# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

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| CITATION: | *Legal Services Commissioner v Williamson (No 2)* [2020] QCAT 133 |
| PARTIES: | **LEGAL SERVICES COMMISSIONER** (applicant)<br><br>**v**<br><br>**JENNIFER LESLIE WILLIAMSON** (respondent) |
| APPLICATION NO/S: | OCR071-15 |
| MATTER TYPE: | Occupational regulation matters |
| DELIVERED ON: | 14 May 2020 |
| HEARING DATE: | 19 November 2019 |
| HEARD AT: | Brisbane |
| DECISION OF: | Justice Daubney, President |
| ORDERS: | **1. The respondent's application for costs is refused.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the applicant brought three charges against the respondent in a discipline application – where there was some delay in investigating and bringing that discipline application – where all charges were dismissed by the Tribunal – where the respondent seeks the making of a costs order against the applicant pursuant to s 462(4) of the *Legal Profession Act* 2007 (Qld) – whether "special circumstances" exist so as to enliven the Tribunal's discretion to make such an order under that subsection – whether the Tribunal ought to exercise the enlivened discretion<br><br>*Legal Profession Act* 2007 (Qld) s 435, s 462<br><br>*Baker v Legal Services Commissioner (No 2)* [2006] 2 Qd R 249<br>*Legal Services Commissioner v Atkins* [2009] LPT 10<br>*Legal Services Commissioner v Bone* [2014] QCA 179<br>*Legal Services Commissioner v Bradshaw* [2009] QCA 126<br>*Legal Services Commissioner v McQuaid* (2019) 1 QR 499<br>*Legal Services Commissioner v Scott (No 2)* [2009] LPT 9<br>*Legal Services Commissioner v Sing (No 2)* [2007] LPT 5 |

APPEARANCES & REPRESENTATION:

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| Applicant: | G Rice QC, instructed by the Legal Services Commission |
| Respondent: | G Page QC, instructed by Williamson & Associates |

**REASONS FOR DECISION**

[1] In the primary hearing, the applicant prosecuted three charges against the respondent in a discipline application brought under the *Legal Profession Act* 2007 (Qld) ("*LPA*"). After a contested hearing, the three charges were dismissed. The background to each of the charges is set out at length in the Tribunal's primary reasons,[1] and need not be repeated at length here.

[2] It is sufficient to note that Charge 1 turned on an allegation that the respondent had falsely witnessed the complainant's signature on a transfer document in circumstances where the document had not been signed in her presence. The determination of that charge involved an assessment of evidence led by both the applicant and the respondent, a consideration of expert evidence, the assessment of the credibility and reliability of a number of witnesses (including the complainant, Ms Dickinson), and an assessment of whether the applicant had proved its case to the requisite standard. In short, there was a fully contested hearing in relation to Charge 1, with the Tribunal concluding that the applicant had not made out the case on Charge 1 to the requisite standard.

[3] Charge 3, which averred that the respondent acted without instructions, could not be maintained if Charge 1 failed, and consequently it was dismissed.

[4] The central factual allegation under Charge 2 was that the respondent allowed signatures on the impugned document to be incorrectly dated. As explained in the primary reasons,[2] even on the respondent's version it was clear that she had "allowed" the incorrect dating of the subject signatures. The Tribunal found, however, that this was an isolated instance which did not warrant a finding of unsatisfactory professional conduct. In that regard, the Tribunal said:[3]

> Every case depends upon its own facts and is determined on its own merits. In the very particular and isolated circumstances of this case, the Tribunal is not satisfied that the respondent's conduct amounted to unsatisfactory professional conduct. It may have been somewhat sloppy practice. It may have been somewhat misguided. But it does not bespeak repeated erroneous conduct or such a significant departure from accepted standards of competence as would warrant a finding of unsatisfactory professional conduct.

[5] It was on that basis that Charge 2 was dismissed.

[6] The respondent now asks the Tribunal to exercise its discretion under s 462(4) of the *LPA* to make a costs order against the applicant.

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1 *Legal Services Commissioner v Williamson* [2019] QCAT 82 ("*Williamson*").
2 *Williamson*, [127]–[128].
3 *Williamson*, [147].

