the Roll of Solicitors. A further important distinction was that this respondent has demonstrated no remorse for his conduct.

[56] For the reasons given by the Chief Justice, the Tribunal was right to conclude that a period of suspension was the appropriate penalty; the Tribunal was conscious of its duty to protect the public and was entitled to conclude that the respondent would act professionally in the future, having learnt from his mistakes and after serving his suspension. Had I been imposing the penalty at first instance, I would have suspended the respondent from practice for a longer period, but the 12 months period of suspension was not manifestly inadequate, especially in circumstances where there may have been uncertainty amongst some members of the profession as to the appropriate level of fees in speculative personal injury cases generally and medical negligence cases in particular.

[57] In light of the clear statements made by the Court in this case, practitioners who continue to breach their fiduciary duty by placing their own and their firm's interests before those of clients, importuning them to enter into costs agreements charging exorbitant fees, whether or not in speculative cases, can expect heavier deterrent penalties for their professional misconduct. Substantial penalties will be justified to protect primarily the public but also the reputations of the vast majority of decent practitioners to whom such conduct is abhorrent. Where appropriate, the penalty may include striking the name of the offending practitioner from the Roll of Solicitors of this Court.

[58] I agree with the orders proposed by the Chief Justice.

[59] **WILLIAMS JA:** The relevant facts are fully set out in the reasons for judgment of the Chief Justice and I need not repeat them. For the reasons given by the Chief Justice both the appeal and cross-appeal should be dismissed. I would, however, add some brief additional observations of my own.

[60] There was, in my view, clear breach of the fiduciary duty owed by the solicitor to his client arising out of the circumstances in which the second retainer came to be executed on 12 October 2000. The solicitor called the client to his offices ostensibly to discuss mediation of the pending claim which was scheduled to be held in December 2000. Given the relatively short period between the date of that meeting and the mediation the client reasonably believed that most preparatory work for the mediation had already been carried out. In fact that was not the case, but the solicitor did not inform the client of that. The client reasonably believed that only a small amount of work would attract the higher fees specified in the second retainer. The solicitor was under an obligation to clarify the position and failed to do so.

[61] Further, the timing of the presentation of the second retainer to the client placed the latter under significant pressure. Given the work which undoubtedly had been done to that point of time, and given the short interval before the date fixed for the mediation, there was pressure on the client to remain with his existing legal representation rather than seek to procure fresh and cheaper representation. There was clearly an intentional breach of the 30 day advance notice requirement specified in the first agreement.

[62] Particularly given the absence in the contemporaneous diary note of any reference to independent legal advice, the Tribunal was, in my view, entitled to reject the solicitor's evidence that, though he could not specifically recall giving the client advice as to his right to obtain independent legal advice, he believed he had done so. Once that evidence was rejected there was simply no evidence before the Tribunal that such advice had been given. In the absence of such advice there was a breach of the solicitor's fiduciary duty in procuring the execution of the second retainer in the circumstances which otherwise existed. As is demonstrated by authorities such as *Maguire v Makaronis* (1997) 188 CLR 449 at 466, a conclusion that there has been a breach of fiduciary duty can more readily be reached where there is no evidence that the client was advised to seek independent legal advice.

[63] The finding there was a breach of fiduciary duty is supported by the evidence and should not be overturned.

[64] Whilst there is some force in the submission on behalf of the appellant that the Tribunal erred in the way it approached making findings with respect to the second charge, that error is of little practical consequence. The alleged breach was of "gross overcharging" and particulars were then provided substantiating that charge. The Tribunal looked at each particular in isolation and determined whether it alone established gross overcharging. With respect to most particulars the Tribunal came to the conclusion that gross overcharging was not made out. The error, in my view, was in not having regard to the context in which each allegation was made (that is, the relevance and force of the other particulars) in evaluating the particular allegation. If that approach had been adopted then, in all probability, a finding would have been made that a number of the alleged particulars supported the allegation of "gross overcharging".

[65] But, as I have said, the error is of little practical significance because the charge of "gross overcharging" was found to be established by certain of the particulars alleged. Because the charge involved the one client and the one bill of costs it cannot be said that the offence was made more serious because it was established by a number of discrete evidentiary facts.

[66] When it came to the question of penalty the Tribunal had before it evidence from two legal practitioners as to the solicitor's standing in the legal community and as to his preparedness to act in difficult cases for disadvantaged clients.

[67] Given all the character evidence, and given the opportunity the members of the Tribunal had of hearing the solicitor give evidence, it was entitled to come to the conclusion that the solicitor was generally a person of integrity and that the subject matter of the two charges represented "a serious error of judgment on the practitioner's part."

[68] The Tribunal also referred to some "doubt in the profession about the appropriateness of blended rates of charges". There was some evidence before the Tribunal that senior experienced practitioners were charging approximately $500 per hour for work on matters of the type involved here. The contention then was that a "blended rate" of $300 per hour was justifiable. But as the detail contained in the reasons for judgment of the Chief Justice demonstrates, applying the $300 per hour to some of the work performed by paralegals in this case clearly evidenced "gross overcharging".

[69] It is clear that the Tribunal gave anxious consideration to the appropriate penalty and it cannot be said that it erred in not determining that striking off was the appropriate penalty. Though it is in no way decisive, it is interesting to note that the Law Society of the Australian Capital Territory did not submit that practitioners guilty of similar offences should be struck off: *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138. There the Society submitted the penalty ought to be 12 months suspension, but the court suspended the practitioners for 18 months. As noted by the Chief Justice here, there are some distinguishing features between the two cases.

[70] Though the breaches were serious the penalty imposed was not so inadequate as to call for intervention by this court. Suspension for 12 months is a heavy penalty to impose on a practising solicitor, and the findings against him by the Tribunal will have an impact long after that 12 months period has passed. Given the specific findings of the Tribunal the penalty imposed should stand.

[71] In all the circumstances I agree that the appeal and cross-appeal should be dismissed.