QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Legal Services Commissioner v Laylee & Anor* [2016] QCAT 237
PARTIES:	Legal Services Commissioner (Applicant/Appellant) v Ms Angela Laylee Mr John Joseph Devlin (Respondents)
APPLICATION NUMBER:	OCR327-12 & OCR329-12
MATTER TYPE:	Occupational Regulation matters
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice DG Thomas, President** Assisted by: **Ms Megan Mahon, Legal panel member** **Mr Keith Michael Revell, Lay panel member**
DELIVERED ON:	27 July 2016
DELIVERED AT:	Brisbane

ORDERS MADE:

1. **The charges are dismissed.**

2. **The Legal Services Commissioner is to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs the Commissioner wishes to make, by:**

   4:00pm on 17 August 2016.

3. **The respondents are to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs they wish to make, by:**

   4:00pm on 7 September 2016.

4. **The Legal Services Commissioner is to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in reply, by:**

4:00pm on 28 September 2016.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the Legal Services Commissioner allege the respondents are guilty of unsatisfactory professional conduct – where relevant test for unsatisfactory professional conduct outlined – where the case of *Legal Services Commissioner v Madden* says the Legal Services Commissioner is confined to the allegations contained in the disciplinary application – where the applicant submits that the first respondent failed to maintain reasonable standards of competence and diligence in relation to the lodgement of a caveat on behalf of her client – where the applicant submits that the second respondent should not have charged for work performed as he ought to have known his colleague was in error – whether the respondents are guilty of unsatisfactory professional conduct

Legal Profession Act 2007 (Qld) ss 418, 419
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Barwick v Law Society of New South Wales [2000] HCA 2
Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors [1979] Ch 250
Briginshaw v Briginshaw (1938) 60 CLR 336
D'Alessandro v Legal Practitioner's Complaints Committee (1995) 15 WAR 198
Jones v Dunkel (1959) 101 CLR 298
Lee v Crime and Corruption Commission & Anor [2014] QCATA 326
Legal Services Commissioner v Bone [2013] QCAT 550
Legal Services Commissioner v Madden [2008] 1 Qd R 149
Legal Services Commissioner v McClelland [2006] LPT 13
Legal Services Commissioner v Mould [2015] QCAT 440
Pillai v Messiter (No 2) (1989) 16 NSWLR 197

Puryer v Legal Services Commissioner [2012] QCA 300
Ryan v Hansen (2000) NSWSC 354
Walsh v Law Society of New South Wales (1999) 198 CLR 73

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined at an oral hearing and then on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

REASONS FOR DECISION

[1] In relation to the first of these matters involving Angela Laylee, the Legal Services Commissioner alleges that Ms Laylee failed to maintain reasonable standards of competence and diligence in relation to the conduct of a matter (involving lodgement of a caveat) on behalf of Ranee Misso and that this failure amounted to unsatisfactory professional conduct.

[2] In relation to the second matter involving John Devlin, the Legal Services Commissioner alleges that Mr Devlin charged legal costs in circumstances where he was not entitled to do so, and that his conduct in this respect amounted to unsatisfactory professional conduct.

Background

[3] There is no substantial dispute between the parties as to the relevant factual background of these matters.

[4] On 1 March 2010, O'Reilly Lillicrap were engaged by Ms Misso to assist her to recover money owing to her by her brother Mr Alstino. O'Reilly Lillicrap were instructed to lodge a caveat claiming an interest in property of which Mr Alstino was the registered proprietor.

[5] Ms Misso consulted with Ms Laylee in relation to this.

[6] Before consulting with O'Reilly Lillicrap, Ms Misso had sought the help of an acquaintance, Mr Malcolm Blue QC,[1] in South Australia. Mr Blue QC told Ms Misso that she should engage a Queensland firm of solicitors to act on her behalf.

[7] O'Reilly Lillicrap were instructed to lodge a caveat over the house and initiate Court proceedings to recover monies owing to Ms Misso.

[8] At the time, Ms Misso provided instructions to Ms Laylee, she handed to Ms Laylee a document styled "particulars of claim" drafted by Mr Blue QC.

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1 Now the Honourable Justice Blue of the Supreme Court of South Australia.

[9] Ms Laylee assumed, based upon her discussion with Ms Misso and the particulars of claim, that there was a written loan agreement between Ms Misso and Mr Alstino which was sufficient to found a claim for an equitable mortgage over the property in Ms Misso's favour.

[10] Between 1 and 3 March 2010, Ms Laylee drew the caveat over the property which was sent to Ms Misso by express post on 3 March. The interest claimed was "as equitable mortgagee pursuant to the loan agreement dated May 1990 between Gerald Alstino, being the Gerald Alstino who is the registered proprietor, and the caveator".

[11] On 4 March, Mr Blue QC sent an email to Ms Laylee setting out, in summary form, the legal basis he proposed for the intended proceedings and caveat.

[12] Subsequent to the wording first prepared by Ms Laylee, she did not alter the draft, nor give any further advice to Ms Misso concerning the caveat, even after receiving the email from Mr Blue QC on 4 March 2010.

[13] On 8 March 2010, Ms Misso signed the caveat and returned it to Ms Laylee. The caveat was received by Ms Laylee on 10 March and it was lodged with the Department of Natural Resources and Mines ('DERM') on 11 March.

[14] The caveat was requisitioned by DERM on 16 March on the following basis:

> Item 4 – the grounds of claim in this caveat should be expanded to state the specific clause of the agreement which gives rise to the interest being claimed in item 3. The grounds should also state that it charges the land with the payment of monies, if such is the case.

[15] In fact, there was no written agreement.

[16] Ms Laylee was on vacation from 17 March. On that day, she provided a briefing memo to Mr Devlin, who assumed the conduct of the matter.

[17] Mr Blue QC engaged with Mr Devlin to attempt to have the caveat registered. The second attempt to register the caveat was the subject of a requisition by the titles office. The caveat was never registered.

[18] On 31 March (prior to Ms Laylee returning from vacation) O'Reilly Lillicrap:

a) Charged legal costs to the client totalling $3,352.28, including a bill for $2,456.88 dated 31 March 2010 comprising $2,226.95 for professional costs and $299.93 in outlays; and

b) Included, in the 31 March 2010 bill, sums totalling $515.90 comprising costs in connection with Ms Laylee's work relating to drafting and lodging of the caveat.

[19] O'Reilly Lillicrap used $2,500.00 paid by Ms Misso into trust to discharge the 31 March 2010 bill referred to above (and a small part of a subsequent bill).

[20] Thereafter O'Reilly Lillicrap wrote off the remaining outstanding amount of $852.28.

