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Supreme Court of New South Wales - Court of Appeal

Leon Nikolaidis v Legal Services Commissioner [2007] NSWCA 130 (8 June 2007)

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NEW SOUTH WALES COURT OF APPEAL

CITATION: Leon Nikolaidis v Legal Services Commissioner [2007] NSWCA 130

This decision has been amended. Please see the end of the judgment for a list of the amendments.

FILE NUMBER(S):

40766/05

HEARING DATE(S): 12 September 2006

JUDGMENT DATE: 8 June 2007

PARTIES:

Leon Nikolaidis (Appellant)

Legal Services Commissioner (Respondent)

JUDGMENT OF: Beazley JA Hodgson JA McColl JA

LOWER COURT JURISDICTION: Administrative Decisions Tribunal Legal Services Division

LOWER COURT FILE NUMBER(S): 032022

LOWER COURT JUDICIAL OFFICER: J Brennan, C Gailey, C Bishop, A O'Neill

LOWER COURT DATE OF DECISION: 1 November 2004; 25 August 2005

LOWER COURT MEDIUM NEUTRAL CITATION:

The Legal Services Commissioner v Nikolaidis (No 2) [2004] NSWADT 248; Legal Services Commissioner v Nikolaidis (No 3) [2005] NSWADT 200

COUNSEL:

GC Lindsay SC; J Chippindall (Appellant)

M Hadley (Respondent)

SOLICITORS:

MD Nikolaidis & Co (Appellant)

Legal Services Commissioner (Respondent)

CATCHWORDS:

EVIDENCE – expert witness report – rejection of evidence – independent assessment of fair and reasonable costs pursuant to Legal Profession Act 1987 (NSW) – instructions by practitioner to expert regarding assumptions to be made in determining costs – whether Administrative Decisions Tribunal erred in rejecting expert witness report

LEGAL PRACTITIONERS – Legal Profession Act 1987 (NSW) – certificate by Costs Review Panel as to fair and reasonable costs pursuant to Part 11 – determination of professional misconduct pursuant to Part 10 of the Act – s 208KF costs certificate not binding in disciplinary proceedings – costs certificate issued under Part 11 not determinative of what was fair and reasonable for purposes of professional misconduct

LEGAL PRACTITIONERS – Legal Profession Act 1987 (NSW) – professional misconduct pursuant to Part 10 of the Act – whether costs 'grossly excessive' is to be determined by evidence and the Administrative Decisions Tribunal may invoke its own professional experience

LEGAL PRACTITIONERS – Legal Profession Act 1987 (NSW) s 208Q – professional misconduct – deliberate charging of grossly excessive amounts of costs – requirement that practitioner personally implicated in either knowingly overcharging or was reckless as to whether or not excessive costs had been charged – whether Administrative Decisions Tribunal erred in finding practitioner guilty of professional misconduct

LEGISLATION CITED:

Evidence Act 1995 (NSW) ss 60, 69, 76, 79, Pt 2 cl 1

Legal Practitioners Act 1898 (NSW) ss 41, 42, 43

Legal Profession Act 1987 (NSW) ss 59D, 61, 62, 63, 123, 127, 155, 167, 168, 169, 174, 175, 177, 179, 199, 201, 206, 207, 208J(1), 208JAA, 208K, 208KA, 208KB, 208KC, 208KF, 208KG, 208J, 208KI, 208L, 208M, 208Q, 209C

Legal Profession Act 2004 (NSW) ss 393, 498

Legal Profession Amendment (Costs Assessment) Regulation 1999 (NSW) reg 26IJ

Legal Profession Reform Act 1993 (NSW)

CASES CITED:

ACCC v Advanced Medical Institute [2005] FCA 1357

Allinson v General Council of Medical Education and Registration [1894] 1 QB 750

Barwick v Law Society of New South Wales [2000] HCA 2; (2000) 74 ALJR 419

Cave v Robinson Jarvis & Rolf (a firm) [2002] UKHL 18; [2003] 1 AC 384

Coleman v Power [2004] HCA 39; (2004) 220 CLR 1

Commissioner for Railways (NSW) v Agalianos [1955] HCA 27; (1955) 92 CLR 390

Commonwealth of Australia v Cornwell [2007] HCA 16; (2007) 61 ACSR 118

Coshott v Council of the Law Society of New South Wales (Court of Appeal, 17 December 1997, unreported, BC9707048)

D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198

Forder v Great Western Railway Company [1905] 2 KB 532

Harrison v Tew [1989] 1 QB 307

In Re City Equitable Fire Insurance Co Ltd [1925] Ch 407

Keane v Caravan City Cowra Pty Ltd [2006] NSWSC 942

Keefe v Law Society of New South Wales (1998) 44 NSWLR 451

Kelly v The Queen [2004] HCA 12; (2004) 218 CLR 216

Legal Services Commissioner v Nikolaidis (No 3) [2005] NSWADT 200

Murray v Legal Services Commissioner [1999] NSWCA 70; (1999) 46 NSWLR 224

Myers v Elman [1940] AC 282

Myers v Rothfield [1939] 1 KB 109

New South Wales Bar Association v Amor-Smith [2003] NSWADT 239

New South Wales Bar Association v Evatt [1968] HCA 20; (1968) 117 CLR 177

Paric v John Holland Constructions Pty Ltd (1985) 59 ALJR 884

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28

Re a Solicitor [1960] VicRp 96; [1960] VR 617

Re Hodgekiss [1959] 62 SR (NSW) 340

Re Mayes and the Legal Practitioners Act [1974] 1 NSWLR 19

Re Melvey; Ex parte Law Society of New South Wales (1966) 85 WN (Pt 1) (NSW) 289

Re Miles; Ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW) 163

Re Munro; Ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW) 154

Re Veron; ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW) 136

Ritz Hotel Ltd v Charles of the Ritz Ltd & Anor (1988) 15 NSWLR 158

Solution 6 Holdings Ltd v Industrial Relations Commission of NSW [2004] NSWCA 200; (2004) 60 NSWLR 558

The Legal Services Commissioner v Nikolaidis (No.2) [2004] NSWADT 248

Veghelyi v The Law Society of New South Wales (unreported, NSWCA, 6 October 1995

Walsh v Law Society of New South Wales (1999) 198 CLR 73; [1999] HCA 33

Waterwell Shipping Inc v HIH Casualty and GIO Ltd (unreported, NSWSC, Giles CJ Comm D, 8 Sept 1997)

DECISION:

(1) Appeal allowed.

(2) Set aside the finding of the Tribunal made on 1 November 2004 that the second complaint was established and that the conduct complained of amounts to professional misconduct.

(3) Set aside the orders made by the Administrative Decisions Tribunal on 25 August 2005 in respect of the second complaint.

(4) Dismiss Ground 2 of the Information.

(5) Respondent to pay the costs of the appeal.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40766/05

BEAZLEY JA

HODGSON JA

McCOLL JA

8 June 2007

LEON NIKOLAIDIS v LEGAL SERVICES COMMISSIONER

Headnote

Facts

On 25 August 2005, the Administrative Decisions Tribunal of New South Wales, Legal Services Division, (the Tribunal) found the appellant guilty of professional misconduct on the ground that his conduct involved deliberate charging of grossly excessive costs. The particulars of the complaint filed against the appellant related to an itemised bill of costs submitted to a client, a Mr Antoni, for a total sum of $28,365.60.

Mr Antoni applied to have the bill of costs assessed pursuant to the provisions of Pt 11 Div 6 of the *Legal Profession Act 1987* (NSW) (the *Legal Profession Act*). On 25 May 2001, a costs assessor assessed the fair and reasonable costs in the sum of $3,305.70. The appellant applied for a review of this assessment and the determination was set aside and a new determination of $5,820.60 was made as the fair and reasonable costs and disbursements to be paid to the appellant. A costs certificate to that effect was issued by the Costs Review Panel.

During the course of the assessment process, the costs assessor requested the appellant to provide him with various documents and further particulars. The appellant failed to provide the material requested. The costs assessor referred the matter to the Legal Services Commissioner, pursuant to s 208Q(2A) of the *Legal Profession Act*, for the appellant’s failure to comply with the notices the costs assessor had issued under s 207 of the Act.

On 26 September 2003, the Legal Services Commissioner referred the matter to the Tribunal pursuant to s 155(2) of the *Legal Profession Act* on the basis that he was satisfied that there was a reasonable likelihood that the Legal Services

Division of the Tribunal would find the appellant guilty of unsatisfactory professional conduct or professional misconduct in respect of the appellant's failure to comply with the s 207 notices (the "first complaint") and on the basis that the appellant's conduct involved the deliberate charging of grossly excessive amounts of costs (the "second complaint"). The particulars given of the second complaint were based on the disparity between the costs as charged and the costs as assessed.

On 28 July 2004, in the course of hearing the complaint, the Tribunal rejected a report of Mr Kerry Hardman, which the appellant had sought to tender as an expert witness report. The solicitor gave evidence that the work represented in the bill had been done by his former partner and a solicitor supervised by that partner, that the bill was prepared by a competent and experienced solicitor and that he did not see it before it was sent to the client.

The Tribunal concluded the bill constituted gross overcharging. It said the appellant ought to have been on notice that the bill called for his own personal involvement or at least his supervision, but that he had elected to rely on an employee and, having failed to check it when it was sent out, had failed to review it afterwards. It concluded the appellant had "deliberately" charged those costs because he had at all relevant times adopted the bill in the same way as if he were the author.

The Tribunal concluded the appellant was guilty of professional misconduct applying common law principles. It did not refer to s 208Q(2) of the *Legal Profession Act* which declared that the deliberate charging of grossly excessive amounts of costs was professional misconduct, nor to s 127(1)(c) which provided that "professional misconduct included conduct that is declared to be professional misconduct by any provision of this Act ...".

At a later hearing to deal with penalty, the appellant sought to have the finding of professional misconduct set aside on the basis that on the basis that he had been charged with "overcharging", but had been found guilty substantially with a failure to supervise his office. The Tribunal rejected that application and observed that the appellant's misconduct included his failure to supervise his office with the recklessness evident in his acceptance that the bill was contentious before it was issued.

The appellant appealed against the Tribunal's rejection of Mr Hardman's report and its finding that he was guilty of professional misconduct.

The professional misconduct finding

Held, per McColl JA (Hodgson JA agreeing), allowing the appeal:

(1) The Commissioner had not established the appellant was guilty of deliberately charging excessive amounts of costs.

(2) In order for a legal practitioner to be guilty of professional misconduct for deliberately charging excessive amounts of costs, whether at common law or pursuant to s 208Q(2) it is necessary to prove the practitioner was personally implicated in either knowingly overcharging or was reckless as to whether or not excessive costs had been charged

Myers v Elman [1940] AC 282; *Re Hodgekiss* [1959] 62 SR (NSW) 340 applied *Re Veron; ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136 applied;

Re Munro; Ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW) 154, *Re Miles; Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 163; *Re Melvey Ex parte Law Society of New South Wales* (1966) 85 WN (Pt 1) (NSW) 289, *Re Mayes and the Legal Practitioners Act* [1974] 1 NSWLR 19. *New South Wales Bar Association v Evatt* [1968] HCA 20; (1968) 117 CLR 177; *D'Allessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 considered.

(3) There was no evidence that the appellant knew the amounts in the bill were excessive; the Commissioner had not

charged the appellant with recklessness or lack of supervision.

(4) The Tribunal's finding that the appellant had deliberately charged excessive amounts of costs because he had failed to exercise adequate supervision over the staff who prepared the bill and acted recklessly as to whether the bill charged excessive amounts of costs exceeded its jurisdiction, as the appellant had not been charged with either recklessness or lack of supervision.

Walsh v Law Society of New South Wales [1999] HCA 33; (1999) 198 CLR 73 applied.