[7] Section 462 of the *LPA* provides:

> **462 Costs**
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> (1) A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.
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> (2) A disciplinary body may make an order requiring a person whom it has found not to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, if the disciplinary body is satisfied that—
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> (a) the sole or principal reason why the proceeding was started in the disciplinary body was the person's failure to cooperate with the commissioner or a relevant regulatory authority; or
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> (b) there is some other reason warranting the making of an order in the particular circumstances.
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> (3) Without limiting subsection (2), a disciplinary body that makes an order under section 460 may make a further order requiring an Australian legal practitioner, in relation to whom the order under section 460 relates, to pay costs in relation to the order.
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> (4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that—
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> (a) the Australian legal practitioner or law practice employee has not engaged in prescribed conduct; and
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> (b) the body considers that special circumstances warrant the making of the order.
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> (5) An order for costs—
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> (a) may be for a stated amount; or
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> (b) may be for an unstated amount but must state the basis on which the amount must be decided.
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> (6) An order for costs may state the terms on which costs must be paid.
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> (7) The only other circumstances in which the tribunal exercising its jurisdiction in relation to a disciplinary application may award costs are the circumstances stated in the QCAT Act, section 103 or 104.
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> *Note—*
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> See the QCAT Act, sections 106 to 109 for provisions about the tribunal awarding costs.
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> (8) In this section—
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> ***engaged in prescribed conduct*** means engaged in unsatisfactory professional conduct or professional misconduct, or engaged in misconduct in relation to a relevant practice, as mentioned in section 456(1) or 458(1).

[8] On the face of s 462(4), there are two prerequisites to the discretion under that subsection being enlivened, namely that the Tribunal be satisfied that:

(a) the respondent did not engage in prescribed conduct; and

(b) special circumstances warrant the making of the order.

[9] Given the dismissal of each of the charges, albeit in the circumstances described above, the Tribunal is satisfied that the respondent did not engage in prescribed conduct.

[10] The real questions for the Tribunal on the present application are:

(a) whether the respondent has demonstrated that special circumstances warrant the making of a costs order; and

(b) if so, whether the Tribunal ought exercise the enlivened discretion to make a costs order against the applicant.

[11] In relation to the first of those questions, it is clear that it is for the respondent, as the moving party, to satisfy the Tribunal as to the existence of special circumstances.

[12] As to the second question, it should be noted that the demonstration of special circumstances does not automatically yield a costs order for the respondent. The expression "may" in the opening words of s 462(4) confers a discretion. That can be contrasted with the opening words of s 462(1), which mandate an order for costs in the circumstances covered by that subsection.

[13] In *Legal Services Commissioner v Bone*,[4] Morrison JA, with whom Fraser and Gotterson JJA agreed, canvassed the authorities in which the "question of what might constitute 'special circumstances' within the meaning of s 462(4) … has received some attention".[5] His Honour referred to the decision of the Legal Practice Tribunal in *Legal Services Commissioner v Atkins*[6] and the judgment of McPherson JA, with whom Jerrard JA and Douglas J agreed, in *Baker v Legal Services Commissioner (No 2)*,[7] as well as the decisions of the Legal Practice Tribunal in *Legal Services Commissioner v Sing (No 2)*[8] and *Legal Services Commissioner v Scott (No 2)*.[9]

[14] Morrison JA observed that the question whether "special circumstances" exist for the purposes of s 462(4) is quite separate from a consideration of the basis of assessment for costs which are awarded (i.e. whether on the indemnity or standard basis). His Honour said that it "should not be assumed that if 'special circumstances' exist so as to enliven the power to order costs, that that automatically means on an indemnity basis".[10]

[15] Importantly for present purposes, Morrison JA said:[11]

> In my view *Atkins* and *Baker* establish the following propositions:

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4 [2014] QCA 179 ("*Bone*").
5 *Bone*, [55].
6 [2009] LPT 10.
7 [2006] 2 Qd R 249 ("*Baker (No 2)*").
8 [2007] LPT 5.
9 [2009] LPT 9.
10 *Bone*, [65].
11 *Bone*, [66].