Issues for consideration

[21] In respect of Ms Laylee, the parties each suggest that the issue for consideration is whether, properly understood in the light of the evidence, the conduct (the acknowledged error of judgment in drafting the caveat) was sufficiently serious as to amount to unsatisfactory professional conduct.[2]

[22] In relation to Mr Devlin the question, according to Mr Devlin, is whether the applicant's allegations in the proceedings are capable – even if proved – of establishing unsatisfactory professional conduct and, if the Tribunal considers they are so capable, whether the evidence establishes conduct comprising unsatisfactory professional conduct.[3]

[23] In relation to Mr Devlin, the Commissioner frames the key issues as follows:

a) Whether Ms Laylee's work on the caveat was work that was objectively a mistake (as distinct from unsatisfactory professional misconduct);

b) Whether Mr Devlin had sufficient notice of the standard of Ms Laylee's work; and

c) Whether with the information available to him, Mr Devlin ought to have charged Ms Misso the cost of Ms Laylee's work on the caveat.[4]

[24] As to Devlin, the Commissioner contends that if the three aspects mentioned above are established it necessarily follows that such conduct would amount to unsatisfactory professional conduct.

Unsatisfactory professional conduct – s 418 *Legal Profession Act* 2007 (Qld)

[25] The Commissioner asserts that the conduct of Ms Laylee and Mr Devlin was unsatisfactory professional conduct but not professional misconduct. Unsatisfactory professional conduct is the less serious of the types of

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2 Submissions on behalf of the applicant, filed 16 April 2015, paragraph 7; Submissions on behalf of the respondent, filed 29 May 2015, paragraph 5(a).

3 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 5(b).

4 Submissions on behalf of the applicant, filed 16 April 2015, paragraph 8.

conduct described in sections 418 and 419 of the *Legal Profession Act* 2007 (Qld) ('The Act').

[26] The assertion is that the conduct amounted to unsatisfactory professional conduct. The proceedings are a matter of great consequence for each of the respondents.

[27] The Tribunal must be satisfied as to the breach, on the basis of the degree of satisfaction outlined in the case of *Briginshaw v Briginshaw.*[5] In that case, Dixon J observed at 361-2:

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality… 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

[28] Each side made submissions concerning the concept of "unsatisfactory professional conduct" as that term is used in section 418 of the Act.

[29] Section 418 of the Act is an inclusive definition providing that unsatisfactory professional conduct includes conduct which "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner."

[30] The test to determine whether conduct is unsatisfactory professional conduct has been considered in a number of cases (referred to by the parties) which include *Legal Services Commissioner v McClelland*[6] and *Legal Services Commissioner v Bone.*[7]

[31] In *McClelland*, de Jersey CJ concluded that the relevant "failure" (as contemplated by section 418 of the Act) does not embrace all cases of error. In that case, de Jersey CJ found that the error was "substantial enough to fall within its ambit".[8]

[32] The matter was considered again in *Bone* where Alan Wilson J considered that the question was whether the conduct in question was "sufficiently substantial to warrant the conclusion that it constitutes unsatisfactory professional conduct".[9]

[33] As has been recognised by the Commissioner, Alan Wilson J concluded that the decided cases suggest that unsatisfactory professional conduct will generally involve repeated or significant departures from acceptable standards.[10]

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5 (1938) 60 CLR 336 ('Briginshaw').
6 [2006] LPT 13 at [27] '*McClelland*'.
7 [2013] QCAT 550 at [64] to [65] '*Bone*'.
8 *McClelland* at [27].
9 *Bone* at [64].
10 Submissions on behalf of the applicant, filed 16 April 2015, paragraph 19.

[34] The Commissioner agrees that not all mistakes will amount to conduct falling short of the standards the public is entitled to expect from a practitioner. Substantial errors will, naturally, meet the test but that the test remains that set out in section 418 of the Act.[11]

[35] In the opening, counsel for the Legal Services Commissioner indicated:

> "In Ms Laylee's case it must be proved that her conduct in attempting to lodge the caveat in those circumstances amounted to a substantial departure from the accepted standards of competence and diligence in a lawyer. That's the case that must be made out in relation to that work from Ms Laylee."[12]

[36] In the submissions, the respondents agree with the Commissioner's position that "there has to be a substantial departure from the standard in order to meet the definition".[13] The respondents submit that it is unnecessary to analyse with precision the various authorities including *Bone*, to emphasize the point, said to be obvious, that "not every error will constitute unsatisfactory professional conduct" and "a single mistake will often not be enough".[14]

[37] The respondents submit it is self-evident that the statutory definition requires a line to be drawn somewhere as to whether or not conduct sufficiently departs from the theoretical ideal so as to fall short of the standard to which the definition refers.[15] In response, the Commissioner notes that the concession made by the Commissioner in the opening is consistent with the decision in *Bone* but emphasizes that the definitive test is that set out in the statute, in section 418 of the Act.

[38] In *Legal Services Commissioner v Mould*[16] Carmody J, in the context of various cases involving the conduct of medical practitioners, refers to observations made by Kirby P (as he then was) in *Pillai v Messiter.*[17]

[39] Whilst in a different context and concerning a different regulatory regime, in *Pillai,* Kirby P described a general approach and emphasized that, in light of the potential consequences for the practitioner, a finding should only be made where it is necessary to protect the public from "*delinquents and wrong doers… (or) seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements.*"

[40] If every negligent act or error made by a practitioner were to be categorised as unsatisfactory professional conduct, disciplinary prosecutions would follow every claim against a legal practitioner for professional negligence, for which every practitioner must be insured.

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11 Ibid, paragraph 20.
12 Transcript of proceedings held on 5 March 2015, page 1-10 lines 38 to 42.
13 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 9.
14 Ibid, paragraph 9.
15 Ibid.
16 [2015] QCAT 440.
17 (No 2) (1989) 16 NSWLR 197, 220-202 (*'Pillai'*).

[41] Whether or not conduct amounts to unsatisfactory professional conduct is a question which must be determined based upon the facts of the individual case.

[42] The Tribunal agrees with, and follows, the observations made in *McClelland* and *Bone*.

[43] The test required to determine whether conduct is unsatisfactory professional conduct is such that the relevant "falling short" does not embrace all cases of error but must be sufficiently substantial. There must be an appreciable departure from the standard for the conduct to be unsatisfactory professional conduct. An isolated instance, not involving unethical conduct, and more in the nature of conduct which might give rise to an assertion of negligence, is less likely to amount to unsatisfactory professional conduct. Serious, or repeated instances, are more likely to amount to unsatisfactory professional conduct or professional misconduct.

[44] In this context, it must be borne in mind that the consequences for a respondent, whose conduct is found to have been unsatisfactory professional conduct, are very serious, and so findings of such conduct should only be made where the "falling short" is sufficiently substantial and very obvious. The Tribunal must be satisfied by reference to the Briginshaw standard.

Claim against Ms Laylee

[45] The Commissioner describes the central allegation as stemming from the fact that Ms Laylee had insufficient basis for lodging a caveat relying upon a written agreement creating the necessary interest. The Commissioner suggests that it may be relevant for the Tribunal to make a finding on the reasonableness of Ms Laylee's belief.