Held per Beazley JA:

(5) Section 208Q(2) of the *Legal Profession Act* contains two elements. The first is the charging of grossly excessive amounts of costs and the second requires that such charging be deliberate: [46]

(6) Having regard to the approach which the Tribunal took of applying the professional experience of its members to the issue of whether there was a gross overcharge, the Tribunal did not fall into the error of determining that the effect of the Costs Review Panel's determination conclusively established the guilt of professional misconduct: [54]

Veghelyi v The Law Society of New South Wales (Court of Appeal, 6 October 1995, unreported, BC9505459); *Re Veron; ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136 considered

(7) The phrase "*the deliberate charging of grossly excessive amounts of costs"* within s 208Q(2) of the *Legal Profession Act* means the solicitor must have intended to charge the client the costs set out in the bill. The adjectival function of the word 'deliberate' relates to the charging of costs. The fact that the costs are grossly excessive is descriptive of the costs actually charged: [80]

(8) The fees charged by the appellant were five times greater than those that the Tribunal determined were fair and reasonable. A disparity of that order is grossly excessive. As the appellant charged those fees and did so deliberately, it follows that the Tribunal's finding of professional misconduct was correct: [89]

The evidence issue

Held per Beazley JA (Hodgson and McColl JJA agreeing):

(9) The letter of instruction given by the appellant to Mr Hardman for the purposes of preparing an expert witness report deprived Mr Hardman of the ability to independently make an appropriate assessment of what costs were fair and just. The Tribunal's finding that Mr Hardman's report was of no value as an expert report was open to it, and indeed, was probably the only conclusion available: [28], [32]

(10) (Obiter) Section 208KI is contained within Pt 11 of the *Legal Profession Act*, which deals specifically with legal fees and other costs. The effect of the Costs Review Panel determination being binding is of particular significance having regard to the procedures for the enforcement of a bill assessed under Pt 11: [35]

(11) (Obiter) However, the position was different under Pt 10 of the *Legal Profession Act* – which related to professional conduct. There is nothing in the provisions of s 208KI which required it to be construed as being binding upon the Tribunal. The Tribunal must determine the question whether the costs charged were grossly excessive having regard to any evidence before it as to a fair and reasonable charge for the legal services and the Tribunal's own professional experience: [36], [41], [43]

Veghelyi v The Law Society of New South Wales (Court of Appeal, 6 October 1995, unreported, BC9505459); *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198; *Harrison v Tew* [1989] 1 QB 307 referred to

(12) (Obiter) Section 208KI of the *Legal Profession Act* is not determinative of what was a fair and reasonable amount for the legal services provided by the appellant and the Tribunal erred in rejecting the tender of the report of Mr Hardman on

that basis: [44]

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40766/05

BEAZLEY JA

HODGSON JA

McCOLL JA

8 June 2007

LEON NIKOLAIDIS v LEGAL SERVICES COMMISSIONER

Judgment

1 **BEAZLEY JA**: On 25 August 2005, the Administrative Decisions Tribunal of New South Wales, Legal Services Division (the Tribunal), found the appellant guilty of professional misconduct on the ground that his conduct involved deliberate charging of grossly excessive costs. The particulars of the complaint filed against the appellant related to an itemised bill of costs submitted to a client, a Mr Antoni, on 9 June 2000, in a total sum of $28,365.60 in respect of legal services provided to Mr Antoni relating to the recovery of party/party costs to which the client was entitled in proceedings that he had brought against Telecom Australia. Mr Antoni's previous solicitors, Messrs G H Healey & Co, had represented him in those proceedings. The appellant was also retained by Mr Antoni in relation to a practitioner/client bill rendered by Messrs G H Healey & Co, who had deducted their costs from the funds received from Telecom Australia on Mr Antoni's behalf.

2 Mr Antoni applied to have the bill of costs assessed pursuant to the provisions of Pt 11 Div 6 of the *Legal Profession Act 1987* (NSW) (the *Legal Profession Act*). On 25 May 2001, the costs assessor assessed the fair and reasonable costs for providing the legal services in the sum of $1,905.70. The fair and reasonable disbursements were assessed in the sum of $1,400, making a total assessment in the sum of $3,305.70.

3 The appellant applied for a review of the costs assessor's assessment. On 24 January 2002, the determination of the costs assessor was set aside by a Costs Review Panel and a new determination of $5,820.60 was made as the fair and reasonable costs and disbursements to be paid to the appellant. A costs certificate to that effect was issued by the Costs Review Panel.

4 On 20 May 2002, the appellant wrote to Kalmath & McGhee, solicitors for Mr Antoni, seeking payment of the costs in the amount assessed by the Costs Review Panel, less an amount of $1,000 held to the credit of Mr Antoni's account. The solicitors responded that they no longer acted for Mr Antoni.

5 On 3 February 2003, the appellant wrote to Mr Antoni advising that the costs certificate had been filed in the District Court. As explained below, the effect of filing the certificate was that the certificate became a judgment of the Court.

6 From time to time during the course of the assessment process, the costs assessor requested the appellant to provide him with various documents and further particulars. The appellant failed to provide the material requested. On 6 February 2001, the costs assessor referred the matter to the Legal Services Commissioner, pursuant to s 208Q(2A) of the *Legal Profession Act*, for the appellant's failure to comply with the notices the costs assessor had issued under s 207 of the Act.

7 On 26 September 2003, the Legal Services Commissioner referred the matter to the Tribunal pursuant to s 155(2) of the *Legal Profession Act* on the basis that he was satisfied that there was a reasonable likelihood that the Legal Services

Division of the Tribunal would find the appellant guilty of unsatisfactory professional conduct or professional misconduct in respect of the appellant's failure to comply with the s 207 notices (complaint 1) and on the basis that the appellant's conduct involved the deliberate charging of grossly excessive amounts of costs (complaint 2).

8 The complaints were heard by the Tribunal on 12, 13 and 28 July 2004 and the decision was delivered on 1 November 2004. On 28 July 2004, the Tribunal, in a separate judgment, had rejected a report of Mr Kerry Hardman, which the appellant had sought to tender as an expert witness report.

The appeal

9 The appellant appeals against the finding of professional misconduct in respect of the deliberate charging of grossly excessive amounts of costs and in respect of the rejection of the tender of Mr Hardman's report.

10 The principal challenge to the Tribunal's reasoning in respect of the professional misconduct charge is that the Tribunal erred in treating a costs assessment made under Pt 11 of the *Legal Profession Act* as being conclusive of misconduct in disciplinary proceedings. It was submitted that to treat the costs assessment as conclusively determining misconduct involved a fundamental error of construction of s 208KI(2) of the *Legal Profession Act*. The principal challenge in relation to the evidence determination was that the Tribunal erred in determining that a party against whom a charge of misconduct had been made, based upon an overcharging evidenced in a bill of costs, could not call evidence to challenge the costs assessment determination.

Statutory scheme

11 The appellant's conduct in relation to the costs rendered to the client was governed by the provisions of the *Legal Profession Act*. Part 11 of the Act made provision for a client's rights in respect of the costs charged by a solicitor. Under Div 1, a solicitor was required to give a client information, relevantly, as to how the solicitor would charge for costs for legal services and an estimate of the likely cost of those services: s 174(1)(a).

12 Division 2 of Pt 11 of the Act made provision for the disclosure of specific matters relating to costs, including the basis of the costs of the legal services to be provided: s 175(1); and an estimate of the likely amount of costs: s 177(1). The disclosure was required to be in writing: s 179(1). Division 3 provided that a solicitor could enter into an agreement with a client as to the costs of the provision of legal services.

13 Division 6 provided for the assessment of costs. Under s 199, a client given a bill of costs was entitled to apply for an assessment of costs: s 199(1). A solicitor who had given a bill of costs was also entitled to apply for assessment: s 201(1). An application for the assessment of costs was referred to a costs assessor: s 206. Pursuant to s 207, a costs assessor was entitled to require the production of documents. The section provided, relevantly:

> "(1) A costs assessor may, by notice in writing, require a person ... to produce any relevant documents of or held by the person in respect of the matter."

14 The costs assessor was also entitled to require further particulars to be furnished by, relevantly, the solicitor or the client: s 207(2).

15 Division 6 Subdivision 4 made provision for the enforcement of a costs assessment. On the making of a determination, a costs assessor was required to issue a certificate to each party setting out the determination: s 208J(1). The costs assessor was also required to provide a statement of reasons for the determination which was to accompany the certificate issued under s 208J: s 208JAA.

16 Pursuant to s 208K, a costs assessor's determination was final, subject to a review as provided by the Act. The terms of s 208K were as follows:

> "A costs assessor's determination of an application is binding on all parties to the application and no appeal or other review lies in respect of the determination, except as provided by this Division."

17 Subdivision 4A provided for review by a panel of two costs assessors on the application of any party dissatisfied with the determination of the costs assessor: s208KA; s 208KB. A Costs Review Panel constituted under the Division was empowered to review a determination of the costs assessor and could affirm it or make some other determination in substitution for the costs assessor's determination: s 208KC(1).

18 A Costs Review Panel was required to provide a certificate of its determination: s 208KF. The certificate was to be accompanied by a statement of reasons: s 208KG.

19 Section 208KI provided for an appeal against the determination of a Costs Review Panel in accordance with Subdivision 4B and otherwise provided that the Costs Review Panel's determination was final. As s 208KI is one of the provisions central to the determination of the appeal, I will set it out in full. It provides:

> "(1) Subdivision 4B applies in relation to a decision or determination of a panel under this Subdivision as if references in Subdivision 4B to a costs assessor were references to the panel.
>
> (2) Subject to subsection (1), the panel's determination of an application for review of a costs assessor's determination is binding on all parties to the assessment that is the subject of a review and no appeal or other review lies in respect of the determination."

20 Under Subdivision 4B, a party dissatisfied with a decision of a costs assessor as to a matter of law could appeal to the Supreme Court: s208L(1). Section 208M provided for the making of an application for leave of the court to appeal against the determination of a costs assessor in accordance with the rules of court.

21 Section 208Q provided that a costs assessor must refer a matter to the Legal Services Commissioner if the costs assessor considered that any conduct of a solicitor involved the deliberate overcharging of grossly excessive amounts of costs. Section 208Q(2) provided:

> "For the purposes of this Act, the deliberate charging of grossly excessive amounts of costs ... [is] declared to be professional misconduct."

22 Subsection 2A provided that a costs assessor may refer a failure by a legal practitioner to comply with a notice under s 207 to the Legal Services Commissioner.

23 Part 10 of the *Legal Profession Act* provided for complaints against and discipline of legal practitioners. Section 127 provided that for the purposes of Pt 10, professional misconduct includes conduct that is declared to be professional misconduct by any provision of the Act: s 127(1)(c).

24 Part 10 Div 7 dealt with applications respecting complaints against legal practitioners to the Tribunal. Section 167 provided that proceedings may be instituted in the Tribunal in respect of a complaint and the Tribunal was to conduct a hearing into each allegation. Section 168 provided that the Tribunal was to observe the rules of law governing the admission of evidence.

Reasons of the Tribunal: the evidence issue

25 The Tribunal rejected the report of Mr Hardman on the basis that it was not admissible and did not constitute expert evidence. Its reasoning in respect of its finding was twofold. First, it found that in circumstances where the solicitor had not exercised the appeal rights under Pt 11 of the Act and, in particular, those provided by ss 208L and 208M, the effect of s 208KI was to make the Costs Review Panel's determination binding on the practitioner, such that it was not open to the appellant in proceedings before the Tribunal to seek to obtain a fresh determination of the fair and reasonable costs of the appellant, when those costs had already been determined by the Costs Review Panel: see Tribunal Reasons of 28 July 2004 at [12].

26 The Tribunal then stated at [13]:

> "The Act provides a specific procedure for the determination of fair and reasonable costs and that procedure has been concluded in relation to the matter which is the subject of the second complaint [the professional misconduct complaint]. The evidence of this expert is sought to be admitted, on the issue of the fair and reasonable costs that were properly chargeable by [the appellant]. In the view of the Tribunal, this course is not open to be pursued on behalf of [the appellant]. Section 208KI(2) makes it clear that the Panel's determination is binding on all parties (see *Veghelyi v The Law Society of New South Wales* (Court of Appeal, unreported, 6.10.1995)) and the Tribunal holds that the effect of the provision is that it is binding upon [the appellant] in these proceedings as to the fair and reasonable costs chargeable."

27 The Tribunal found, alternatively, that even if it was wrong in its construction of the operation of s 208KI(2), the report of Mr Hardman was of no value as an expert's report. The Tribunal reached this conclusion having regard to the letter of instructions that the appellant gave to Mr Hardman for the purposes of preparing the report. That letter of instructions directed Mr Hardman to make a number of assumptions for the purposes of preparing a bill of costs (which bill was intended to provide an independent assessment of the fair and reasonable costs of the provision of the legal services to Mr Antoni). It is not necessary for present purposes to set out the totality of the instructions given to Mr Hardman. It is sufficient to refer to the following only as providing appropriate support for the Tribunal's finding. The instructions required Mr Hardman to proceed upon the assumption that all work recorded on the appellant's time costing records "*was undertaken and necessary for the conduct of the matter*"; and where there was work that the file demonstrated was undertaken but was not recorded on the appellant's costing records, Mr Hardman was directed to insert the amount of costs as was considered reasonable based on the evidence available to him from the file. He was further directed that if there was no evidence as to the person who undertook the work, he was to assume that the work was undertaken by the person who had the carriage of the file at the relevant time. The instructions further directed Mr Hardman that where there was no evidence on which to make an assessment on the length of time spent upon a particular aspect of the bill, he was to assume that it was one unit.

28 These assumptions may have been quite wide of the mark, or they may have been accurate enough. But, whatever the position, they deprived Mr Hardman of the ability independently to make an appropriate assessment of what was fair and just. For example, one of the matters for a costs assessor's assessment is a determination of whether work undertaken was in fact necessary for the conduct of the matter. If it was not, then, as a matter of proper costs assessment, it is to be disregarded. Likewise, the making of an assumption as to who undertook the work may deprive the client of the application of a lower charge rate if in fact a person not as qualified as the person with carriage of the matter undertook the work. That particular assumption could, of course, work in the opposite direction, so that if a person more senior than the person who had the carriage of the matter undertook the work, then a higher charge rate may have been appropriate. The point, however, is that the instructions that he assess the costs on the basis of assumptions that may or may not have been correct, meant that the assessment of the costs undertaken by Mr Hardman was of questionable value.