(a) The mere fact that a charge fails, or a particular factual allegation is not sustained, cannot establish 'special circumstances', because of the general rule that a practitioner found not guilty is not entitled to costs;

(b) If a charge has no substantial prospect of success, and that ought reasonably to have been known by the LSC, that may amount to special circumstances;

(c) If the LSC knew or ought to have realised, if properly advised, that a particular allegation of fact had no real prospect of being established, that may amount to special circumstances; and

(d) Where charges have a sufficiently substantial prospect of success to justify their prosecution, that will not amount to special circumstances.

[16] It is also clear, both from *Legal Services Commissioner v Bone* and the more recent authority of *Legal Services Commissioner v McQuaid*,[12] that the word "costs" in s 462(4) is not constrained so as to refer only to all the costs of the particular proceeding, but may comprehend only part of the overall costs. This is to be contrasted with the use of the word "costs" in s 462(1) which has been held not to convey a general discretion as to costs but rather means "all of the costs of the proceeding".[13]

[17] In her written submissions on costs, the respondent contended that in this case there were special circumstances that warranted the making of a costs order. It was argued:[14]

> The LSC failed to comply with its special duty to act as a model litigant, where doing so would have resulted in the proceedings being discontinued once the unreliability of the evidence against the respondent became known. The special circumstances arise where the Commissioner, appropriately advised knew or ought to have known that the prosecution of the respondent was foredoomed. The Commissioner had the basis for this knowledge as a result of evidence within its possession, and a submission written to the LSC based on that evidence discovered by the respondent on the LSC's file.

[18] In advancing this argument, the respondent made a number of assertions:

(a) That there were several occasions when the applicant "should reasonably have reassessed its case against the respondent and discontinued";[15] in that regard the respondent relied on:

(i) a 2011 report from the Queensland Law Society ("QLS") to the applicant recommending that no charges be laid;

(ii) 2011 submissions to the applicant from the respondent "contradicting the allegations of the complainant";

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12 (2019) 1 QR 499.

13 See, eg, *Baker (No 2)*, [56] (McPherson JA), considering the cognate predecessor to s 462(1); and *Legal Services Commissioner v Bradshaw* [2009] QCA 126, [63] (McMurdo P).

14 Respondent's further amended submissions on costs, para 5 ("Respondent's Submissions").

15 Respondent's Submissions, para 8(a).

(iii) the fact that the applicant had in its possession from August 2011 a medical report by Dr David Whiting dated 13 October 2005 which cast "serious doubt on the reliability of [the complainant's] memory";[16]

(iv) the provision of further medical reports in 2016 (which had been obtained by the respondent on third party disclosure from the complainant's insurer) which addressed the complainant's cognitive functioning "and its impact to her credibility";[17]

(v) the applicant's failure to disclose a tenancy agreement, which the complainant had provided to the applicant in 2011, as containing an exemplar of the signature of her former husband and which also bore the complainant's signature (although it was in issue at the hearing as to whether the document had been provided to the applicant for the purpose of providing an exemplar of the complainant's signature);

(vi) the fact that the applicant was in possession of statutory declarations (attaching signed documents) by persons who said they had actually witnessed the complainant's signature (these were people who subsequently gave evidence at the hearing before this Tribunal.)

[19] The respondent was also critical of the applicant for what she said was a decision to provide only specimens to the handwriting expert, Mr Heath, which supported the prosecution case when the applicant was aware that other signatures "eroded" the prosecution. The respondent reaffirmed this submission by asserting:[18]

> The actions of the LSC robbed the respondent of a genuine opportunity to cast doubt at an early stage on the centrepiece of the LSC's expert evidence. The LSC consistently relied on this opinion as justification for the prosecution to proceed despite other evidence, in circumstances where it knew or ought to have known that the opinion would be materially changed and ultimately be inconsistent with the prosecution of the respondent.

[20] In relation to the further medical reports obtained on third party disclosure, the respondent asserted:[19]

> In our submission once the additional medical reports were obtained from Suncorp it should have been obvious to the LSC that the significant degree of cognitive and functional defects of [the complainant] materially affected her credibility and, along with the signatures attached to the statutory declarations of Coles and Mamara, that the prosecution would fail. They never disclosed the Whiting report upon which the Tribunal, along with the other medical reports, placed reliance in rejecting the evidence of [the complainant].