[46] The Commissioner further submits that there was a substantial body of evidence suggesting that Ms Laylee had no reasonable basis for a belief that there was a written agreement creating an interest in the property. This included:

a) Ms Laylee herself states that Ms Misso did not expressly tell her there were written agreements but she placed reliance on Ms Misso mentioning that the agreements were with Mr Blue QC.[18]

b) In looking at the particulars of claim provided by Mr Blue QC, Ms Laylee ought to have noticed the highly unusual absence of any reference to:

i. specific dates for the various agreements;

ii. clause numbers in these agreements; or

iii. any express statement that the agreements were in writing.

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18 Affidavit of Angela Mary Laylee sworn 18 February 2014, paragraph 8.

c) The very complexity of Mr Blue QC's particulars, including his email on 4 March 2010,[19] strongly suggested that there was nothing as straight-forward as a written loan agreement underlying the claim. The terms of that email make it clear that its contents form the basis for the caveat as well as the substantive proceedings.

d) The reference in the caveat itself[20] to "the loan agreement dated May 1990" does not mention whether the agreement was written or oral and omits the particular date in May on which the agreement was entered into. It seems unusual that Ms Laylee (or any lawyer) would not have turned her mind to these omissions.

e) Ms Laylee never asked for a copy of the agreement or other documents, and concedes at paragraph 10 of her affidavit that failing to do so was an error of judgement on her part.

f) At their first meeting Ms Misso did provide Ms Laylee with a letter she sent to her brother in 2007.[21] This letter does not mention any written agreement.

[47] Furthermore, the Commissioner submits that it was, in fact, irrelevant whether Ms Misso's instructions were construed as being that a written agreement existed, as Ms Laylee drafted the caveat on her own expertise disregarding the formulation of Mr Blue QC. Ms Laylee drafted a caveat against the background that she understood a written agreement creating an interest in land was essential to the viability of the caveat, and Ms Misso could not have been expected to know whether any document or written agreement actually created an interest in the land and moreover the draft particulars of claim prepared by Mr Blue QC did not allege that such an agreement existed.

[48] Ms Laylee has conceded that in hindsight she made an error of judgment by not ensuring she ascertained the existence of an actual written agreement

[49] Ms Laylee says that there is not "a substantial body of evidence" (as asserted by the Commissioner) suggesting a lack of reasonableness.[22]

[50] Ms Laylee submits:

a) Based upon her instructions from Ms Misso and the particulars of claim provided by Ms Misso the interest claimed in the property was most appropriately described as an equitable mortgage.[23]

b) Ms Laylee assumed there was a written loan agreement because Ms Misso told her that all the paperwork relating to the matter including

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19 Ibid, exhibit AML 11.
20 Ibid, exhibit AML 9.
21 Affidavit of Ranee Misso sworn 10 May 2013, exhibit "RM1" see pages 1 to 5.
22 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 27.
23 Affidavit of Angela Mary Laylee sworn 18 February 2014, paragraph 8.

"the agreements" were with Mr Blue QC and the particulars of claim referred to an agreement and defined five terms of the agreement with no suggestion that they were oral or implied terms.[24]

c) There is nothing unusual, let alone highly unusual, about the fact that no date was specified.[25]

d) It is not unusual, or highly unusual, that a loan agreement did not include clause numbers or, even if numbering was included, for a pleading to set out wording or effect of the relevant terms but not the numbering.[26]

e) The applicant did not call any evidence to suggest that the lack of a date or clause numbers should have alarmed a lawyer in Ms Laylee's position.[27]

f) Indeed, the only evidence on the point was from Ms Laylee who said "it wouldn't be the first time I've seen … documents aren't dated".[28]

g) Ms Laylee cannot be criticised for not following Mr Blue QC's formulation (as may have appeared from the particulars) in circumstances where Mr Blue QC ultimately agreed that an amended caveat be filed with the word "oral" deleted.[29]

h) Ms Laylee did not deliberately disregard Mr Blue QC's formulation of the particulars of claim – rather she considered the particulars to be "confusingly drafted and difficult to follow" so that they "would require clarification in due course" but they appeared to her to rely upon a loan agreement to support the claimed interest that was consistent with her understanding of Ms Misso's instructions.[30]

i) In the circumstances, there is no "substantial body of evidence" that establishes the alleged unreasonableness of Ms Laylee's assumption.[31]

j) In short, whilst in hindsight Ms Laylee might have done better not to make the assumption about the written agreement it is apparent how the assumption came to be made – Ms Misso referred to a loan agreement, as did the particulars (which provided a date) and rather precisely expressed terms, Ms Misso said that documents including agreements were with Mr Blue QC, Ms Laylee believed there to be pressure from Ms Misso to prepare and lodge the caveat urgently

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24 Ibid.
25 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 20(a).
26 Ibid, paragraph 20(b).
27 Ibid, paragraph 20(c).
28 Transcript of proceedings held on 5 March 2015, page 1- 58, lines 7 to 20.
29 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 22.
30 Ibid, paragraph 23.
31 Ibid, paragraph 27.

and Ms Misso never said either when instructing Ms Laylee or later dealing with Mr Devlin, that there was no written agreement.[32]

k) Whilst with hindsight the assumption was erroneous (and Ms Laylee acknowledged that she should have checked it more thoroughly) it cannot be said that Ms Laylee's isolated error of judgment was sufficiently unreasonable or substantial to comprise unsatisfactory professional conduct.[33]

[51] The assertion by the Commissioner is that Ms Laylee's work "fell so far short of accepted standards of competence that it amounts to unsatisfactory professional conduct".[34] In submitting that the conduct was unsatisfactory professional conduct the Commissioner asserts that "the conduct was not a mere slip but a very stark misapprehension of instructions, followed by an equally stark lack of curiosity about the apparent deficiencies in her instructions as they applied to her task in hand."[35]

[52] The Tribunal does not believe that either of those submissions are made out on the evidence.

[53] Evidence was given by Ms Laylee and Ms Misso.

[54] In cross examination, Ms Misso conceded she told Ms Laylee about the history, the original agreement with her brother, that there was a loan arising from the agreement, and that all the documents relating to the matter were with Mr Blue QC.[36]

[55] Whilst not forthcoming and clearly of the mind to give evidence consistent with the case against Mr Laylee,[37] Ms Misso conceded she told Ms Laylee that all documents relating to the matter were with Mr Blue QC including the mortgage statements and bank statement and agreements and trust deeds.[38]

[56] Under cross-examination in relation to the exchange of emails with Mr Devlin, Ms Misso was evasive in her answers. She did not answer why she had not, in response to the clear questions from Mr Devlin, simply said that there was no written agreement. In this context she asserted, for the first time, that "I told everything to Angela at this time, it was all oral. The only thing I have got is this particulars of claim".[39] However, she could not recall when she told Ms Laylee that the agreements were oral.[40] Ms Misso then retracted that testimony to say that, consistent with what had

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32 Ibid, paragraph 28.
33 Ibid, paragraph 29.
34 Submissions on behalf of the applicant, filed 16 April 2015, paragraph 6.
35 Ibid, paragraph 23.
36 Transcript of proceedings held on 5 March 2015, page 1- 31 lines 10 to 40.
37 Ibid, page 1-32 lines 1 to 11.
38 Ibid, page 1-32 lines 17 to 19.
39 Ibid, page 1-42 lines 5 to 6.
40 Ibid, page 1-42 line 7.

been recorded in her affidavit, she was intending to say that she did not tell Ms Laylee the agreement was in writing.