29 The costs assessor also disallowed costs for acting for Mr Antoni after the appellant had been advised that other solicitors were acting. The first notification that Mr Antoni had new solicitors was during December 1998. On 26 May 1999, the new solicitors apparently specifically informed the appellant that he no longer acted for the client. The costs assessor found no evidence following that advice that Mr Antoni authorised the appellant to provide further legal services. Notwithstanding this, the appellant had continued to do so and charged him substantial costs in relation to a number of

matters, including costs for preparing the bill of costs and correspondence in respect of an alleged lien for unpaid costs. In the letter of instructions to Mr Hardman, the appellant directed him to deduct work claimed that was clearly not chargeable to the client, for example, the preparation of the bill of costs. This appears to cover part of the costs disallowed by the costs assessor, but did not direct Mr Hardman to reduce the bill or ignore work done, including correspondence in respect of an alleged lien for unpaid costs.

30 There was a further difficulty with the assumption that all work recorded on the time costing record was undertaken and necessary for the conduct of the matter. Some of the charges that had been disallowed by the Costs Review Panel related to the work undertaken by the appellant in making claims of misconduct against Mr Antoni's previous solicitors, Messrs G H Healey & Co, to the Law Society. The Costs Review Panel formed the view "*that those services provided no benefit whatsoever to/or for [Mr Antoni] and were not within the purview of his instructions to or retainer with [the appellant]*".

31 The Tribunal concluded that the instructions to Mr Hardman were not consistent with his being asked to prepare an expert's report in an impartial manner, had the issue of proper costs chargeable by the appellant remained a live issue for consideration by the Tribunal. (It was not a live issue because the Tribunal had already determined that the Costs Review Panel's costs assessment was conclusive as to the fair and reasonable charges for the work done.) Further, the Tribunal considered that the assumptions that Mr Hardman was instructed to make, that the work recorded on the solicitor's time costing records was both undertaken and necessary, removed a fundamental part of the task given to a costs assessor, namely to make an assessment as to whether work was in fact both undertaken and necessary for the conduct of the matter.

32 In my opinion, the Tribunal's finding that Mr Hardman's report was of no value as an expert report was open to it, and indeed, was probably the only conclusion available. That conclusion would be sufficient to dispose of the ground of appeal relating to the evidence issue. However, as the Tribunal's finding as to the operation of s 208KI involves a matter of some importance, it is appropriate to consider whether the Tribunal's construction of the section was correct.

33 The provisions of s 208KI are set out above. The Tribunal found support for its determination that the Costs Review Panel's assessment was binding upon the appellant, in the sense that it could not be challenged in the proceedings before it, in this Court's decision in *Veghelyi v The Law Society of New South Wales* (unreported, NSWCA, 6 October 1995). In that case, Priestley JA, with whom Kirby P agreed, stated (BC 9505459 at 17):

> "The position [was that] the appellant was entitled to charge what was fair and reasonable but no more. The result reached by the taxing officer must be taken as the equivalent of a ruling binding both the appellant and [the client] that a fair and reasonable charge was $2,548.69. The appellant had no authority to charge more than that and was not entitled to ask for more than that."

34 *Veghelyi's* case was heard by this Court in 1995 in respect of conduct that arose prior to the commencement of the *Legal Profession Act* and was brought under the *Legal Profession Act* 1898 (NSW). That Act had no provision equivalent to s 208KI. Nonetheless, Priestley JA was of the opinion that a costs determination made by a taxing officer was equivalent to a ruling binding both the solicitor and the client as to the fair and reasonable charge.

35 Section 208KI is contained within Pt 11 of the Act, which deals specifically with legal fees and other costs and makes provision that the assessment of a Costs Review Panel is "*binding on all parties to the assessment*", subject only to a review under the Part. The effect of the determination being binding is of particular significance having regard to the procedures for the enforcement of a bill assessed under Pt 11. Pursuant to s 208J(3), upon the filing of the costs assessor's certificate in the office or registry of a court, the certificate was taken to be a judgment of that court for the amount of unpaid costs. This summary procedure for enforcement could not operate if the determination of the costs assessor or the Costs Review Panel, as the case may be, was not of a binding nature. Further, the very purpose of having a procedure for the assessment of costs is to permit the determination, in a way that is binding, of the costs that are payable by the client and recoverable by the solicitor. If the costs are not paid, so that curial proceedings are required, the parties upon whom the assessment is binding, namely, the client and the practitioner, are the parties to those proceedings.

36 The position was different under Pt 10 of the Act. The power of the Tribunal to conduct a hearing into an allegation against a practitioner was enlivened by the making of a complaint by the Law Society Council or the Legal Services Commissioner. Section 155(2) provided that the relevant Council (in this case, the Law Society Council) or the Legal Services Commissioner:

> " ... must institute proceedings in the Tribunal with respect to the complaint against the legal practitioner if satisfied that there is a reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct."

37 Section 169 regulated the persons who may appear at a hearing conducted by the Tribunal. Those persons are the legal practitioner, the appropriate Council, the Legal Services Commissioner, the Attorney-General and, subject to subs (2), to which I shall refer, the complainant, who is likely to be the legal practitioner's client. Section 169(2) provided:

> "Unless a complainant is granted leave to appear at the hearing by the Tribunal, the complainant's entitlement to appear is limited to those aspects of the hearing that relate to a request by the complainant for a compensation order."

38 Pursuant to subs (3), the Tribunal could also grant leave to any other person to appear if satisfied that it is appropriate for that person to do so. Subsection (5) provided that a person who appears at a hearing is taken to be a party to the hearing.

39 In a case where a solicitor is charged with deliberate charging of grossly excessive amounts of costs, a determination by a costs assessor would likely be the primary evidence upon which the complaint was based. But this would not necessarily be so. The complaint might be based upon the costs to which the parties have agreed under a costs agreement: see s 184. There might also be circumstances where a client did not have a bill of costs assessed under Pt 11, but nonetheless made a complaint to a relevant Council or the Legal Services Commissioner, which that entity determined to investigate. It might also be that a relevant Council or the Legal Services Commissioner might, in the course of the investigation of a complaint framed in different terms, reach a conclusion that a practitioner had deliberately charged grossly excessive amounts of costs. In those circumstances, the provisions of s 208KI would have no application because there had been no relevant costs assessment. However, they do indicate the variety of circumstances in which overcharging might arise.

40 Likewise, there might be circumstances in which a solicitor's bill had been the subject of a determination by a costs assessor or a Costs Review Panel and the solicitor did not take any steps to engage the relevant appeal process available in respect of one or both of those procedures: see ss 208KA (Application for review of costs assessor's determination); 208KI (Appeal against the Costs Review Panel's determination); 208L (Appeal against a determination as to a matter of law); and 208M (Leave to appeal to the Supreme Court). The failure of a legal practitioner to access the review or appeal processes available under the *Legal Profession Act* might be due to a variety of circumstances: the costs in both time and money in doing so, illness or extenuating personal circumstances, to name a few. It would be extraordinary if, in those circumstances, a solicitor's professional standing could be seriously and even irrevocably adversely affected by the tendering of a determination of a costs assessor or a Costs Review Panel which may have been challengeable, either in amount or as involving the erroneous application of a principle of law. As there is nothing in s 208KI which makes provision for a determination not to be binding in exceptional circumstances, the section must be taken to be binding regardless of the existence of such exceptional circumstances.

41 As it would be extraordinary to make the binding nature of the certificate under Pt 11 apply in proceedings under Pt 10 in circumstances such as I have referred to, the binding nature of the document for any purpose under Pt 10 must likewise be questionable. In my opinion, there is nothing in the provisions of s 208KI which requires it to be construed as being binding upon the Tribunal. That construction may be tested against the propositions to which I have already referred. The considerations to which I have referred are practical ones which illustrate the essential difference in scope and purpose of Pts 10 and 11. Part 10 relates to professional conduct – specifically, complaints against and discipline of legal practitioners. Part 11 relates to legal fees and other costs. As Ipp J (as his Honour then was) pointed out in *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, the ethical conduct of practitioners and questions of whether costs are fair and reasonable are fundamentally different matters. His Honour said at 209:

> "The fact that the court exercises ultimate control both over costs charged by a legal practitioner to his or her client, and the ethical conduct of the practitioner (which may involve an inquiry into overcharging), does not mean that each function is the same. They are indeed different and separate. The court, when exercising its function of reviewing the taxation of bills of costs, and when determining whether a costs agreement is unreasonable within the s 59(5) of the Act, is not directly concerned with whether the solicitor has acted unethically. The latter issue, however, is the sole question before the court when it reviews disciplinary proceedings involving legal practitioners."

42 The legislation under consideration by his Honour was different from the provisions of the *Legal Profession Act*. In particular, there was no equivalent provision to s 208Q(2). Nonetheless, his Honour's observations as to the fundamentally different concepts involved in a disciplinary matter and a costs assessment remains true. The difference is emphasised in the decision of *Harrison v Tew* [1989] 1 QB 307 (to which Ipp J referred) where the Court of Appeal held that as between solicitor and client, the amount of the solicitor's bill was binding (given the relevant legislative scheme under consideration there) and did not determine the question whether the solicitor was guilty of professional misconduct by reason of excessive overcharging.

43 The legislative scheme under consideration in this case is different. However, the fundamental principle remains. The Tribunal is required to determine, as part of its determination under s 208Q(2), whether the costs charged were grossly excessive. The question for determination is not whether the costs were more than they ought to have been or were excessive. The Tribunal must determine the question whether the costs charged were grossly excessive having regard to any evidence before it as to a fair and reasonable charge for the legal services and the Tribunal's own professional experience.

44 Having regard to the matters to which I have referred, I am of the view that s 208KI is not determinative of what is a fair and reasonable amount for the legal services provided and the Tribunal erred in rejecting the tender of the report of Mr Hardman on that basis.

The overcharging issue

45 The second issue on the appeal is whether the Tribunal erred in its finding that the appellant engaged in deliberate charging of grossly excessive amounts of costs. As explained at [21] and [23], such conduct, by operation of ss 127(1)(c) and 208Q(2), constitutes professional misconduct.

46 Section 208Q(2) contains two elements. The first is the charging of grossly excessive amounts of costs and the second requires that such charging be deliberate.

47 The central challenge to the Tribunal's finding against the solicitor under this ground was that the Tribunal held that the difference between the disputed costs in the amount of $28,365.60, claimed by the appellant in the bill of costs rendered to Mr Antoni, and the amount of $5,820.60, certified as fair and reasonable costs for the work undertaken, conclusively established that he was guilty of professional misconduct in "*the deliberate charging of grossly excessive amounts of costs*".

48 The appellant contended that the Tribunal's finding of professional misconduct was fundamentally based upon its construction of s 208KI. I have already found that s 208KI is not conclusive in the way determined by the Tribunal. However, in dealing with the question whether the amount of costs charged was grossly excessive, the Tribunal's approach is to be found in paras [69] to [74] of its reasons. The Tribunal first referred to the provisions of s 208K, that a costs assessor's determination "*is binding on all parties to the application*", which has been discussed above. The Tribunal then said at [70]:

> "It is ... appropriate to put the question of gross overcharging into perspective by quoting from the decision of Priestley JA in *Veghelyi.*"

49 In *Veghelyi*, Priestley JA said that the effect of the taxing officer's determination in that case must be taken as the equivalent of a binding ruling on both the practitioner and the client as to the fair and reasonable charge in the matter. His Honour then said (BC 9505459 at 17):

> "The appellant had no authority to charge more than [what was fair and reasonable] and was not entitled to ask for more than that. It seems to me that the charge of $1,595.48 more than he was entitled to, when the amount he was entitled to charge was $2,548.69 is fairly described as a gross overcharge."

50 In *Veghelyi* it had been expressly argued that it was not sufficient for the Tribunal simply to compare the amount claimed in the bill of costs and the taxing officer's assessment. Priestley JA agreed with that contention, but added:

> "The extra element required is the evaluative judgment of the Tribunal or Court, based on practical legal experience, which will be taken into account in deciding whether the difference amounts to gross overcharging".

51 A similar approach had been taken in *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136, where Heron CJ, Sugarman and McLelland JJA said in the joint judgment:

> "The Court does not sit as taxing officers dealing with individual items of costs ... We are guided by experience and a broad sense of what is reasonable and fair and not by any narrow approach to questions of mere overcharging."

52 In that case, their Honours referred to the *Guide to Professional Conduct and Etiquette of Solicitors*, by Sir Thomas Lund, where it was said in relation to a case where a solicitor had agreed with a client as to the fee to be charged which was substantially larger than the fee that would be allowed on taxation:

> "It is a question of degree and dependent upon the facts of the individual case. As in all questions of degree, cases may occur in which it is difficult to decide on which side of the borderline they fall. The Court in these present proceedings is in no difficulty in deciding on which side of the line the solicitor's conduct falls."

53 The Tribunal, having referred to the authorities, then concluded at [74]:

> "This Tribunal is a specialist Tribunal and it is appropriate that it apply the professional experience of its members to the issue of considering whether the charges made by the Practitioner constitute gross overcharge in the same way as the Full Court in *Veron* brought its experience to bear on an issue of overcharging in that matter. While the Tribunal accepts the question of degree, the applicability of the facts of the case as referred to by Sir Thomas Lund ... this Tribunal has no difficulty in acknowledging that the proper costs of the Practitioner in this matter were $5,820.60 as determined by the Review Panel and that this determination was binding upon the Practitioner and that the costs charged by him to the client of $28,265.60 constituted gross overcharge."