[21] Separately, and additionally, in her written submissions the respondent argued that:

(a) the applicant had failed to observe its own guidelines by not proceeding in this matter in the public interest when it was "simply one word against another";[20]

(b) the applicant was guilty of protracted and unnecessary delay in commencing and then prosecuting the proceeding;

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16 Respondent's Submissions, para 8(a)(iii).
17 Respondent's Submissions, para 8(a)(iii).
18 Respondent's Submissions, para 10 (omitting footnotes).
19 Respondent's Submissions, para 18 (omitting footnote).
20 Respondent's Submissions, para 19.

(c) the applicant was derelict in refusing or failing to send the additional signatures for examination by the handwriting expert which had been requested on behalf of the respondent, particularly in circumstances where the applicant's officers should have been alive to the importance of the different signatures. This was then highlighted by the outcome of the cross-examination of Mr Heath at the hearing.

[22] The central plank of the respondent's argument that there were "special circumstances" in this case was not merely that the respondent was successful in defeating the charges, but that the applicant, as a model litigant, knew or ought to have known that the case against the respondent was untenable. Mr Page QC, who appeared for the respondent at the hearing, confirmed as much when he argued that the submission of special circumstances was "based upon the fact that this matter should have been well concluded prior to a hearing of this matter".[21] Consistent with the written submissions, he initially argued that "there were several instances at which point [the applicant] should reasonably have assessed its case against the respondent and discontinued".[22] In his argument-in-chief, Mr Page QC summarised the respondent's contentions as follows:[23]

> That, your Honour, then, is really the crux of what this application is about. The word "special" does not denote a particular form of conduct or action. The whole of the matter has to be taken into account to consider whether the word "special" should apply, such as the time in which this person was involved in these proceedings, the efforts that had to be made to obtain material, the lack of response, the lack of disclosure, the necessity of third party discovery, the involvement in a hearing. It all has to be considered when there is cogent evidence that that need not have taken – that the trial need not have taken place.
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> And it's not a question of compensation for hurt feelings or for – or in any way for recompense because she was successful in the findings that were made, saying that that has to be taken into account. It is simply that the circumstances created by the LSC in this case warrant an order that they pay the costs, and they pay the costs – if there has to be a distinction of the costs as against some figure and indemnity costs, that is all the costs incurred. My submission would be that these are people that are set out to be model litigants. They breached that title or expectation in many ways and left this person having to pay a much larger sum of money than she would have otherwise had to pay. That really is the basis upon which we bring this application.

[23] All of these submissions, and the accompanying criticism of the applicant, proceeded on an assumption that the applicant's case against the respondent was, and always was, not able to be supported on the evidence and was, in a word, hopeless.

[24] That, however, is a false assumption.

[25] Even a cursory review of this Tribunal's reasons in the primary decision reveals the extent of analysis of evidence relating to Charge 1 which was required before the Tribunal concluded that the applicant had not proved the charge to the requisite

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21 Transcript 1-12.
22 Transcript 1-11.
23 Transcript 1-12 – 1-13

standard. It is also abundantly clear that the applicant held evidence which supported Charge 1, particularly the expert evidence of Mr Heath and the evidence of the complainant.

[26] True it is that the applicant was in possession of medical evidence which could have been (and was) relied on to cast doubt on the complainant's reliability and credibility. But the applicant's case was not founded solely on the evidence of the complainant. Importantly, it had the evidence of Mr Heath, who had expressed the firm opinion that the signatures he had been given for examination fell into two groups: the genuine and the simulated. His characterisation of the signatures lent weight to the complainant's version.

[27] As is also clear from the primary reasons, the finding that the probative value of Mr Heath's evidence had been "significantly eroded" by concessions he made in cross-examination turned on the Tribunal's acceptance of evidence given by Mr Mamara, Ms Coles and the respondent herself.[24] That in turn required a consideration of the evidence given by each of those people, and assessments as to their credibility and reliability.

[28] In short, the determination of Charge 1 (and consequently Charge 3) turned on, and had to turn on, the Tribunal's consideration and assessment of the competing evidence led by the applicant and the respondent.

[29] The fact that the applicant's case on Charge 1 was susceptible to challenge, as it was, does not mean that it was hopeless. So much was effectively conceded in reply by Mr Page QC, who acknowledged that, by the time of the hearing, the state of the competing evidence was such that the respondent could not have made, and did not make, a "no case" submission.