[57] Ms Misso was an unimpressive witness whose recollection was unreliable.

[58] In this context, she indicated that she had assistance in drafting her affidavit and that some of the words, such as the description of the instructions provided to Ms Laylee, were not her words.[41]

[59] Ms Laylee was more measured in giving evidence and there was no attempt to promote the arguments in her favour. She answered the questions in a frank way and, where she could not recall, she conceded this.[42]

[60] As it happened, the evidence from each witness did not reveal major conflicts as to many relevant issues. To the extent there is conflict, the Tribunal prefers the evidence of Ms Laylee over that of Ms Misso.

[61] Ms Laylee confirmed in evidence that Ms Misso had instructed her that all the documents including agreements were with Mr Blue QC and that, in formulating the caveat, she had read the particulars which referred to an agreement.[43] Ms Laylee explained that her assessment of the basis upon which the caveat could be lodged was that of an equitable interest arising from the loan of monies from Ms Misso to her brother and that this could be gleaned from the particulars of claim.[44] Ms Laylee recalled that Ms Misso had asked her to prepare the caveat "there and then" and that Ms Misso was extremely concerned on that point.[45]

[62] In particular, the following is relevant to this issue:

a) Ms Misso told Ms Laylee that all the paperwork relating to the matter, including "the agreements" were with Mr Blue QC.[46]

b) The particulars of claim paragraph 8 referred to an agreement and identified terms of the agreement. In her evidence Ms Misso said she told Ms Laylee that all the documents relating to the matter were with Mr Blue QC including mortgage statements, bank statements and agreements and trustees.[47]

[63] Ms Misso, who at the time, was in contact with Mr Blue QC, received the caveat prepared by Ms Laylee, signed it and returned it.

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41 Ibid, page 1-33 lines 14 to 30.

42 Ibid, page 1-60 lines 39 to 45 where questions were asked about information which had been provided to Mr Devlin.

43 Ibid, page 1-54 lines 42 to 44.

44 Transcript of proceedings held on 5 March 2015, page 1-56 lines 1 to 7.

45 Ibid, page 1-56 lines 33 and 34.

46 Affidavit of Angela Mary Laylee sworn 18 February 2014, paragraph 8.

47 Transcript of proceedings held on 5 March 2015 page 1-31, line 30 to page 1-32, line 21.

[64] Neither party called independent evidence about the impact of the fact that no precise date (other than reference to May 1990) was attributed to the agreement and there was no reference to clause numbers. There would have been no difficulty in calling such evidence.

[65] Ms Laylee was questioned about this issue. The transcript references are as follows: [48]

> "Ok. Did it not strike you as odd that no date had been provided for the document? – I can't recall, to be honest. But it wouldn't be the first time I've seen a document – well that I've seen documents aren't dated.
>
> Ok. Well we're talking about the minority. We're talking about one in thousands legal? ... Not necessarily.
>
> Ok? ... But I would make that estimation.
>
> Ok. If we're talking about equitable mortgages, things – a written document that produces one of those or creates one of those, they would tend to be in your experience dated. Would you agree with that? … Again, I've seen documents that aren't.
>
> Ok. In terms of practice, you know once a year? … I couldn't answer that question.
>
> Ok? … I don't – I don't know the answer to that question.
>
> Did it cross your mind or can you recall if this remove, whether it interested you whether there should be an actual date for that document or not? … I can't recall if that crossed my mind, but I was relying on the instructions that I was given at the time. And my understanding that there was a loan agreement that gave rise to the interest that was Ms Misso to her brother."

[66] That is the only evidence on the issue of the lack of a precise date. It does not support the contention advanced by the Commissioner.

[67] The respondents submitted that the Tribunal can take judicial notice that there is nothing unusual, let alone highly so, about a written agreement not including a precise date – that they are not infrequently executed but left undated, or given two or more different dates by those executing.[49]

[68] The respondents also submitted that the position is similar with respect to the absence of reference in the particulars of claim to precise clause numbers, it being not unusual, or highly unusual, for loan agreements between individuals to include clause numbers nor, even if the agreement did include numbering, for a pleading to set out the wording or effect of the relevant terms but not the numbering.[50]

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48 Ibid, page 1-58 lines 8 to 32.

49 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 20(a).

50 Ibid, paragraph 20(b).

[69] In the submissions, the respondents also rely upon the evidence given by Ms Laylee.[51]

[70] The Tribunal finds that the absence of these particulars, whilst it might have caused a practitioner to seek additional information, does not lead to the conclusion that the failure to inquire further amounted to a "very stark misapprehension of instructions" or a "stark lack of curiosity".

[71] This is not a case where there is any suggestion of dishonesty or unethical conduct, nor can it be concluded on the evidence that there was any substantial or repeated error. It was an isolated instance.

[72] In the circumstances, the Tribunal finds that the conduct was more in the nature of a mere slip and certainly not, as is submitted by the Commissioner, a very stark misapprehension of instructions followed by an equally stark lack of curiosity and it was not conduct which fell so far short of accepted standards of competence that it amounted to unsatisfactory professional conduct. In terms of the decisions in McLennan and Bone, the conduct was not sufficiently substantial to be unsatisfactory professional conduct.

Claim against Mr Devlin

Charges made by a solicitor

[73] As to the charges made by a solicitor, the applicant referred to the case of *Ryan v Hansen*,[52] in making the submission that a solicitor is not permitted to charge a client for work that is done negligently or contrary to instructions, especially if the work is otherwise useless to the client.[53]

[74] The Tribunal believes that is correct. A practitioner cannot charge for work that is done negligently or contrary to instructions.

[75] Authorities such as *Ryan v Hansen* deal with the ability of a solicitor to recover costs on a taxation. They are relevant to that issue.

[76] Different considerations arise between the assessment process for solicitor's bills and the question of whether there has been any ethical breach by a solicitor in rendering a bill. In this respect, the respondent referred to the case of *D'Alessandro v Legal Practitioner's Complaints Committee*[54] where Ipp J said that the standards applied under the Court's duty to monitor the taxation of bills of costs agreement and the Court's duty to supervise the disciplinary and legal practitioners are not necessarily the same and do not involve identical purposes. The Tribunal believes that is the correct approach.