54 In my opinion, having regard to the approach which the Tribunal took of applying the professional experience of its members to the issue of whether there was a gross overcharge, the Tribunal did not fall into error as contended by the appellant, that is, the error of determining that the effect of the Costs Review Panel's determination conclusively established the guilt of professional misconduct. As I have already indicated, the Tribunal in the passage at [66] determined that it was appropriate to deal with the complaint as constituting two critical aspects. The first was whether the charges were grossly excessive and the second was whether the conduct of the solicitor constituted deliberate charging of those costs. The second of those questions would not have involved separate consideration if the Tribunal had taken the approach for which the appellant contends.

55 However, that does not necessarily conclude the matter. The question remains as to whether there was evidence before the Tribunal upon which it was able to make a finding that there was gross overcharging. This question was not specifically raised by the parties but it does raise for consideration how the Tribunal may determine whether there has been gross overcharging.

56 Overcharging involves a comparison of two figures: the amount in fact charged and the amount which was in all the circumstances reasonable to charge. The question whether overcharging was "*gross overcharging*" involves an evaluation by the Tribunal as to whether the overcharging was so excessive as to warrant being characterised as "*gross*". I am not presently concerned with that evaluative process. Rather, I am concerned with the basis upon which the Tribunal was able to determine whether the costs rendered involved overcharging.

57 The first of the relevant figures was proved by the evidence of the bill rendered by the appellant. There is no issue about that. The question that needs to be considered however is the process whereby the Tribunal was satisfied as to what were the reasonable charges. As I have already found, it could not do so on the basis that the certificate issued by the Costs Review Panel was binding. What, then, was the basis upon which it was entitled to make a finding in respect of the fair and reasonable costs of the legal services provided by the appellant to the client?

58 The starting point of this consideration is s 168 of the *Legal Profession Act* which provides that in conducting a hearing into a question of professional misconduct, the Tribunal is to observe the rules of evidence. In this case, the 'evidence' before the Tribunal in relation to the reasonable costs included: the appellant's itemised bill of costs to the client; the costs assessor's certificate and reasons for determination; the Costs Review Panel's certificate and reasons for determination; and an affidavit of the appellant, in which he concedes that certain charges should not have been included in the bill – in particular he concedes that charges for the costs of preparing the bill of costs and charges for correspondence relating to the claim in respect of the firm's lien over the monies ultimately paid to the client's new solicitors should not have been included. There was also the evidence by way of correspondence that the appellant had claimed from the client the sum assessed by the Costs Review Panel and that a judgment had been entered in the District Court for that amount (less the amount held by the appellant on credit). There is nothing in the appeal book to indicate that a record of the judgment itself was before the committee.

59 The appellant's affidavit evidence was admissible subject to any specific objections, of which there appears to be none. The bill of costs was admissible as a business record: see the *Evidence Act* 1995 (NSW) (the *Evidence Act*) s 69. The correspondence was also admissible as a business record. That leaves the question whether the costs assessor's certificate and reasons for determination, the Costs Review Panel's certificate and reasons for determination were admissible.

60 In my opinion, the certificates and reasons for determination are business records: see s 69 and definition of "*business*" in the Dictionary to the *Evidence Act* Pt 2 cl 1. However, those documents would not be admissible because of the provisions of s 69(3)(a) which provides:

> "69 Exception: business records
>
> (1) This section applies to a document that:
>
> (a) either:

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or

(ii) at any time was or formed part of such a record, and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

(2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation:

(a) **was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding** ...”

61 In order for s 69(3) to apply, there is a strong line of authority to the effect that proceedings, in relation to which the representation is “*prepared*” or “*obtained*”, must be “*likely*” or “*reasonably probable*”: see *Waterwell Shipping Inc v HIH Casualty and GIO Ltd* (unreported, NSWSC, Giles CJ Comm D, 8 Sept 1997); see also recent support and an outline of authorities *Keane v Caravan City Cowra Pty Ltd* [2006] NSWSC 942 at [15] and *ACCC v Advanced Medical Institute* [2005] FCA 1357 at [40]- [43]. The purpose of this provision was to guard against the admission of self-serving statements: *Keane* at [15].

62 The purpose of the assessment procedure is to provide a simplified means whereby costs may be determined and, if not paid, a proceeding in an Australian Court of competent jurisdiction is commenced by filing the certificate. In my opinion, the certificates and the reasons for determination were thus prepared in contemplation of proceedings and are not admissible as a business record by virtue of s 69(3)(a).

63 However, the certificate and the reasons for determination would be admissible under Part 3.3 of the *Evidence Act*, the relevant sections of which provide:

“76 The opinion rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

...

79 Exception: opinions based on specialised knowledge

If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”

64 As that material was, in my opinion, admissible, there was evidence before the Tribunal as to what were the fair and reasonable costs for the work done. However, that material was not placed before the Tribunal in an admissible form. As I have said, the certificate and reasons for determination were not admissible as business records. For evidence as to the fair and reasonable costs to be given in an admissible form, it should have been given by the costs assessors directly either by way of affidavit or orally, notwithstanding that their opinion was recorded in the certificate and reasons for determination. Alternatively, such evidence could have been given by an independent assessor. In any event, such persons should have been available for cross-examination.

65 However, no objection was taken to the admissibility of the certificate and reasons. The appellant was represented before the Tribunal by experienced senior counsel. In addition, the solicitor had sought to prove the amount of the fair and reasonable costs by the evidence of a costs assessor. It is open for a court to conclude, in circumstances where a party against whom evidence was tendered in inadmissible form, fails to object to the tender, that there has been a waiver of the right to object to the tender: *see Ritz Hotel Ltd v Charles of the Ritz Ltd & Anor* (1988) 15 NSWLR 158. It is likely that there was such a waiver here given the level of legal representation engaged by the appellant, although it is also possible that the matter was simply overlooked.

66 On balance, however, given the absence of objection, both in the Tribunal and in this Court, and the level of legal representation, I consider that this Court should proceed on the basis that any right to object to the evidence was waived. I am fortified in this conclusion by the fact that the Tribunal gave its own consideration to what were the fair and reasonable costs, although I acknowledge that in doing so it accepted the hourly rates that had been relied upon by the Costs Review Panel.

67 The Tribunal considered that the assessment of the costs assessor was not relevant to the determination of the complaint but was relevant only as a procedural part of the process. Subject to the question of admissibility, there was no error in the Tribunal so treating the original assessment by the costs assessor.

68 The Tribunal then considered the assessment made by the Costs Review Panel by reference to the appellant's bill of costs. It concluded at [74], based upon its own professional experience, that the proper costs of the practitioner were $5,820.60, as determined by the Costs Review Panel. In my opinion, this alternate approach of the Tribunal was a correct approach and its independent finding as to the reasonable costs was one that it was entitled to reach.

69 It is also apparent from the Tribunal's reasoning at [74] that it understood that its task was to apply its own experience in considering whether the charges constituted a gross overcharge. As I have already explained, the Tribunal's initial approach to that question was in error in treating the Costs Review Panel's assessment as being conclusive as to what were the fair and reasonable charges. There may be cases where a bill of costs was greater than that assessed under the costs assessment procedures of Pt 11, but which would not constitute gross overcharging. However, having been satisfied as to the amount of the fair and reasonable costs for the legal services, in circumstances where the charges claimed were nearly five times greater than a fair and reasonable charge, that finding was open.

Was the overcharging deliberate?

70 That leaves the question of whether the overcharging was deliberate. The Tribunal found that although the appellant was not the original author of the bill, at all relevant times he adopted the bill as if he was the author and that his course of conduct was deliberate.

71 In coming to this view, the Tribunal accepted that the bill had been issued by an employee of the appellant in accordance with a procedure that the appellant had established. The Tribunal found that the bill was validly issued but the appellant, who at that time was in sole practice, was responsible for the bill as the employer of the solicitor who in fact issued it. The Tribunal found that the issuing of the bill called for the appellant's involvement or at least his supervision. The Tribunal found that although the employee had prepared the bill based on computer generated charges checked by reference to the file, being the practice which the solicitor had established, there was no suggestion that the process in

which he engaged involved any consideration of what were fair and reasonable charges for the work done, or of any of the matters that were applicable to that test. The solicitor who prepared the bill only had carriage of the file for little more than a month before the bill was issued, in circumstances where Mr Antoni had engaged the appellant many years previously. The Tribunal considered that it would have been proper for the appellant to have reviewed the bill at least at some stage, but he had never done so.

72 The Tribunal concluded, therefore:

> "78 Having instructed his employee to send the Bill to the client, the Tribunal finds that it was incumbent upon [the appellant], where he had failed to check the Bill before it was sent out, to at least do so promptly thereafter, so that he could ensure that the Bill was in order as was his duty. If [the appellant] had reviewed the Bill and if he had then made an extremely large reduction in the charges so that they were ultimately more in line with the Panel's assessment, the situation would no doubt have been personally embarrassing, but without the more severe consequence of his facing a complaint of the deliberate charging of grossly excessive amounts of costs.
>
> 79 In fact, [the appellant] adopted the Bill for he lodged it for assessment and then, although he did not personally sign correspondence to the Costs Assessor, he advised on 10 May 2001:

'Previous correspondence to you has been prepared at my direction and under my supervision'.

> 80 Accordingly, the Tribunal finds that [the appellant], although not the original author of the Bill, at all relevant times adopted the Bill in the same way as if he were the author and that his course of conduct was deliberate."

73 The appellant contends that, contrary to the Tribunal's finding, there was no basis for a finding that the solicitor intended to charge a grossly excessive amount. He submitted that in order for a charge of deliberate overcharging to be established, it was necessary to make a finding that a solicitor had a particular state of mind, that is, "*an intention to charge grossly excessive amounts of costs*". In this case, it was said that the evidence was in fact to the contrary. In the first place, the fact that the solicitor had another solicitor in his firm prepare the costs in anticipation of (and subject to) an assessment of costs under Pt 11 was fundamentally inconsistent with the existence of such an intention. The appellant had no engagement at all with the billing process and had not sought to enforce against the client any entitlement to costs beyond those assessed as payable under Pt 11.

74 The appellant further pointed out that the complaint against him was not one of a failure to properly supervise an employed solicitor in the preparation of the bill. Rather, it was to directly make him responsible for the bill in circumstances where, if it was found to involve a gross overcharge, he was thereby guilty of professional misconduct. It was submitted that that process of reasoning failed to engage the specific element of the complaint that involved the intentional, that is, 'deliberate', conduct. The underlying premise of this submission was that no complaint had been made against the appellant for failure to supervise.

75 In *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33 the High Court held that an appeal from an Order made by the Tribunal under the *Legal Profession Act* pursuant to the provisions of s 171F required the Court to hear and determine the appeal "*against the Tribunal's determination of a* ***complaint***" (at [66]; emphasis added). It followed that the focus of the attention of the Court on the appeal had to be in respect of the complaint against the legal practitioner. The **complaint** was that contained in the "*information laid by the ... Commissioner ... in accordance with the Act*": see *Legal Profession Act* s 167. The point being made by the Court was that the Court could not determine that there had been professional misconduct based on some other wrongdoing not specifically the matter of a complaint.

76 The question, therefore, which arises for consideration in this case, is whether a solicitor can deliberately overcharge in circumstances where the solicitor, on whose behalf the bill was sent, did not have any personal involvement in its

preparation or in forwarding the bill to the client. That question focuses on the meaning of the phrase "*the **deliberate** charging of grossly excessive amounts of costs*" in s 208Q(2).

77 The word "*deliberate*" is a word of ordinary English meaning. The Australian Concise Oxford Dictionary defines its meaning as "*intentional*"; "*fully considered*" and "*not impulsive*". The Macquarie Dictionary definition is the same. The same definition appears in 'Black's Law Dictionary', Garner and Black (8th ed, 2004).

78 In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, McHugh, Gummow, Kirby and Hayne JJ observed at [69] that:

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390 at 397, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed." (References omitted)

79 The relationship that is governed by the costs provisions of the *Legal Profession Act* is the contractual relationship of the client and, relevantly, the solicitor. It is the solicitor, or in a given case, the firm of solicitors, who charges the costs. It is the solicitor or firm of solicitors that may recover those costs in a court of law. As I explain more fully below, it is irrelevant that some person other than, in this case, the appellant, prepared the bill of costs. Preparation of the bill of costs is, conceptually, an entirely distinct task from **charging** costs.

80 In my opinion, the phrase "*the **deliberate** charging of grossly excessive amounts of costs*" within s 208Q(2) means that the solicitor must have intended to charge the client the costs set out in the bill. In other words, the word's adjectival function relates to the charging of the costs. The fact that the costs are grossly excessive is descriptive of the costs actually charged. In this case, that means that the appellant must have intended to charge the sum of $28,365.60.

81 It appears that the appellant's usual practice in preparing bills was for the person who had the carriage of the matter to render the bill, although the appellant said that he would see the bills, or at least any contentious bills before they went out. It is, of course, a matter of common knowledge that bills of costs are sometimes prepared "*in-house*", by a person within a solicitor's firm, including by the solicitor herself or himself, an employed solicitor, a clerk or a secretary. Sometimes bills of costs are prepared by costs assessors, engaged by a solicitor for that purpose.