[30] The situation with respect to Charge 2 was even more clear cut. As noted above, there was, in truth, no factual dispute that the respondent had "allowed" the relevant document to bear a false date. The issue for the Tribunal was whether a characterisation of "unsatisfactory professional conduct" should attach to that conduct. The Tribunal's conclusion was that in "the very particular and isolated circumstances of this case", the respondent's conduct did not amount to unsatisfactory professional conduct. On the effectively undisputed facts, the assessment of the characterisation of the respondent's conduct in the circumstances of the case was one which necessarily had to be referred to the Tribunal for determination.

[31] This was not, therefore, a case in which it could be said that there was no substantial prospect of success. Nor could it have been said that particular allegations of fact had no real prospect of being established. It was certainly a case in which the parties' positions were diametrically opposed. But that does not mean it was a case which ought not have been pursued by the applicant to have the Tribunal perform its necessary function of evaluating the competing versions of events and rendering a decision. The applicant had evidence to support the charges. It took the advice of counsel as early as 2011, whose advice was that there were reasonable prospects of the Tribunal being satisfied to the requisite standard that the alleged misconduct had occurred. That advice included consideration of the complainant's evidence, which

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24 *Williamson*, [111]–[114].

counsel noted was independently corroborated (at least potentially) by, *inter alia*, the handwriting expert.

[32] Further, in his reply submissions at the costs hearing, counsel for the respondent significantly modified the respondent's argument. He conceded[25] that there "was probably no time at which [the applicant] could sit back and say 'we cannot proceed because of the evidence that is there', but had there been an efficient approach to the matter – and there was not – then there might well have been that form of approach taken by the applicant" which would have reduced the burden on the respondent. Counsel agreed that there had been a basis for the applicant to proceed with the hearing[26] and that it was "a hearing that had to be had".[27]

[33] Counsel for the respondent highlighted the respondent's argument about the delay in investigating and prosecuting the matter, and the difficulties in getting material before the handwriting expert. Yet counsel for the respondent agreed that, even on his argument, if disclosure and the referral of documents to the handwriting expert had happened in a more expeditious timeframe, and the respondent had then prevailed at the primary hearing, there would have been no costs argument because he would have been unable to point to "special circumstances".[28] He ultimately agreed that the best that could really be sought by the respondent was an order for extra costs which may have been incurred by the respondent because of what were contended to be unreasonable delays in the applicant's pursuit of the matter.[29]

[34] Even on this iteration of the respondent's argument, the necessary starting point is for the respondent to persuade the Tribunal that the applicant caused pre-proceeding delay which was so extraordinary as to qualify as "special circumstances" for the purposes of the ensuing discipline application (assuming, without deciding, that such a delay may give rise to a finding of "special circumstances" for the purposes of s 462(4)).

[35] The initiating complaint was received by the applicant on 11 January 2010. The applicant sought, and obtained, further information from the complainant's agent in mid-February 2010. Then on 22 February 2010, the applicant referred the matter to the QLS for investigation.[30] The QLS returned the file, together with its investigation report, on 22 November 2010. The QLS Professional Conduct Committee ("QLS Committee") recommended that the complaint be dismissed. At that stage, the QLS Committee only had the benefit of Mr Heath's first report, which was admittedly inconclusive in relation to the impugned signature. It might be parenthetically noted, however, that even within the QLS investigation unit there were opposing views as to whether there was sufficient evidence in the material to sustain the complaint, and those diametrically opposed viewpoints fundamentally reflected the contrasting cases which were ultimately presented to the Tribunal for resolution.

[36] On 30 November 2010, the applicant gave the respondent a copy of the QLS investigation report together with a request for further information. It followed up

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25 Transcript 1-25.
26 Transcript 1-26.
27 Transcript 1-27.
28 Transcript 1-27.
29 Transcript 1-28.
30 See *LPA* s 435.

on that request and also, on 7 February 2011, wrote to the respondent putting the "post-dating issue" to her.

[37] At the end of March 2011, the applicant received a lengthy and detailed submission prepared by a barrister on behalf of the respondent. This submission argued that there was no reasonable likelihood of a disciplinary body finding the applicant had falsely witnessed the subject document and also addressed the concern that the later dating of the document (i.e. the conduct which became the subject of Charge 2) constituted either professional misconduct or unsatisfactory professional conduct.