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51 Transcript of proceedings held on 5 March 2015, page 1-58 lines 7 to 20.
52 (2000) NSWSC 354 (*'Ryan v Hansen'*),
53 Submissions on behalf of the applicant, filed 16 April 2015, paragraph 25.
54 (1995) 15 WAR 198.

[77] Whether the fees would be payable on an assessment of costs is one of the factors which might be taken into account (no doubt an essential factor) but is not the only factor.

The Scope of the Charge - *Legal Services Commissioner v Madden*

[78] As between the parties, there is disagreement concerning the effect of the charge which has been brought against Mr Devlin.

[79] The charge reads "the respondent charged legal costs in circumstances where he was not entitled to do so".

[80] The respondents assert that the Tribunal's jurisdiction is confined by reference to the particular allegation made in the application,[55] and that the Tribunal will exceed its jurisdiction if it embarks upon a hearing to determine whether Mr Devlin acted dishonestly or with some other specific state of mind, when engaging in the conduct which is alleged in the application, when the state of mind is not itself alleged.[56]

[81] Mr Devlin relied upon the decision in *Legal Services Commissioner v Madden.*[57]

[82] Whilst conceding that Madden "decided that the Tribunal's jurisdiction is limited by the allegations stated in the discipline application and, by extension, that the Tribunal has no jurisdiction to find conduct whilst dishonesty was not alleged in the complaint",[58] the Commissioner submits that the principle in *Belmont Finance Corporation Ltd v Williams Furniture Ltd & Ors*[59] was relevant, and specifically referred to in the Madden reasons, such that consideration of the principle that an allegation of dishonesty must be clearly pleaded and with particularly, was central to the reasoning.[60]

[83] The Commissioner submits it does not necessarily follow that this requirement (that dishonesty must be clearly pleaded) applies to knowledge or other states of mind when engaging in conduct which is alleged in the application.[61]

[84] In other words, the Commissioner seeks to confine the ambit of the decision from *Madden (*and *Puryer v Legal Services Commissioner*[62]*).*

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55 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 10.
56 Ibid, paragraph 10.
57 (2008) 1 Qd R 149 (*'Madden'*).
58 Submissions on behalf of the applicant, filed in reply 9 June 2015, paragraph 17.
59 [1979] Ch 250 at 268.
60 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 19.
61 Ibid, paragraph 20.
62 [2012] QCA 300.

[85] It is not correct to confine those decisions in the way which is asserted by the Commissioner.

[86] In *Madden*, the joint decision of the Court of Appeal was clearly of a more general effect. It included the following:

> "[72] … The procedural provisions in Part 4.9 of the 2007 Act, notably ss 452, 453, 455 and 456, confirm that the legislative intention was to confine the Tribunal's jurisdiction by reference to the particular allegations made by the Commissioner in the discipline application. That appears clearly from the requirement in s 453 that the disciplinary body must hear and decide "each allegation stated in the discipline application". It is that which the Tribunal is "empowered to deal with under this Act" in terms of s 598, the provision that identifies the purpose of s 601.
>
> [73] … s 456(1) provides that the Tribunal may only decide it is satisfied and make an order "after the Tribunal has completed a hearing of a discipline application". The context makes it clear that that hearing and decision are those identified in s 453, that is to say the hearing and decision of each allegation stated in the discipline application.
>
> [74] The scheme of the 2007 Act is that the Commissioner investigates possible misconduct, decides whether to bring a charge, and decides what to charge. The Tribunal's role is adjudicative. Section 455 is consistent with that scheme, in that any amendment of the discipline application may be made only upon the Commissioner's application; the Tribunal then exercises a judicial discretion in deciding whether the amendment sought by the Commissioner is to be allowed.
>
> [75] One aim of these provisions is to ensure fairness to legal practitioners accused of misconduct… Those provisions should not be given a narrow construction."

[87] The joint decision of the Court also referred to cases in the High Court of Australia.

[88] In *Barwick v Law Society of New South Wales,*[63] Kirby J said (in relation to the New South Wales scheme which is reflected in the Queensland legislation) at 90:

> "The object of that reform was to secure greater transparency in the determination of complaints and to establish new institutions for the process but with balancing provisions designed to afford procedural and other safeguards for the practitioner involved. … These safeguards should not be narrowly construed."

[89] Similarly in the decision in *Walsh v Law Society of New South Wales*[64] McHugh, Kirby and Callinan JJ observed at 62: "the requirements of particularity contained in the Act (and the safeguards thereby introduced for the practitioner concerned) should not be narrowly construed… the provisions of the Act must be complied with."

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63 [2000] HCA 2.

64 (1999) 198 CLR 73.

[90] In that case, the High Court held that the New South Wales Court of Appeal had exceeded its jurisdiction in an appeal from the Tribunal by making findings which went beyond the particular allegations formulated and particularised against the solicitor in the complaint heard by the Tribunal.[65] The Court in Madden concluded that the Tribunal's jurisdiction was limited to hearing and determining the allegations in the discipline application.[66]

[91] It is incorrect to confine the effect of the decision in Madden to suggest that the decision is limited by reference to the rule that dishonesty should be clearly pleaded. The Tribunal rejects the approach taken by the Commissioner in this respect.

[92] To afford procedural fairness to the Practitioner, the charges to be levelled must be fully and adequately set out in the Discipline Application. As a matter of procedural fairness, the Practitioner should not be left in any doubt as to the extent of the allegations that is to be met. The Tribunal's jurisdiction is limited to hearing and determining the allegations in the Discipline Application.

Scope of the Charge - Knowledge

[93] The respondents contend that the knowledge of Mr Devlin (or his state of mind) is not relevant to the charge. The respondents assert that there is no basis upon which the charge against Mr Devlin can be advanced without reliance upon an allegation that he was aware, or at least ought to been aware that the work done by Ms Laylee was "a mistake" for which the firm should not render a bill, at the time it was rendered.

[94] The issue was raised by the respondents at the outset of the hearing and Mr Mac Giolla Ri, appearing on behalf of the Commissioner, said that Mr Devlin's awareness was not an element of the charge.

[95] Mr Mac Giolla Ri said the following:

> "In relation to Mr Devlin, as I understand the point, the complaint is that I would have opened that there … must have been an awareness on Mr Devlin's part, but awareness or knowledge or fraudulent behaviour or anything of that kind has not been alleged against him in the complaint and that is so. The allegation is as it is in the complaint and in the particulars."[67]

[96] On behalf of Mr Devlin, Mr Pincus suggests that the charge, and also the particulars of charge, are "completely devoid of any allegation that he had, or ought to have had, such knowledge".

[97] Mr Pincus asserts that, essentially, the complaint amounts to a pleading of strict liability.

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65 *Legal Services Commissioner v Madden* (No 2) [2008] QCA 301 at [76].
66 Ibid at [77].
67 Transcript of proceedings held on 5 March 2015, page 1-19 lines 22 to 28.

[98] He submits that, without knowledge, or something less than knowledge but sufficient to sheet responsibility home to him, Mr Devlin sending the invoice in question could never comprise unprofessional conduct.