82 However, it is irrelevant that some person other than the solicitor may have prepared the bill. If that was a defence to a complaint of "*deliberate charging of grossly excessive amounts of costs*" it is unlikely that professional misconduct on that basis would ever be established. Solicitors would always have their costs prepared by someone else. However, professional misconduct, as established by the section, could not defeat such a practice. Section 208Q(2) is directed to the conduct of the solicitor in intending to charge a client an amount of costs which in fact is grossly excessive, which could occur in a variety of circumstances. This is to be contrasted with, for example, a case where there is an accidental charging of an amount which is grossly excessive.

83 However, in this case, the appellant's intention was to have a bill prepared which was to be sent to the client for the payment of costs specified in the bill. The intention was that the client be charged that amount and that the client pay that amount. The employed solicitor did not charge the client, nor did the employed solicitor have any right to be paid the costs that were charged in the bill. The employed solicitor did no more than undertake a task that he was directed to undertake by the appellant, in the course of his employment. It was at all times the appellant's bill to the client.

84 It is irrelevant that the client had the right to have the bill of costs assessed. Likewise, it is irrelevant that at the time that the appellant forwarded the bill to the client for payment, the client had other solicitors acting for him. The right to

have a bill of costs assessed is a statutory right provided for the protection of clients. The protection relates to overcharging, but not only to overcharging. The statutory right also provides protection from erroneous charging, which may or may not involve overcharging. There is also the statutory right for either party, that is the solicitor or the client, to have an assessed bill reviewed, as well as rights of appeal to the Supreme Court, including on questions of law. These various rights demonstrate that there may be questions as to whether particular costs are as a matter of law properly chargeable, as well as there being legitimate ranges of opinion as to whether particular costs were appropriately incurred or were charged at an appropriate rate.

85 Further, for reasons that are similar to those that might explain why a legal practitioner may not apply for a review of a costs assessment, a client may not apply for an assessment. There could be a variety of other reasons, including language difficulties; the difficulty of lay persons engaging the legal procedures involved; or financial difficulties. Again, the circumstances could be many, but the very real point is not in the examples, but in the possibility that the rights might not be exercised. The fundamental point is that the professional and ethical requirement that legal practitioners not engage in conduct that constitutes professional misconduct is not dependent upon whether a client asserts a legal right after the conduct has been engaged in. The requirement on the legal practitioner is not to engage in the conduct which would otherwise constitute professional misconduct.

86 Section 208Q is not qualified by the various rights provided by the statutory assessment regime. Those rights exist independently of the professional requirement that a solicitor charge costs that are reasonable and fair. If a solicitor deliberately charges costs in a grossly excessive amount then his conduct is, by operation of statute, declared to be professional misconduct. It is also irrelevant, in my opinion, that in charging grossly excessive amounts of costs, a solicitor may have engaged in other conduct of an unsatisfactory professional nature, such as by failing to properly supervise an employee. If such a complaint is laid, then it has to be considered on its merits. But the possibility that a legal practitioner may have transgressed in a way additional to that in respect of which a complaint is laid does not mean that the complaint cannot be made out. If the elements of the complaint have been established, the practitioner, by operation of the statute, has engaged in professional misconduct.

87 However, the question remains whether it was established that the appellant was guilty of the complaint made against him being “*the **deliberate** charging of grossly excessive amounts of costs*” in circumstances where the appellant’s evidence was that in this case, he did not see the bill at any time before it was forwarded to the client for payment. The appellant contended that it could not be said that he had engaged in *deliberate charging of grossly excessive amounts of costs* because he had never turned his mind to the costs that were charged. If he had engaged in any conduct that was subject to criticism it was that he had failed to properly supervise his employed solicitor. However, no such complaint had been brought against him.

88 I have not found this matter easy to resolve. In the end, however, and notwithstanding that a finding of professional misconduct is a most serious matter, I have concluded that the complaint has been made out. My view turns upon my construction of s 208Q and the adjectival function of the word “*deliberate*”. If its function was also adjectival to “*grossly excessive amounts of costs*” then it is likely that the complaint had not been made out. However, that is not how I have construed the section.

89 In this case, the fees charged are in the order of five times greater than those that the Tribunal determined were fair and reasonable. A disparity of that order is grossly excessive. For the reasons I have already indicated, the solicitor charged those fees and did so deliberately. It follows that the Tribunal's finding was correct and the appeal should be dismissed with costs.

90 **HODGSON JA:** I agree with the orders proposed by McColl JA and, subject to what I say below, with her reasons.

91 I agree with Beazley JA and McColl JA that the s.208KF certificate was not binding in disciplinary proceedings, and was admissible only as expert evidence; and that although its presentation as expert evidence was formally deficient (unless s.60 of the Evidence Act 1995 applied), its admission was not objected to.

92 I agree with Beazley JA that it was open to the Tribunal to find that the expert report on which the appellant sought to rely was of no evidentiary value, but I do not agree that this was probably the only conclusion available. Consistently with

Paric v. John Holland Constructions Pty. Ltd. (1985) 59 ALJR 884, there were in my opinion parts of the report that could have been given probative weight; but the Tribunal could correctly have regarded them as of no significance. The Tribunal's conclusion that the fees set out in the bill under consideration were a gross overcharge was plainly open to it.

93 I agree with McColl JA that, for conduct to amount to professional misconduct according to general law principles, there must be significant personal misconduct, either deliberate or negligent. On the facts of the present case, if the appellant was guilty of any such misconduct, it was of the nature of failure adequately to supervise his staff; and he was not charged with misconduct of that kind.

94 I agree with McColl JA that the provision of s.208Q(2) of the Legal Profession Act 1987 that "the deliberate charging of grossly excessive amounts of costs" is "declared to professional misconduct" should be construed having regard to the very serious consequences of a finding of professional misconduct, and the general law requirement of significant personal misconduct for such a finding. Accordingly, in my opinion, a finding of "deliberate" charging of grossly excessive amounts of costs by a solicitor requires a finding that the solicitor's conduct was deliberate in relation to the gross excessiveness of the costs, and not merely in relation to the charging of costs that were, as a matter of fact, grossly excessive.

95 **McCOLL JA:** I have had the benefit of reading Beazley JA's judgment in draft. I agree with her Honour's conclusions that the expert evidence upon which the appellant sought to rely was of no evidentiary value, having proceeded on irrelevant assumptions, that the s 208KF certificate issued by the Review Panel did not bind the appellant in disciplinary proceedings pursuant to Pt 10 of the *Legal Profession Act* 1987 (the "1987 Act") but that the ADT was entitled to rely upon its own experience and the evidence of the review panel's assessment, admitted without objection, to conclude that the fees set out in the bill of costs under consideration were a gross overcharge.

96 I depart from her Honour, however, on the question of whether the appellant deliberately charged grossly excessive amounts of costs whether in contravention of s 208Q or so as to constitute professional misconduct for the purposes of s 127(1) of the 1987 Act. I am also of the view that the approach the Tribunal took to reach its conclusion that the appellant had been guilty of professional misconduct went beyond the terms of the complaint, so that it exceeded its jurisdiction. For the reasons that follow I am of the opinion that the appeal should be allowed.

Legislative framework

97 The complaint was instituted in the Tribunal by an information laid by the Legal Services Commissioner in accordance with Pt 10, Complaints and Discipline, of the 1987 Act.

98 The Information preferred by the Commissioner on 26 September 2003 complained that:

> "... as a result of the Commissioner's investigation of a complaint made under Part 10 of the *Legal Profession Act* about Mr Leon Nikolaidis ... the Commissioner complains that the Practitioner while practising as a solicitor was guilty of professional misconduct on the following grounds:

...

> **Ground 2**
>
> The conduct of the Practitioner involved the deliberate charging of grossly excessive amounts of costs."

99 Particulars of Ground 2 appeared in the First Schedule which relevantly stated:

> "1. The Practitioner charged the client, Mr Antoni, costs and disbursements of $28,365.60 for work done in recovering party/party costs and the assessment of practitioner/client costs charged by the clients' former solicitors, G H Healey & Co.
>
> 2. Costs were assessed by Mr P J McNally, Costs Assessor in Costs Assessment No 91522 of 2000.
>
> 3. The Costs Assessor issued a Certificate as to Determination of Costs on 25 May 2001 substituting for the disputed costs the amount of $3,306.70.
>
> 4. The Practitioner applied for a review of the Costs Assessor's Determination. The Review Panel issued a Certificate as to Determination of Costs by Review Panel on 24 January 2002 setting aside the Costs Assessor's Determination and substituting the amount of $5,820.60 for the amount determined by the Costs Assessor."

100 The orders the Commissioner sought were set out in the Second Schedule and included a request for a finding that the "Practitioner" is guilty of professional misconduct.

101 The appellant's reply to the Information denied that the Bill of Costs constituted over-charging and also asserted:

> "The Respondent had no knowledge of any fact or matter that gave rise to any belief on the part of the Respondent that the Bill of Costs constituted an over-charging."

102 Parts 10 and 11 of the 1987 Act as they applied to the appellant's case were substituted for the previous Pts 10 and 11 by the *Legal Profession Reform Act* 1993 (the "1993 Act"). Prior to their substitution a person could apply to the Supreme Court for the taxation of a Bill of Costs (s 199). The certificate of a taxing officer as to the amount to be paid was, subject to presently irrelevant matters, final and conclusive: s 206(1). For the purposes of Pt 10, professional misconduct included conduct declared to be professional misconduct by any provision of the *Act*: s 123. There was no provision equivalent to s 208Q.

103 Part 6 of the 1987 Act as enacted dealt with Trust Accounts. Wilful contraventions of s 61(1) (which dealt with money received by a solicitor on behalf of another), s 62(1) – (3) (which related to the keeping of accounts) and s 63(2) (which related to giving an auditor records for the purposes of an audit) were declared to be professional misconduct and thus were caught by s 123.

104 Sections 61 and 62 substantially corresponded with ss 41 and 42 of the *Legal Practitioners Act* 1898 (the "1898 Act"). Section 41 required a solicitor to hold all moneys received for or on behalf of any person exclusively for such person, to be paid to such person, or to be dispersed as that person directed and, until the moneys were so paid or dispersed, required them to be paid into a trust account. Section 42 required every solicitor to keep accounts of all moneys received in such a manner as to disclose the true position in regard thereto and to enable the trust account to be conveniently and properly audited. Section 43 provided that "wilful failure by any solicitor to comply with any provision of section forty-one or section forty-two of this Act shall be professional misconduct".

105 Section 61 was an attempt to put into a clear statutory form the position as it had been decided to be under the more generally expressed s 41 of the 1898 Act: *Keefe v Law Society of New South Wales* (1998) 44 NSWLR 451 at 457 per Priestley JA (Sheller and Powell JJA agreeing).

106 Section 127 which appeared in the new Pt 10, Div 7 relevantly provided:

> "127 **Professional misconduct and unsatisfactory professional conduct**
>
> (1) For the purposes of this Part, 'professional misconduct' includes:
>
> > (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of

competence and diligence, or

(b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or

(c) *conduct that is declared to be professional misconduct by any provision of this Act* ...” (emphasis added)

107 Section 208Q, which appeared in the new Pt 11, provided:

“**208Q Referral of misconduct to Commissioner**

(1) If a costs assessor considers that any conduct of a barrister or solicitor involves the deliberate charging of grossly excessive amounts of costs or deliberate misrepresentations as to costs, the costs assessor must refer the matter to the Commissioner.

(2) For the purposes of this Act, the deliberate charging of grossly excessive amounts of costs and deliberate misrepresentations as to costs are each declared to be professional misconduct.

(2A) A costs assessor may refer any failure by a legal practitioner to comply with a notice issued under section 207, or with any other provision of this Part, to the Commissioner.

(3) Nothing in this section limits the matters which a costs assessor may refer to the Commissioner.”

108 It is not entirely clear whether the Costs Assessor referred the appellant’s conduct to the Commissioner on the basis that it involved “the deliberate charging of grossly excessive amounts of costs”: s 208Q(1). Mr Lindsay submitted that the Assessor did not refer the overcharging matter. This was not the Tribunal’s view: see *The Legal Services Commissioner v Nikolaidis (No.2)* [2004] NSWADT 248 at [60]. The Assessor did not express the opinion that the Bill involved “the deliberate charging of grossly excessive amounts of costs” in his Statement of Reasons pursuant to s reg 26IJ of the *Legal Profession Amendment (Costs Assessment) Regulation*. Whether or not he held that opinion is not relevant for the purposes of this appeal. The Assessor’s action, as the Tribunal noted, is relevant to the procedural history, but was not determinative of the complaint. He certainly referred the allegation that the appellant failed to comply with notices issued by a costs assessor under s 207 and that, as Mr Lindsay acknowledged, was sufficient to place the matter in the Commissioner’s hands.

109 However, for reasons which do not appear from the record, but were frankly conceded by Mr Hadley, who appeared for the respondent, to have arisen from him not drawing the Tribunal’s attention to s 208Q(2) and s 127(1)(c), the Tribunal did not rely on those provisions to reach its conclusion the appellant had been guilty of professional misconduct. Rather, as will appear later in these reasons, the Tribunal reached that conclusion by reference to common law principles. This is significant when considering the Tribunal’s conclusion that the appellant’s conduct was “deliberate”.