[38] The applicant then, on 4 May 2011, briefed counsel to advise. Further information was requested by counsel and supplied by the applicant. The material with which counsel was briefed included the QLS documentation (including the dissenting reports of the QLS investigators), and the respondent's barrister's submission (and ancillary documentation). Counsel's advice was not received by the applicant until October 2011. The advice was that disciplinary charges should proceed against the applicant, and draft charges were provided to the applicant by counsel.

[39] The applicant published those draft charges to the respondent on 10 November 2011.

[40] It seems that the parties (or at least their legal representatives) conferred on 25 November 2011, because on 30 November 2011 the respondent's then solicitors wrote to the applicant referring to that conference and asking to be provided with an updated statement from the complainant (the complainant had changed her version concerning the dates of her presence in Brisbane.)

[41] The next correspondence between the parties was on 16 April 2012, when the applicant sent the respondent's then solicitor an email concerning the provision of the complainant's further statement and the fact that the original of the impugned transfer document had been located and would be sent to Mr Heath. There then followed a series of emails between the legal representatives expressing opposing views about the further documents to be provided to Mr Heath. On 2 May 2012, the respondent's solicitors formally wrote to the applicant stating their position as to the documents which should be provided to Mr Heath.

[42] Over the subsequent months of 2012, there was a series of emails and correspondence between the legal representatives concerning the documents to be provided to Mr Heath. On 24 September 2012, the respondent's solicitors wrote complaining that they still had not been provided with the complainant's further statement. The counterpoint, expressed by the applicant in correspondence, was that the applicant was waiting to be advised as to what documents the respondent wanted submitted to Mr Heath for examination. It is clear from emails sent in November 2012 that the situation remained unresolved.

[43] On 4 January 2013, the respondent's solicitors wrote to the applicant. Amongst other things, they identified a number of contracts (the originals of which were held by another law firm) as documents which needed to be supplied to Mr Heath for examination. By that time, the applicant had provided a draft of the complainant's further statement, and the respondent's solicitors also identified further issues which they said needed to be addressed by the complainant.

[44] From February 2013, there was a series of correspondence between the parties dealing with the obtaining of the documents from the other firm, who should pay that firm for retrieving the documents, the settling of the final brief of documents to be examined by Mr Heath, and the logistics of that examination. That correspondence went backwards and forwards until November 2013. Mr Heath finally, it seems, examined the original impugned transfer in late November 2013, and his addendum report is dated 17 December 2013. It was sent to the respondent's solicitors under cover of an email dated 13 January 2014.

[45] There was then, in March and April 2014, some further correspondence between the parties in which the applicant confirmed it had no objection to Mr Heath examining documents requested by the respondent. It does not appear, however, that the respondent advanced this any further.

[46] The applicant's Principal Legal Officer, Mr Edwards, then drafted an Investigation Report for the applicant. A draft of that report was sent to the respondent's solicitors on about 4 August 2014, with a request that any submissions be provided by the respondent by 26 August 2014. The respondent herself provided submissions in a letter dated 1 September 2014.

[47] The Investigation Report was then finalised by Mr Edwards on 3 September 2014.

[48] It seems that the process within the applicant's office at the time was for such an investigation report to be referred to the applicant's prosecution team for another review of the material and an appraisal as to whether the investigator's recommendation should be acted on. On the evidence before this Tribunal, the file was sent to the prosecution team in September 2014, and the applicant then made the decision to prosecute on 22 April 2015. There is no explanation whatsoever in the material for that delay of some seven months.

[49] This discipline application was then filed on 24 April 2015.

[50] It can be seen from the foregoing that, whilst there was undoubtedly some delay in progressing the matter on the part of the applicant (including the unexplained delay between September 2014 and April 2015), there were also significant periods of time during which neither party advanced the matter with any degree of alacrity. In particular, it simply cannot be said that any delay in the referral of documents to Mr Heath was caused solely by the applicant. The parties engaged in protracted correspondence over that issue, and related topics. There was also a not insignificant period during which arrangements had to be settled for the retrieval of documents from the other law firm.