[99] The contention was:

a) The charge cannot succeed in the absence of evidence of knowledge by Mr Devlin; and

b) The question of knowledge is irrelevant to the charge as it was made against Mr Devlin and the Tribunal would exceed its jurisdiction if it embarked upon a hearing which focused upon Mr Devlin's state of mind when engaging in the conduct which is alleged in the application.

[100] The charge, with the accompanying particulars (1.1 to 1.22), does not make any reference to knowledge.

[101] When dealing with the case against Mr Devlin, Mr Mac Giolla Ri submitted that, what must be shown "was that the work was a mistake and the costs incurred to Ms Misso were unnecessary and unjustifiable".[68]

[102] As to knowledge, Mr Mac Giolla Ri opened, "it may be that the evidence was that he was completely unaware that the bill went out in those terms, or that there was a mistake and if that's the case, well then, even if the Tribunal finds that there was a mistake on Ms Laylee's part, the case hasn't been proved against him. However… the corollary of that is if the evidence shows that he intentionally sent the bill knowing that he was exploiting a poor woman or something of that kind, it doesn't make out the charge anymore… the charge remains as alleged in the particulars, but the evidence is simply different."[69]

Lee v Crime & Misconduct Commission - the Applicant's opening

[103] In relation to the admissibility of evidence concerning knowledge, the Commissioner refers to the case of *Lee v Crime and Corruption Commission.*[70]

[104] The Commissioner submits that, in Lee's case, it was held that evidence of more serious conduct than alleged in a particular charge was not irrelevant as long as it is also relevant to the charge being tried. That being the case, there was no basis for any objection to the reception of evidence that Mr Devlin was on notice that Ms Laylee's work on the caveat was "a mistake" particularly when such reliance was made clear in the opening by Mr Mac Giolla Ri at the oral hearing.

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68 Ibid, page 1-11 lines 2 to 4.
69 Transcript of proceedings held on 5 March 2015, page 1-19 lines 30 to 37.
70 [2014] QCATA 326 ('Lee').

[105] The issue with this submission lies in the nature of the charge. The charge (and associated particulars) do not contain any allegations concerning the question of knowledge.

[106] In the context of what is submitted by the Commissioner, even by reference to Lee's case, it does not meet the test of being relevant to the charge being tried. As was said by Honourable JB Thomas AM QC, in Lee's case "it would be wrong to admit evidence the principle purpose of which is to establish conduct that lies beyond the ambit of the charge".[71]

[107] It is not clear that the reliance asserted was made clear in the Opening statements at hearing. In any event, the allegations which Mr Devlin was required to meet are those outlined in the Discipline Application. The opening cannot add additional assertions to those contained in the Discipline Application.

[108] The Tribunal concludes that the question of knowledge of the practitioner was not alleged as an aspect or element of the charge laid against him, that charge being limited to charging legal costs in circumstances where he was not entitled to do so.

Nature of the Assertions

[109] The Commissioner asserts that the charge against Mr Devlin is on the basis that he was a partner in the law practice and in that capacity was responsible to the client for Ms Laylee's error. His work in rectifying Ms Laylee's error goes, according to the applicant, to the circumstances in which the practice charged for the legal services and the charge against Mr Devlin does not depend upon his state of mind but rather depends upon his entitlement to charge for the particularised legal services.[72]

[110] The Commissioner asserts that it was not a case of Mr Devlin knowing he was not entitled to charge but, in all the circumstances, the client should not have been charged and Mr Devlin as supervising partner was responsible for the fact that she was charged.[73]

[111] The Commissioner submits that the circumstances are capable of founding a charge of unsatisfactory professional conduct based upon the breach of the duty to the client though whether it amounts to unprofessional conduct, is a matter for the Tribunal.

[112] Whether conduct is unsatisfactory professional conduct depends upon the particular facts of each case.

[113] In the case of an allegation relating to the rendering of an account in circumstances where there is no entitlement to do so, a factor which will generally be regarded as significant is the knowledge which the practitioner has of the circumstances, which mean that there is no

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71 *Lee v Crime and Corruption Commission & Anor* [2014] QCATA 326, paragraph 110.

72 Submissions on behalf of the applicant in reply, filed 9 June 2015, paragraph 27.

73 Ibid, paragraph 29.

entitlement. It may also be relevant whether the practitioner should have been aware of the lack of entitlement or was reckless in the way in which the account was rendered. If the practitioner had no knowledge of these circumstances at the time the account is rendered, then another factor that might become relevant is the action taken by the practitioner after becoming aware of the lack of entitlement.

[114] None of these issues are raised in the discipline application and so are not an aspect or element of the charge made against Mr Devlin.

The question of knowledge and surrounding circumstances

[115] Without derogating from the finding just made about the scope of the charge, the Tribunal will, however, for the sake of completeness consider the circumstances surrounding the charging of legal costs by Mr Devlin.

[116] The respondents put forward an alternative position on the basis that the question of knowledge is relevant to the charge. These circumstances may also be relevant to whether Mr Devlin should have been aware of the lack of entitlement.

[117] Mr Devlin did not give evidence. The Commissioner submits that, on the basis of the principle in *Jones v Dunkel,*[74] the Tribunal should infer that the evidence could have been unfavourable to him.

[118] The respondents reject the reliance of the Commissioner on the principle in *Jones v Dunkel* to the effect that the Tribunal could infer that any evidence Mr Devlin gave regarding his assessment of Mr Laylee's work would not have assisted his case.

[119] In that respect, the respondents make the following points:

a) The Commissioner's case did not allege knowledge and so the question was not in issue – as a result there was no reason for Mr Devlin to consider giving evidence on the point.[75]

b) Mr Devlin made clear his understanding that it was not alleged, and it was told on the record during the opening, that the Commissioner did not consider it an element of the offence charged.

c) Mr Devlin's understanding of the lack of an allegation of knowledge against him is in the words of Kitto J in *Jones v Dunkel* a "sufficient explanation" for his not giving evidence on the issue.

d) The operation of *Jones v Dunkel* is confined to permitting an inference, which is already open on the facts proved, to be drawn.

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74 (1959) 101 CLR 298 *('Jones v Dunkel')*.

75 Submissions on behalf of the respondent, filed 29 May 2015, paragraph 36.

Jones v Dunkel cannot be used to fill gaps in the evidence or to convert conjecture or suspicion into interference.[76]

[120] The Tribunal is of the view that there is a sufficient explanation in Mr Devlin not giving evidence, so the principle in *Jones v Dunkel* does not apply to lead to any inference that any evidence of Mr Devlin would not have been favourably to his case.