110 It cannot be gainsaid that the complaint against the appellant was triggered by a s 208Q referral to the Commissioner, if not pursuant to s 208Q(1), then at least pursuant to s 208Q(2A). The Commissioner only had jurisdiction to deal with complaints against legal practitioners: s 59D. It is clear that the costs assessor’s referral was treated as a complaint and dealt with under Pt 10 of the 1987 Act. Section 135 required complaints to be made to the Commissioner, unless made by the Commissioner or by a Council. Proceedings such as those against the appellant could only be instituted in the Tribunal with respect to a complaint against a legal practitioner by an information laid in accordance with Pt 10: s 167. The Tribunal’s function was to determine the complaint. If it proceeded beyond that function, it exceeded its jurisdiction: *Walsh v Law Society of New South Wales* [1999] HCA 33; (1999) 198 CLR 73 at [66] per McHugh, Kirby and Callinan JJ. This

proposition is closely tied to the fact that the jurisdiction of the Tribunal to deal with proceedings under Pt19 was correlative with the duty of the Council or the Commissioner to institute proceedings following a complaint and that the Tribunal's jurisdiction was not regularly invoked if there had not been substantial compliance with Pt 10, Div 5 of the 1987 Act: see *Barwick v Law Society of New South Wales* [2000] HCA 2; (2000) 74 ALJR 419 (at [51], [63]) per Gleeson CJ, Gaudron and McHugh JJ; see also *Murray v Legal Services Commissioner* [1999] NSWCA 70; (1999) 46 NSWLR 224 (at [88] – [92]) per Sheller JA (Priestley and Stein JJA agreeing).

111 The 1987 Act was repealed on 1 October 2005: Sch 1, *Legal Profession Act* 2004 (the "2004 Act"*)*. Chapter 3, Pt 3.2, Div 11 of the 2004 Act deals with Costs Assessment. Section 393 sets out the circumstances in which a costs assessor must, or may, refer a matter coming to light during a costs assessment to the Commissioner. Section 393(1), which deals with a referral in relation to the quantum of costs, differs from s 208Q of the 1987 Act in two relevant respects. First, it makes no reference to the conduct of the practitioner being "deliberate". A costs assessor who forms the view that "the legal costs charged by a law practice are grossly excessive" must refer the matter to the Commissioner to consider whether disciplinary action should be taken against any Australian legal practitioner. Secondly, there is no declaratory provision such as s 208Q(2). Rather, s 498(1)(b) of the 2004 Act provides that charging excessive legal costs in connection with the practice of law is capable of being unsatisfactory professional conduct or professional misconduct.

Statement of the case

112 Mr Hadley, Counsel for the Commissioner, opened the case before the Administrative Decisions Tribunal on 12 July 2004. He explained Ground 2 as follows:

> "The second ground of alleged professional misconduct is the deliberate charging of grossly excessive amounts for costs and the particulars ... are in the information ... As I said before, an assessment was taking place. The assessor made a determination as to what were fair and reasonable costs. He wrote expressing concern at the level of fees and the practitioner's apparent lack of understanding of important provisions of the Act.
>
> The assessor has power to refer such overcharging to the Commissioner ... and the assessor did refer his concerns about overcharging to the Commissioner ... [105] Ground 2 arises from the [assessor's] determination, and you can see from the particular that the costs and disbursements that were being assessed totalled $28, 365.60. The assessor determined that the fair and reasonable cost for that work was $3306.70 ... [T]he review panel only increased the amount to $5820.60."

113 The Tribunal noted in its second judgment that the Costs Assessor had referred the costs issue to the Commissioner on 25 May 2001: *The Legal Services Commissioner v Nikolaidis (No.2)* at [60]. It expressed the view that his reasons were not relevant to the determination but were relevant as a procedural part of the process leading to the second complaint. On the assumption the procedural history is relevant, it is pertinent to record that the costs assessor appeared to accept the appellant's submissions:

> "... [T]hat the costs charged by [the] Practitioner were due to the lack of understanding on the part of the Practitioner and Mr Zwar of how the costs assessment scheme works resulting in the use of an unnecessary and expensive procedure."

This observation related to the Costs Assessor's view (with which the appellant disagreed) that instead of using the costs assessment procedure, under Pt II, Div 6 of the 1987 Act, the appellant had instituted proceedings pursuant to s 209C to require the client's former solicitors to provide an itemised bill of costs. The Review Panel which reviewed the costs assessment, in contrast, expressed the view that the appellant

was justified in applying for a s 209C order. Their re-assessment awarded the appellant the costs considered fair and reasonable for that exercise.

114 The appellant gave evidence, much of which appears from the following passage in the Tribunal's second judgment:

> "46 The second ground alleged professional misconduct on the ground that the conduct of the Practitioner involved deliberate charging of grossly excessive amounts of costs.
>
> 47 On 9 June 2000 the Practitioner submitted an itemised Bill of Costs to his client, Mr Antoni, for a total sum of $28,365.60 ('the disputed costs').
>
> 48 The Practitioner's Bill was submitted for assessment and on 25 May 2001 the Costs Assessor issued a Certificate as to the determination of costs pursuant to the Act by which he substituted for the disputed costs the sum of $3,306.70 as a fair and reasonable amount of costs to be paid to the Practitioner.
>
> 49 The Practitioner sought a review of the Costs Assessor's determination and on 24 January 2002 the Review Panel issued a Certificate setting aside the Costs Assessor's determination and substituting the sum of $5,820.60 for the amount previously determined by the Costs Assessor.
>
> 50 In his Affidavit of 6 April 2004, the Practitioner (who, by the year 2000, was a sole practitioner) deposed to the following:
>
>> (a) In June 2000 he instructed his employed solicitor, Tony Clark*, whom he described as experienced and competent* to prepare an itemised bill in the Antoni matter.
>>
>> (b) The bill was prepared by Mr Clark and the Practitioner did not see the final bill or any draft of it before it was signed by Mr Clark and served.
>>
>> (c) The bill should not have contained any costing for the preparation of the bill, nor should it have contained a charge for any work which was undertaken by the Practitioner's firm which was not work undertaken to advance the interests of the client or incidental to advancing the client's interests, notably the correspondence relating to the Practitioner's claim of lien.
>
> 51 In his Affidavit of 6 April 2004 the Practitioner also detailed his then current billing practice

which may be summarised as follows:

(a) all solicitors and staff were required to complete daily time sheets of all work undertaken in respect of a file whether billable or non-billable;

(b) work recorded on time sheets was then entered into cental costing records of the practice, generally by secretarial staff;

(c) it was left to the person undertaking the work to record the time using the appropriate billable or non-billable code;

(d) since 1986 the general practice of the Practitioner's firm was for accounts to be prepared by a senior secretary with reference to the file and the computerised costing records;

(e) 'It is the responsibility of the solicitor then having carriage of the matter to review the draft Bill and costing records to ensure their accuracy, completeness and that the charges set out in the Bill are properly chargeable to the client and are fair and reasonable.'

52 The Practitioner also deposed of action he had taken on the Antoni file on 7 March 2000 and then continued in paragraph 73:

> 'However, I note that the Antoni file does not describe any action being taken until 2 May 2000 by which time Tony Clark, a solicitor then in the employ of the firm, had assumed carriage of the matter.'

53 The evidence does not suggest that Mr Clark had the knowledge of the Practitioner's file for the period from 29 August 1994 to enable Mr Clark to discharge the responsibilities which the Practitioner chose to set out so expressly in his Affidavit of 6 April 2004. *There can be no dispute that the responsibility for the bill was the responsibility of the Practitioner as a sole Practitioner.*

54 In his evidence before the Tribunal, the Practitioner said:

> ‘There is no item of work on annexure R [the Bill of Costs in question] that is not recorded on our computerised printout and a solicitor in our office and my Partner had the day to day conduct of the matter. *He recorded on a day by day or how often he worked on the file his time and the task that he undertook and I have never had any reason at any time to believe that anything that he has done, I still don’t, was inaccurate’*

55 Mr Zwar who had handled the matter of Antoni for some years had ceased to be a Partner with the Practitioner in 1998, two years before the Bill was submitted to the client. The Practitioner agreed in his evidence that he was aware when the account was sent in June 2000 that Mr Antoni was dissatisfied in some way. The evidence was that he was aware that Mr Zwar had given the client an estimate of $17,000.00 for professional charges to undertake the work but that the level of the Bill did not give him great concern.

56 The Practitioner’s evidence was that he did not sign the Bill and he did not see it before it went out, although he conceded that normally he did see Bills before they were sent.

57 The Practitioner’s approach was clarified in further cross-examination:

> Mr Hadley: ‘*If the Bill correctly reflected the computerised time cost (as you call it), you assumed that the computerised work was necessary?’*

> Practitioner: *‘Yes, and that it was properly recorded, yes.’*

> Mr Hadley: ‘So, did you ever look behind the computerised time cost to consider what had actually been done and what had been achieved for the client in the case of Bills you signed?’

> Practitioner: ‘In the case of matters which I had knowledge of and carriage of, I give that consideration. *In matters of which I had no knowledge and have not had the carriage of, obviously I can’t give that consideration and I rely on what the computer records (sic) say. It’s the only thing I can rely on and what’s on the file.........’*

> *Mr Hadley: ‘And this matter was of the second category?’*

Practitioner: 'Yes, it was.'

> 58 In his letters of 17 April 2001, 3 May 2001 and 16 May 2001 sent to the Commissioner the Practitioner referred to a number of issues in relation to costs but nowhere in those letters or in the Statutory Declaration of Mr Zwar forwarded by the Practitioner to the Costs Assessor on 8 May 2001 is any mention made of items which the Practitioner concedes in his Affidavit on 6 April 2004 should not have been contained in the Bill. The issue of a charge for preparation of the Practitioner/client Bill of Costs was, indeed, raised by the Costs Assessor in his letter of 14 May 2001, but this was not conceded then or responded to by the Practitioner when he replied on a paragraph by paragraph basis on 16 May 2001." (emphasis added).

115 The appellant was not cross-examined to suggest he knew that any component of the fees charged to Mr Antoni was excessive, that the confidence he had in the expertise and competence of the solicitor who prepared the bill of costs was misplaced or that he had any reason to doubt that the work recorded in the computerised printout was either not done, or constituted over-servicing.

116 The Tribunal's conclusion that the appellant's bill of costs constituted a gross overcharge was expressed as follows:

> "74 This Tribunal is a specialist Tribunal and it is appropriate that it apply the professional experience of its members to the issue of considering whether the charges made by the Practitioner constitute gross overcharge in the same way as the Full Court in *Veron* [supra] brought its experience to bear on an issue of overcharging in that matter. While the Tribunal accepts the question of degree, the applicability of the facts of the case as referred to by Sir Thomas Lund [supra] this Tribunal has no difficulty in acknowledging that the proper costs of the Practitioner in this matter were $5,820.60 as determined by the Review Panel and that this determination was binding upon the Practitioner and that the costs charged by him to the client of $28,265.60 constituted gross overcharge."

117 The basis for the Tribunal's conclusion that the Bill of Costs constituted gross over-charging is, with respect, not easy to discern. The Tribunal referred (at [71] – [72]) to Priestley JA's statement in *Veghelyi v the Law Society of New South Wales* (Court of Appeal, 6 October 1995, unreported, BC9505459) that a disparity between a bill of costs as rendered and a bill of costs as taxed did not necessarily lead to a conclusion of overcharging and the "extra element required" of "the evaluative judgment of the Tribunal or court, based on practical legal experience, which will be taken into account in deciding whether the difference amounts to gross overcharging". Apart from stating (at [74])

> "...this Tribunal has no difficulty in acknowledging that the proper costs of the Practitioner in this matter were $5,820.60 as determined by the Review Panel and that this determination was binding upon the Practitioner and that the costs charged by him to the client of $28,265.60 constituted gross overcharge."

the Tribunal did not expose its reasons for concluding the Bill constituted a gross overcharge. In my opinion it is incumbent upon a Tribunal reaching an independent conclusion as to overcharging to state the reasons for reaching that conclusion clearly.

118 The Tribunal's conclusion that the appellant's conduct was deliberate appears from the following passage in its second judgment:

“ ‘Deliberate charging’

75 The evidence before the Tribunal is that this Practitioner did not prepare the bill to the client in this matter and did not see it before it was sent to the client.

76 At the time the bill was sent to the client, the Practitioner was in sole practice and the bill was prepared by an employee. The Practitioner’s evidence was that the bill was issued by the employee in accordance with a procedure which the Practitioner had established. There is no question of the bill being other than validly issued and, in the Tribunal’s view, the Practitioner as employer of the solicitor who issued the bill is responsible for that bill.

77 In his Affidavit of 6 April 2004 the Practitioner deposes to instructing his employed solicitor, Tony Clark, to prepare the itemised bill. His evidence thereafter is that he appears to have had no regard for the content of the bill and the charges made, although under cross-examination he conceded that Mr Antoni’s case was going to be a contentious matter as he had terminated the retainer and made allegations about prior solicitors. Common sense would suggest that the practitioner put himself on notice that the Bill was a matter that called out for his own personal involvement or at least his supervision. Instead, the Practitioner elected to rely on his employee whose task was to prepare a Bill based on computer generated charges checked by reference to the file. There is no suggestion that this process involves any consideration of what are fair and reasonable charges for the work done or any of the matters that are applicable to that test. The employed solicitor who prepared the bill had only had carriage of the file for it appears, little more than a month before the bill was issued. Section 208 [sic, this should be s 208A] sets out factors to be taken into account by Costs Assessors in determining fair and reasonable charges and in the view of the Tribunal those are factors which the Practitioner should have applied when reviewing this Bill, before it was sent to the client. It would indeed have been proper for the Practitioner where he had not seen the bill before it was issued to review it subsequently. No such review ever appears to have occurred but in his Affidavits the Practitioner acknowledged that there were matters which should not have been charged for.