[51] The matter certainly proceeded at a pedestrian pace. But it does not seem to this Tribunal that such delays as were occasioned solely by the conduct of the applicant were so egregious or exceptional as to warrant characterisation as "special circumstances".

[52] Even if the Tribunal is wrong about that, and it be considered that such delay solely caused by the applicant constitutes a "special circumstance" for s 462(4), it does not automatically follow that there will be an order for costs in the respondent's favour. It is still for the respondent to persuade the Tribunal to exercise the discretion which has been enlivened.

[53] On the respondent's initial argument, it is not at all clear why the discretion ought be exercised in her favour as a consequence of the delay. As already noted, the parties were from the outset advancing diametrically opposed positions, the determination of which called for an independent adjudication by the Tribunal. The respondent, by her advisers, advanced strongly worded submissions in an attempt to persuade the applicant to change its position. The applicant had regard to, and took advice on, those submissions, and was not persuaded to alter its own position. That does not mean that the applicant acted wrongly or inappropriately. It means it thought it had a sufficient case to put to the Tribunal. At the hearing of this costs argument, counsel for the respondent effectively accepted that to be the case.

[54] Nor is it apparent why the discretion would be exercised in favour of the respondent on the position ultimately adopted by her counsel at the hearing, i.e. that she should have an order for the extra costs occasioned by reason of the applicant's delay. There is simply no material before this Tribunal from which it can be found or inferred that the respondent did, in fact, incur any such extra costs. The only relevant evidence from the respondent in this regard was an affidavit by her filed in support of this costs application. In that affidavit, she described at some length the emotional hardship she had suffered through the course of the investigation and the discipline application. She also referred at some length to the financial hardship she had suffered by reason of the diminution in her confidence and capacity to practice. She described a significant loss of income over the years, which she attributed to the effects of having been subject to this investigation and disciplinary proceeding.

[55] So far as costs are concerned, however, the respondent's affidavit is limited. She annexes to the affidavit a schedule which she said outlined the "actual outlays expended and unpaid legal fees invoices". She said it also included a "modest estimate of my time and fees and outlays". The schedule lists legal fees and expenses from April 2010 to the time of the Tribunal's primary decision, and totals $368,694.82. Of that, $220,000 is said to be for the respondent for the "hours taken … to defend complaint".[31] Of the balance of the fees and expenses, only some $30,000 related to the five years before the discipline application was filed. There is, with respect, simply nothing in the respondent's affidavit, or otherwise in the material, from which it can be discerned as to what part, if any, of those costs were unnecessarily occasioned by the applicant's delay.

[56] In short, even if this were a case of "special circumstance", there is neither a persuasive reason to exercise the costs discretion in the respondent's favour nor any proper evidentiary basis for the exercise of that discretion.

[57] Reverting, then, to the relevant propositions summarised in *Bone*, for the reasons set out at length above the Tribunal finds:

(a) this was not a case in which the charges brought by the applicant had no substantial prospect of success, and that ought reasonably to have been known by the applicant; and

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[31] It is unnecessary for present purposes to consider whether any part of this might have been recoverable in light of the decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007, in which the plurality held that the so-called "*Chorley* exception" should not be recognised as part of the common law of Australia.

(b) this was not a case in which a particular allegation of fact had no real prospect of being established.

[58] As it emerged at the costs hearing, the respondent's real complaint concerned the extra costs she said she had incurred as a consequence of what she contended to be delay by the applicant in pursuing the matter. For the reasons set out above, the Tribunal does not accept that to be the case. Moreover, insofar as the respondent seeks to suggest that a more expeditious pursuit of the matter might have resulted in the applicant making an earlier determination not to pursue the proceeding, the Tribunal simply cannot accept that as a realistic assessment of the situation. As noted above, the versions were, from the outset, diametrically opposed. The respondent, by her advisers, made submissions to the applicant in the strongest and most persuasive possible terms. The applicant, however, had sufficient evidence to warrant pursuit of its position.

[59] This therefore comes down to being a case in which, the parties having adopted diametrically opposed positions, the Tribunal was called on to perform its adjudicative function. The charges were dismissed but, as settled by *Bone*, that fact in and of itself does not constitute "special circumstances" because of the general rule that a practitioner found not guilty is not entitled to costs.

[60] Accordingly, the respondent's application for costs is refused.