[121] In asserting that Mr Devlin was, or ought to have been, aware that the costs were incurred, as a result of Ms Laylee's mistake or negligence, the Commissioner refers to:

a) Mr Devlin being a partner in her office which was a relatively small office in which they spoke constantly.

b) Mr Devlin took over Ms Laylee's files when on holidays.

c) The fact that the caveat had been requisitioned was clear evidence of a mistake of some kind – or at least that there was a real chance that an error had been made.

d) From Mr Devlin's requests of Ms Misso and Mr Blue QC he initially inferred that Ms Laylee was not at fault but subsequent information would necessarily have altered this understanding.

e) In an email on 18 March to Ms Misso, Mr Devlin asserted that Ms Laylee had previously asked Ms Misso for a written agreement. He had not been told that this had happened.

f) The exchange of emails on 18 March ultimately resulted in Mr Devlin learning from Mr Blue QC that the loan agreement was in fact oral.

g) There was no evidence in the correspondence on 18 March that Mr Devlin asserted Ms Misso's instructions as being that there was an agreement in writing or, that Mr Devlin believed this to be the case.

h) Whilst Ms Laylee's memo to Mr Devlin of 17 March suggests that there was supporting documentation, critically there was no express suggestion that a written agreement creating an interest in land existed.

i) Ms Laylee swore that Ms Misso never told her expressly that there was a written agreement and so it was unlikely that Ms Misso would have told Mr Devlin that Ms Misso ever gave those instructions.

j) By 18 March, Mr Devlin was firmly on notice that Mr Blue QC had said there was no written agreement and there was no suggestion from Mr Blue QC to Mr Devlin that Ms Misso ever asserted there was a written agreement and also Ms Misso expressly rejected and

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76 *Jones v Dunkel* (1959) 101 CLR 298 per Menzies J at paragraph 312.

queried the basis of his assertion that Ms Laylee had previously asked for documents.

[122] The Commissioner asserts that, after Ms Laylee returned to work following her holidays, the Tribunal could infer that she had provided Mr Devlin with all the information now available to the Tribunal. The assertion is made that there is no evidence that, upon receipt of this information, Mr Devlin made any attempt to recall the invoice or offer a refund to Ms Misso.

[123] As to this issue, the Tribunal concludes:

a) What happened after the rendering of the invoice is not relevant to the charge which has brought against Mr Devlin. The Commissioner has made no charges with respect to subsequent conduct.

b) Whilst Ms Laylee was cross examined extensively, there was no cross examination regarding this issue raised by the Commissioner. It is surprising that the Commissioner would suggest that such an inference be drawn in the absence of any cross examination about the issue, which would have rendered the need to draw the inference unnecessary.

[124] In the circumstances, there is no evidence to support the assertion made by the Commissioner and the inference will not be made.

[125] The Commissioner submits it must have been obvious to Mr Devlin that a substantial mistake was made by Ms Laylee in assuming that there was some sort of written agreement.

[126] The respondents assert that it was not clear the work done by Ms Laylee (for which $515.90 was charged) should properly be seen as work for which the firm was not entitled to charge. It is asserted that there is insufficient basis to conclude that, had Ms Laylee sought to check the erroneous assumption, she would have been told it was incorrect. As it was clear that no caveatable interest existed, Ms Laylee's work might simply be seen as the first step in attempting to identify a caveatable interest and so may have been properly billable as being that work.

[127] The Commissioner does not respond, in its submissions, to these assertions by the respondents.

[128] The Tribunal does not believe that this submission has merit. It would have been possible to identify a caveatable interest without drafting and lodging a caveat. This could have been done at the first meeting.

[129] The respondents submit the evidence shows clearly that Mr Devlin did not have full information as at the date, 31 March 2010, of the Bill being prepared.

[130] Whilst he knew there was no written agreement, it is submitted there was no basis in the evidence to find that Mr Devlin knew, at any time before

the Bill was sent, that the lack of a written agreement meant Ms Laylee had made a mistake as opposed, for example, to being told incorrectly that there was such an agreement and proceeded on that basis.

[131] The respondents assert that Ms Laylee's briefing memo of 17 March, as she left for vacation, was consistent with the belief that there was a written agreement. She was on holidays when the bill was prepared. Mr Devlin's initial communications with Ms Misso and Mr Blue QC were, as is conceded by the Commissioner, consistent with a belief that Ms Laylee was not at fault.

[132] In communications referred to by the Commissioner, the respondents submit that there was nothing which would have necessarily altered, or even likely altered, Mr Devlin's understanding that Ms Laylee was not at fault.

[133] Instead, the respondents submit that neither Ms Misso nor Mr Blue QC ever said that Ms Laylee had misunderstood her instructions and in fact no complaint was made about Ms Laylee's work until August 2010.

[134] Following the respondents' submissions, the Commissioner filed submissions in reply.

[135] As to the respondents' submissions concerning the fact that Ms Misso did not ever say there was no written agreement (even after being directly questioned by Mr Devlin) the Commissioner refers to email exchanges on 18 March 2010, which the Commissioner suggests require close examination.

[136] The relevant aspects of the emails are extracted in the Commissioner's further submissions.[77]

[137] The relevant extracts are as follows:

> Time: 13:11 Sender: Devlin
>
> Extract: as you can see, detail form the actual loan agreement document is required. We can do nothing to answer the requisition without receiving copies of that original document…
>
> I understand that Angela has asked for a copy of the documents previously but that they have not been provided. For the caveat to have any effect we must now have that material.
>
> Time: 12:39pm Sender: Misso
>
> … Angela did not ask for any document. I received your cost doc…
>
> Time: 14:06 Sender: Devlin

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77 Submissions on behalf of the applicant in reply, filed 9 June 2015, paragraph 33.

> … there will be monthly bills which will need to be paid but we require the $2,500 to be deposited now. Do you have the documents?
>
> Time: 2:37pm Sender: Misso
>
> "John I learned from your email that you need some documents. I was not aware of it before. How soon do you want it. I have read the cost and I need to talk to her regarding the payment as we discussed earlier."
>
> Time: 16:06 Sender: Devlin
>
> (regarding billing only)
>
> Time: 3:56pm Sender: Misso
>
> John… (billing matters)… when will Angela come and please let me know when she has asked for papers I don't even know who you are.
>
> Time: 16:19 Sender: Devlin
>
> … in relation to the documents I am referring to a loan agreement. I have since been in contact with Malcolm Blue and have been advised that there is no such agreement. Rather, the agreement was oral. I will speak to Malcolm tomorrow...

[138] As to the email communications, the Commissioner submits:

a) The exchange was over 3 hours and 8 minutes finishing on the basis that Ms Misso was no longer required to provide any documents.

b) The "actual loan agreement document" could refer to any of the loan agreements between Ms Misso and her various banks.

c) Ms Misso was dealing with a number of issues in the emails.

d) In suggesting that Ms Laylee had previously asked Ms Misso for documents Mr Devlin took "certain license with the facts" as the document provided by Ms Laylee had said that the law practice was yet to receive documents, not that they had been requested.

e) In various communications, Ms Misso challenges Mr Devlin's assertion that she had been asked to provide documentation and actually asks Mr Devlin to produce any correspondence that might support his suggestion that Ms Laylee had previously requested documents.

f) Whilst Ms Misso offered to send documents, by 16:06 Mr Devlin had said that Mr Blue QC indicated there was no document of the kind being chased by Mr Devlin.