78 Having instructed his employee to send the Bill to the client, the Tribunal finds that it was incumbent upon the Practitioner, where he had failed to check the Bill before it was sent out, to at least do so promptly thereafter so that he could ensure that the Bill was in order as was his duty. If the Practitioner had reviewed the Bill and if he had then made an extremely large reduction in the charges so that they were ultimately more in line with the Panel’s assessment, the situation would no doubt have been personally embarrassing, but without the more severe consequence of his facing a complaint of the deliberate charging of grossly excessive amounts of costs.

79 *In fact, the Practitioner adopted the Bill for he lodged it for assessment and then, although*

he did not personally sign correspondence to the Costs Assessor, he advised on 10 May 2001:

> 'Previous correspondence to you has been prepared at my direction and under my supervision.'

> 80 *Accordingly, the Tribunal finds that the Practitioner, although not the original author of the Bill, at all relevant times adopted the Bill in the same way as if he were the author and that his course of conduct was deliberate."* (emphasis added).

119 Having reached this conclusion, the Tribunal considered whether the appellant's conduct amounted to professional misconduct within the meaning of s 127(1) of the 1987 Act: Second Judgment at [81] – [88]. It did so by reference to common law principles reflected in the classic test enunciated in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750. It also referred to *New South Wales Bar Association v Amor-Smith* [2003] NSWADT 239 and *Veghelyi v the Law Society of New South Wales* apparently in support of the proposition that "gross overcharging as such may constitute professional misconduct and that, on an application such as this, it is not necessary to prove in addition that the lawyer was guilty of fraud or the like" (per Mahoney JA in *Veghelyi*) and concluded:

> "87 The Tribunal finds that the extent of the overcharging in this matter is of such a degree that it clearly satisfies the tests of professional misconduct set out in *Allinson* as well as constituting professional misconduct consistent with the test applied by Mahoney JA in *Veghelyi* [supra].

> 88 Accordingly, the Tribunal formally finds the second complaint established and that the conduct complained of amounts to professional misconduct."

120 Having reached this conclusion, the Tribunal adjourned to hear submissions on the question of penalty.

121 The Tribunal's third judgment dealing with penalty gives further insight into the basis of its conclusion that the appellant had been guilty of deliberately charging grossly excessive amounts of costs: *Legal Services Commissioner v Nikolaidis (No 3)* [2005] NSWADT 200.

122 Dealing with a submission that the practitioner had delegated the whole of the control of the litigation to his former partner and to employed solicitors, the Tribunal said:

> "46... The Practitioner was in sole practice at the time the bill was issued and it is clear that as a sole practitioner he was responsible for the bill and responsible for the actions of his employees in the conduct of the practice. He concedes that his systems were not adequate. This is not a mitigating event which would have been the case had the Practitioner checked the bill after it was issued and modified the charges so that total charges consistent with or at the very least within an explicable range of amounts determined by the Review Panel's determination were charged. The complaint is of 'deliberately charging grossly excessive amounts of costs'. The Tribunal has found that charge established and that the conduct is professional misconduct. The Solicitor is responsible for the bill being submitted for assessment and the events that then ensued."

The Tribunal then referred to *Re Hodgekiss* [1959] 62 SR (NSW) 340 and opined:

> "48.... [T]here was no question in *Hodgekiss* as there can be no question here that the Practitioner was responsible for inadvertence or mistakes of himself and others."

After referring to the appellant's evidence that he knew the Bill was "contentious" because the client "had terminated our retainer, and I think at that time we were aware of allegations already made, many serious allegations about his former solicitor [and] [h]e's made allegations about our firm and that he "would have expected to see [it] before it went out", the Tribunal said:

> "50 *The Tribunal has formed the view that the Practitioner was clearly reckless or careless in this matter and that having accepted in his terminology that the Antoni bill was a 'contentious bill' he took no action at the time the bill was served or subsequently to check the bill*. He cannot now seek to rely on delegation in mitigation of the consequences of the Tribunal's finding where he clearly recklessly failed at the time or later to check the bill. The Practitioner has promoted the bill and continued to promote it throughout these proceedings." (emphasis added)

123 The Tribunal accepted (at [71] – [72]) that that the evidence did not suggest "dishonesty, misappropriation or a regime of regular overcharging", that the appellant's former client was not vulnerable to solicitors and (at [80]) that the appellant was a person of integrity. It noted (at [72]), a submission that "the client knew what he was being charged and he might expect to pay", but regarded that submission as unhelpful and "simply disputing the Tribunal's finding that the proper costs to which the Practitioner was entitled were those determined in the costs assessment process." It also accepted (at [80]) that there was no evidence suggesting the appellant was other than a man of integrity.

124 During the penalty hearing, Mr G Lindsay of Senior Counsel, who appeared on the final hearing day, invited the Tribunal to withdraw its finding that the appellant had deliberately charged grossly excessive amounts of costs on the basis that the appellant had been charged with "overcharging", but had been "found guilty on the Commission's submissions substantially with a failure to supervise his office". The Tribunal dealt with that argument as follows:

> "122 The Tribunal in its decision of 1 November 2004 has made a finding of professional misconduct in relation to the 'overcharging' complaint and is of the view that having resolved the issues involved it would not be appropriate to accept Counsel's invitation to revisit those issues and dismiss the second complaint. However, while of that view, the Tribunal has considered in detail the submissions in support of that 'invitation' and formed the view that if it is open to the Tribunal to follow the course of dismissal at this stage as proposed by Mr Lindsay, it would not be appropriate to do so.
>
> 123 The decision of 1 November 2004 is a detailed one and it is a decision dealing with a practitioner who was a sole trader at the time the overcharging complained of occurred. *A solicitor in sole practice is responsible for the acts of his employees and the Practitioner in this matter has on the evidence not only the responsibility for his employees' acts but an additional personal responsibility for he has repeatedly adopted and propounded the charges which are the subject of the Second Complaint.* The Tribunal does not see that either *Murray* or *Barwick* supra would assist the Practitioner if the Tribunal had accepted Counsel's submission in relation to the Second Complaint. The allegation of overcharging was investigated and it is the subject of the information. *This is not a charge made limited to failure to supervise and that is not the finding of the Tribunal*."

Subsequently the Tribunal said:

> “163 ... It is appropriate to point out clearly that the misconduct of the Practitioner took a number of forms. *His failure to supervise his office with the recklessness evident in his acceptance that Mr Antoni’s bill was in the contentious group before it was issued. In the view of the Tribunal the misconduct of the Practitioner in the actual issuing of the bill of costs went beyond a failure to supervise for as the sole proprietor of his firm he distanced himself from the costing and failed to check the charges at the time the bill was issued or it appears subsequently at least until after the Information was filed. The Practitioner adopted the charges, and applied for assessment and subsequently review.*” (emphasis added).

125 In dealing with a submission on penalty which appears to have been to the effect that serving a bill of costs, expressly said to be subject to a Pt 11 costs assessment, did not constitute overcharging (or, apparently, charging at all) the Tribunal said:

> “151 If there is gross overcharging the Tribunal holds that the overcharging occurs when the bill is rendered unless of course moneys are charged and paid or appropriated without a proper bill in which event the date of overcharging is appropriately advanced. The Bill was sent on 9 June 2000 and that ‘sending’ completed the act of overcharging.”

126 The Tribunal recognised (at [187]) that its finding on the second count was “extremely serious”. It concluded (at [192] - [193]) that the appellant should be fined $12,000, be publicly reprimanded and pay the Commissioner’s costs.

Submissions on appeal

127 Mr Lindsay, who appeared on appeal with Mr J Chippindall, submitted that the particulars of Ground 2 were not, of themselves, capable of supporting a finding of misconduct. He argued that in order to establish the appellant had been guilty of deliberately charging grossly excessive amounts of costs, the Commissioner had to prove that the appellant intended to charge grossly excessive costs. He contended that there was no evidence that the appellant had the requisite intention. He argued the complaint was not made good in circumstances where the appellant relied upon competent staff to prepare the Bill of Costs. He also relied upon the fact that the costs were rendered in anticipation of a Pt 11 assessment. He submitted that rendering a single bill, which was substantially reduced upon assessment, could not, of itself, constitute professional misconduct.

128 Mr Lindsay also submitted that while the complaint against the appellant had been one of deliberate over-charging based on the disparity between the amount of the Bill of Costs as delivered and the costs allowed upon assessment, the Tribunal had gone beyond the particulars in the information in characterising the appellant’s conduct as reckless or careless, in criticising his “promotion” of the Bill in the assessment process and the disciplinary process, in pursuing an unarticulated complaint of lack of supervision and in finding the complaint made good because the appellant had “adopted” the Bill.

129 Mr M Hadley, who appeared for the Commissioner, submitted that the Tribunal had not gone beyond the particulars to Ground 2. He argued it was sufficient to establish Ground 2 to prove that the Bill of Costs emanated from the appellant’s firm. In such circumstances, he contended, knowledge that the Bill amounted to gross over-charging was imputed to the appellant, not at the time the Bill was issued but, rather, afterwards by a comparison of the figure of fair and reasonable costs and the actual level of the Bill. I interpolate that this submission is inconsistent with the Tribunal’s conclusion that gross overcharging occurs when the Bill is rendered: Third Judgment at [151]. Mr Hadley submitted that the appellant did not have to intend to charge grossly excessive amounts or know that the amounts charged were grossly excessive.

The nature of professional misconduct

130 The inherent jurisdiction to discipline legal practitioners for professional misconduct rests on the proposition that the practitioner has been guilty of personal default, whether it be by a deliberate wrongful act or negligence personal to him. This proposition was firmly stated in *Myers v Elman* [1940] AC 282 and has been applied in many cases including by the

Court of Appeal (Herron CJ, Sugerman and McLelland JJA) in *Re Veron; ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136 (at 143) (and cases decided at or about the same time by the same Court of Appeal which heard *Veron*, which I deal with below), by Dean J in *Re a Solicitor* [1960] VicRp 96; [1960] VR 617 and by the Australian Capital Territory Supreme Court (Blackburn CJ, Connor and Davies JJ) in *Re a Barrister and Solicitor* (1979) 40 FLR 1 (at 22).

131 The critical question in *Myers v Elman* was whether a solicitor could be ordered to pay to the plaintiff the costs of an action on the ground of professional misconduct because he had delivered defences which he must have known or suspected to be false, and had prepared and permitted his clients to make affidavits of documents which were inadequate and false. The solicitor had left the conduct of proceedings largely to his managing clerk. The plaintiff's application for costs sought to invoke the court's summary jurisdiction to order a solicitor to pay costs based on the court's right and duty to supervise the conduct of its solicitors: *Myers v Elman* (at 302 per Lord Atkin, at 318 - 319 per Lord Wright, at 334 – 336 per Lord Porter).

132 The trial judge held that the solicitor had not been guilty of professional misconduct in allowing the defences to be delivered, but that he had been guilty of such misconduct in allowing the inadequate affidavits of documents to be made. He ordered the solicitor to pay one-third of the plaintiff's costs of the action and two-thirds of the costs of the application. On appeal the Court of Appeal relevantly held (*Myers v Rothfield* [1939] 1 KB 109 per Greer and Slesser LJJ, MacKinnon LJ dissenting), that, assuming that the acts in question, if done by a solicitor personally, would constitute professional misconduct on his part, the solicitor was not liable as he had appointed a fully qualified clerk to prepare the defences and affidavits of documents, and the acts had been done not by the solicitor himself but by the clerk.

133 Greer LJ said (at 123, 126):

> "It appears to me impossible to say that it is misconduct on the part of a solicitor to leave to an unadmitted managing clerk of ability and long experience the conduct of all the interlocutory business in an action in which the solicitor is on the record as solicitor for a defendant. In my judgment, a judge is entitled to exercise the punitive powers of the court in relation to a solicitor who is an officer of the court only if it be established that the solicitor himself has been guilty of conduct which would reasonably be regarded by solicitors of good repute as disgraceful and dishonourable. In this case, it was not established that there was any such conduct on the part of Mr Elman himself....(126) ...the punitive powers of the court can only be exercised when the court is informed of facts which show that a solicitor has himself been guilty of some disgraceful conduct, and he cannot be made liable because it is proved that a clerk whom he was entitled to trust has been guilty of the conduct of which complaint is made."