[139] The Commissioner asserts that the exchange provides no basis upon which Mr Devlin could reasonably have inferred that Ms Misso had told Ms Laylee that there was a relevant written agreement.[78]

[140] Finally, the Commissioner submits the only realistic inference that Mr Devlin could have drawn was that Ms Laylee had made a substantial error in attempting to register a caveat without establishing a legal basis for so doing, and in those circumstances could not reasonably have believed that Ms Misso had positively asserted the existence of a relevant written agreement.[79]

[141] The Tribunal does not believe the "only realistic inference" that Mr Devlin could have drawn was that Ms Laylee had made a "substantial error".

[142] The series of emails exchanged, and to which reference has been made by the Commissioner, do not reveal this. Mr Devlin advised that detail of the actual loan agreement would be required and said that nothing could be done to answer the requisition without receiving copies of the original document. This is straight-forward and expressed in a way that any lay client could understand. Rather than clarifying the position, and saying that there was no such agreement, Ms Misso's response was to say that no document had been asked for. This was most unhelpful. A response such as this is more consistent with such a document being in existence but the client refusing to cooperate. This approach continued throughout the email exchange.

[143] In addition, in one of the emails Ms Misso says, "how soon do you want it". Again this is only consistent with the existence of the document.

[144] Rather than leading to a conclusion it was unlikely Mr Devlin could have reasonably believed that Ms Misso had positively asserted the existence of a document, it would most likely have had the contrary effect namely Mr Devlin could reasonably have believed that Ms Misso had said there was a written agreement and, at the least, would have left Mr Devlin in a state of doubt. That is a reasonable view of the words "how soon do you want it".

[145] As to the question of the relevant knowledge of Mr Devlin, the Tribunal concludes as follows:

a) At the time of receiving the memo from Ms Laylee, it was reasonable for Mr Devlin to have assumed that Ms Laylee had been instructed that there was a written agreement which was with Mr Blue QC.

b) By 18 March, Mr Devlin was aware that there was no written agreement. He had been told this by Mr Blue QC.

c) The fact that there had been no written agreement would not, of itself, have been sufficient to alert Mr Devlin that an error had been

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78 Submissions on behalf of the applicant in reply, filed 5 June 2015, paragraph 35.

79 Ibid, paragraph 36.

made by Ms Laylee. For example, that information would not necessarily have caused him to come to the view that Ms Laylee had made an error as opposed to the instructions having been in error.

d) Mr Devlin's confusion about the issue would have been increased by the very unsatisfactory communications Mr Devlin had with Ms Misso who was unnecessarily defensive in response to very plain and simple questions which he posed to her. When he asked that written documents be provided and told Ms Misso of the importance of these documents, she refused to answer saying instead that she had never been asked about them. In the context of the relevant email exchanges, she asked how soon do you want it? Ms Misso could not explain why she had not simply responded saying that there was no written agreement. Her evidence about this was unsatisfactory.

e) In all of the communications about this time, there was never any complaint raised by either Mr Blue QC or Ms Misso and Mr Devlin's role was to work with Mr Blue QC to endeavour to prepare a form of caveat which would be acceptable. In fact no complaint was made by Ms Misso until August 2010, some months later.

[146] In all the circumstances, at the time Mr Devlin rendered the account, it is not reasonable to infer that Mr Devlin knew, or should reasonably have suspected, that Ms Laylee had made a mistake which would mean that the work which she undertook should not be billed.

[147] The conduct of Mr Devlin was not conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner and so does not amount to unsatisfactory professional conduct.

Subsequent actions

[148] There has been some discussion between the parties about the actions taken by Mr Devlin and his firm, subsequent to the bill being rendered.

[149] Reference has been made to the fact that some monies were written off by Mr Devlin and also that there was an offer that the costs be assessed on a basis excluding all costs referable to the preparation and lodgement of the caveat. Ms Misso denied having ever been made aware of the offer[80] although it was referred to in the affidavit by Mr Edwards. It would be expected that the Commissioner would have made the complainant aware of such an offer.

[150] Of course, when a solicitor becomes aware of an error in relation to billing, the appropriate action for the solicitor to take is to correct the error so that the client is not overcharged.

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80 Transcript of proceedings held on 5 March 2015, page 1-48 lines 15 to 25.

[151] Whilst not essential for this decision, the Tribunal observes that a failure to do so would potentially amount to unsatisfactory professional misconduct or, in the extreme case, professional misconduct.

[152] The appropriate course to follow is in fact recognised by the Commissioner in the November 2013 regulatory guide to billing practises:[81]

> "We take a remedial and preventative approach whenever we reasonably can in preference to a punitive or "gotcha" approach. Everyone makes mistakes, and most complaints about lawyers bills and billing practices, like most other complaints, involve honest and minor mistakes, errors of judgment, oversights "stuff ups" and the like. They call out when they are substantiated not for a disciplinary response but rather for the lawyers subject to complaint to make good their mistake, not least by giving the complainants and others who have been adversely affected fair and reasonable redress, including as appropriate financial redress, or otherwise fixing whatever it was that went wrong."

[153] This is undoubtedly the correct approach. Mr Develin says that he dealt with the issue in the appropriate way.

[154] Of course, the charge against Mr Devlin relates to the billing of Ms Misso and not to any subsequent actions such as the timing of any refund or writing off of costs.

[155] Therefore, the focus, and jurisdiction, of the Tribunal is limited to the actions of Mr Devlin at the time the bill was rendered and sent on 31 March 2010 with the subsequent conduct being irrelevant. The Tribunal makes not findings about this later period.

[156] As at 31 March 2010, the Tribunal finds that it is not possible to infer that Mr Devlin knew, or reasonably could have suspected, that Mr Laylee had made a mistake which meant that her work should not be billed.

Orders

[157] The tribunal has concluded that the conduct of Ms Laylee and Mr Devlin did not amount to unsatisfactory professional conduct.

[158] The charges are dismissed.

Costs

[159] It remains for the Tribunal to make an order about costs. For that purpose, the parties will be allowed to exchange submissions concerning the order as to costs sought by each side.

[160] In the time allowed for the exchange of submissions, the parties can, of course, discuss an agreed order.

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[81] Legal Services Commission Regulatory Guide 8, "Billing practises – some key principles"; version 2, 21 November 2013 page 17.

[161] As to the exchange of submissions, it is ordered that:

a) The Legal Services Commissioner is to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs the Commissioner wishes to make, by:

4:00pm on 17 August 2016.

b) The respondents are to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs they wish to make, by:

4:00pm on 7 September 2016.

c) The Legal Services Commissioner is to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in reply, by:

4:00pm on 28 September 2016.