134 Slesser LJ (who agreed with Greer LJ) explained (at 127) why the appointment of the clerk exonerated the solicitor:

> "It is essential, in my view, as a matter of general principle, that the misconduct of a solicitor must be brought home personally to him. It extends to all cases where the solicitor's conduct is such as to render him unfit to be an officer of the Court: *Rex v. Southerton* [(1805) [1805] EngR 50; 6 East, 126, 143]; and such a case must carefully be distinguished from one of negligence; per Lord Esher M.R. in *Cooke's* case [*In re G. Mayor Cooke* (1889) 5 Times L. R. 407]; in which action, of course, the solicitor may be liable under the general doctrine of respondeat superior for the negligence of an agent or servant. The cases which deal with striking attorneys or solicitors off the roll and those ordering them, in the inherent jurisdiction of the Court, personally to pay costs rest alike on the ground of personal misconduct, and it is a necessary condition of the exercise of the power in both cases that the misconduct should be brought home to the solicitor himself." (footnotes inserted)

135 The House of Lords reversed the Court of Appeal's decision. It said the plaintiff was asking the court to exercise its jurisdiction to order a legal practitioner to pay costs by reason of some misconduct, default or negligence in the course of proceedings which could be exercised where the solicitor was merely negligent, so that the solicitor could not "shelter himself behind a clerk, for whose actions within the scope of his authority he is liable": *Myers v Elman* (at 288, 291) per

Viscount Maugham. In contrast, the disciplinary jurisdiction the court exercised to strike a solicitor off the rolls or suspend a solicitor on the ground of professional misconduct (which the Court of Appeal had apprehended the plaintiff was invoking) was "strictly personal and relates to the solicitor himself and his fitness to practise": *Myers v Elman* (at 289) per Viscount Maugham. Lord Atkin also distinguished between the two jurisdictions, saying, "[n]o punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated", whereas the jurisdiction as to costs will be exercised where "there has been no personal complicity by the solicitor charged": *Myers v Elman* (at 302 - 3); see to like effect Lord Wright (at 321) and Lord Porter (at 334 - 335).

136 Thus while the Court of Appeal's decision was overturned, nothing said by the Law Lords cast doubt upon Greer and Slesser LLJ's statements of principle concerning the necessity that professional misconduct be sheeted home personally to the legal practitioner.

137 The distinction between the court's jurisdiction to supervise the fees charged by legal practitioners to their clients and its ultimate supervisory role over ethical conduct of legal practitioners was recognised by Ipp J (with whom Pidgeon and Franklyn JJ agreed) sitting in the Full Court of the Supreme Court of Western Australia in *D'Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 (at 209 – 212). His Honour said (at 209 – 210) that:

> "The standards applied under the court's duty to monitor the taxation of bills of costs and costs agreements, and the court's duty to supervise the disciplining of legal practitioners are not necessarily the same and do not serve identical purposes. A fee that a solicitor may seek to charge by way of a bill of costs may, upon taxation, be found to be unreasonable and therefore subject to appropriate reduction. It does not, however, necessarily follow that the fees so charged by the bill of costs are so excessive as to constitute a breach of ethics."

Wilfulness/excessive charging

138 Just as wilfulness is the touchstone of misconduct in Part 6, "deliberate" is the touchstone of misconduct in s 208Q. "Deliberate" is a synonym of "wilful". Both are words connoting an intentional act. Both were used in the 1987 Act as descriptors of conduct declared to be professional misconduct for the purposes of Pt 10. Nothing in the legislative history of the provisions in which the respective words appear provides any insight into why "deliberate", rather than "wilful" was used in s 208Q. The pragmatic probability is that it was regarded as more contemporary mode of conveying the same concept by the drafter of the 1993 Act.

139 It is appropriate, in my opinion, therefore to examine cases dealing with the concept of wilfulness in the 1898 Act, as well as the circumstances in which excessive charging constitutes professional misconduct, to cast light on the meaning of s 208Q.

140 In *Re Hodgekiss* a solicitor was found guilty by the Statutory Committee of a wilful breach of ss 41(1) and 42 of the 1898 Act in respect of deficiencies in trust accounts under his control. There had been no loss sustained and it was not claimed that the solicitor had been consciously dishonest. The solicitor was aware of the deficiencies but did not pay money into the accounts to cover them because he believed the total amount due to him out of the trust accounts for costs covered any possible deficiencies. The Statutory Committee ordered that the solicitor's name be removed from the roll. He appealed to the Court of Appeal.

141 On appeal the Full Court of the Supreme Court held that if there was a breach of s 41 it was not proved to have been "wilful" within the meaning of s 43. Owen J (with whom Maguire J concurred) concluded (at 347) that the deficiencies were caused by inadvertence or mistake on the part of the solicitor's staff, his partner and on some occasions himself and that that did not amount to a "wilful" breach within the meaning of s 43. He was not satisfied (at 349) that if Hodgekiss had breached ss 41 and 42, he "knew or believed he had done so". Accordingly, the charges of professional misconduct were not established.

142 Hardie J dealt at length (at 352 – 353) with the phrase “wilful failure” in s 43. He took particular instruction from the decision of Romer J and the Court of Appeal in *In Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407. Both Romer J and Pollock MR in the Court of Appeal concluded that the phrase “wilful neglect or default” in a provision in the Articles of Association of a company limiting the liability of the directors for loss suffered by the company by reason of the exercise of their powers and duties, required proof that the director “knows he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty”. Romer J held (at 434) that a person could not be guilty of “wilful negligence” “unless “he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty”.

143 Pollock MR (at 517) adopted the definition of “wilful misconduct” articulated by Lord Alverstone in *Forder v Great Western Railway Company* [1905] 2 KB 532 (at 535) as:

> “[M]isconduct to which the will is party as contra-distinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences ... or acts with reckless carelessness, not caring what the results of his carelessness may be.”

144 Hardie J also referred with approval to *In Re Vickery* [1931] 1 Ch 572 where Maugham J (as he then was) applied the definition of “wilful neglect or default” in *In Re City Equitable Fire Insurance Co Ltd* to determine the meaning of that phrase in the *Trustee Act* 1925. Maugham J concluded (at 583) that:

> “...a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not”.

145 Hardie J considered the principles laid down in these cases as applicable to the meaning of “wilful failure” in s 43 of the 1898 Act. He concluded (at 353 – 354):

> “Applying those principles, I am of the opinion that the section deals with personal breaches of the statutory provisions in question on occasions when the solicitor knew or believed that he was committing such breaches or was recklessly careless in that regard. It is thus essential in an inquiry as to whether or not there have been wilful breaches by a solicitor of the provisions of ss 41 and 42 to examine the facts and circumstances relevant to his state of mind, knowledge and intention at the material dates.”

146 Hardie J concluded (at 357) that the evidence fell short of establishing any wilful breach of s 41 by the solicitor and that having regard to the evidence about Hodgkiss’ reliance upon a firm of competent and reputable accountants, and members of his staff, the evidence fell short of establishing a wilful breach of s 42.

147 As I noted earlier in these reasons, the Tribunal referred to *Re Hodgekiss* in its Third Judgment finding it of assistance in reaching its conclusion that the appellant’s conduct was “deliberate”. The passage which appeared to give it comfort was Hardie J’s conclusion that “wilful failure” could be demonstrated “when the solicitor knew or believed that he was committing such breaches or was recklessly careless in that regard”: Third Judgment at [48] – [50]). It is not clear from the Third Judgment that the Tribunal recognised that while Hodgekiss was aware of the deficiencies complained of, he was found not to have engaged in “wilful” failure because the conduct complained of was caused by inadvertence or mistake and it was not demonstrated that he knew or believed, nor was recklessly careless, as to breaching the relevant provisions.

148 In *Veron* the Law Society brought disciplinary proceedings alleging, among other matters, that Veron had charged

plaintiffs grossly excessive costs in 65 personal injury actions. In most cases, Veron had obtained an authority from his clients to deduct the sums he retained, although the amounts specified had been fixed arbitrarily and without reference to the work involved (see 145). In reciting (at 142–143) the principles relating to an application to the Court to strike a solicitor off the roll for professional misconduct, the Court referred with approval to Viscount Maugham's statement in *Myers v Elman* (at 289) that such an application is "strictly personal and relates to the solicitor himself and his fitness to practise".

149 The Court also considered the circumstances in which charging excessive costs may amount to professional misconduct, saying (at 144):

> "It has long been recognised that the charging of extortionate or grossly excessive costs by a solicitor may amount to professional misconduct - *Meux v Lloyd* [1857] EngR 492; (1857) 2 CBNS 409; 140 ER 476; *In Re Hill* [1887] 4 TLR 64. All the modern text-writers treat such conduct as a head of professional misconduct - *Cordery on Solicitors*, 6th ed at 604; Lund, *Guide to Professional Conduct and Etiquette of Solicitors,* at 65; *Halsbury's Laws of England* 3rd ed vol 36 at 226 para314 (edited by Sir Thomas Lund, Secretary of the Law Society and HH Turner, its senior Under-Secretary). ... it is not in every case where a solicitor agrees with a client a fee which is substantially larger than the fee which would be allowed on taxation that he is guilty of conduct unbefitting a solicitor. As is stated in Sir Thomas Lund's book (*loc cit*) it is a question of degree and dependent upon the facts of the individual case. As with all questions of degree, cases may occur in which it is difficult to decide on which side of the borderline they fall. This particular difficulty was referred to in *Chapman v Chapman* [1954] UKHL 1; [1954] AC 429 at 445-446 by Lord Simonds LC, who said that he was not as a rule impressed by an argument about the difficulty of drawing the line, since he remembered 'the answer of a great judge that, though he knew not when day ended and night began, he knew that midday was day and midnight was night'." (footnotes inserted)

150 The Court held (at 146) that "the conduct of a solicitor who arbitrarily and as a matter of course and consistency deducts from trust funds in his hands £1,000 per case for profit costs in the general run of road-accident cases is guilty of misconduct". It ordered that Veron's name be removed from the roll. There was no issue in *Veron* that the solicitor was personally involved in the conduct complained of.

151 *Re Munro; Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 154, *Re Miles; Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 163 and *Re Melvey; Ex parte Law Society of New South Wales* (1966) 85 WN (Pt 1) (NSW) 289 were heard by the same bench which heard *Veron*. They also concerned complaints that solicitors were guilty of professional misconduct within the meaning of s 43 of the 1898 Act and of common law professional misconduct in charging plaintiffs excessive costs in personal injury actions.

152 There was no question that Munro and Melvey were personally implicated in charging the excessive fees. Melvey had made "an arbitrary assessment of profit costs based on an estimate of how much the particular client would pay without demur ... [in which] the amount of the settlement and the successful outcome were large factors": *Melvey* (at 297).

153 Miles, however, had devoted his time to advocacy and left the conduct of his personal injury practice to clerks. The Court accepted (at 167) that Miles was unaware of the amounts the clerks were deducting from plaintiffs' verdict. It concluded (at 168) that Miles had retained "grossly excessive sums" for his profit costs out of the verdicts and that a general pattern or scheme of overcharging had been established. The Court also found that Miles had signed disbursement cheques ostensibly for translation services, but which the Court concluded (at 170) were "in large measure ...a commission or bonus for introducing the clients". The Court concluded in this respect (at 170 – 171) that although Miles had not been party to dishonesty, he had shown wilful neglect in not inquiring more closely into the details of payments out of his clients' funds. Accordingly it held (at 171) that Miles was guilty of misconduct in paying those sums, even though this conduct may have been the result of gross carelessness on his part. It also found (at 171) a wilful failure to comply with s 42. Despite its findings that Miles had been guilty of misconduct, the Court concluded (at 173) that he had left important matters to unsupervised clerks, who had taken advantage of his carelessness to enrich themselves at the clients' expense contributed to by a profit-sharing arrangement they had with Miles.

154 The Court accepted (at 173 – 174) that in order to find Miles guilty of professional misconduct it was necessary that he be personally implicated in the conduct complained of. It referred to *Myers v Elman*, *Re Hodgekiss* and *Re a Solicitor*. It regarded *Re Hodgekiss* as authority for the proposition that:

> "[T]o establish the statutory misconduct contemplated under s 43 of the [1898 Act] it is necessary to prove personal breaches, either of s 41 or of s 42 ... on occasions when the solicitor knew or believed that he was committing such breaches, or was recklessly careless in that regard. It is thus essential in an inquiry as to whether or not there have been wilful breaches by a solicitor of the provisions of ss 41 and 42, to examine the facts and circumstances relevant to his state of mind, knowledge and intention, at the material dates."

155 The Court also referred with approval to *Re a Solicitor* where Dean J held, applying *Myers v Elman*, that before a solicitor could be found guilty of misconduct it must be shown that the solicitor had been personally implicated in conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency. Applying that test, Dean J held that a solicitor who had been disqualified by infirmity from taking a very active interest in his practice and had left his business largely in the hands of an employed person had deliberately failed to exercise any control over or supervision of the clerk who handled his clients' moneys and, in the circumstances, was guilty of misconduct in the relevant respect.

156 The Court concluded (at 175) that the question it had to determine was whether Miles' carelessness as to the disposition of trust funds and the keeping of his trust accounts amounted to wilful misconduct. It held that wilful misconduct was established because while Miles knew nothing of the activities of his clerk, he had failed to give personal attention to the trust funds in his practice's custody and had preferred his own interests as advocate to those of his clients.

157 In *Re Mayes and the Legal Practitioners Act* [1974] 1 NSWLR 19 the Court of Appeal considered whether a solicitor who was not personally implicated in any dishonesty or breach of the criminal law had wilfully breached ss 41 and 42 of the 1898 Act. Mayes' partner, Cole, misappropriated clients' funds over a period of four years. Mayes played no part in the misappropriations and informed the Law Society of Cole's defalcations as soon as he became aware of them. Mayes had had little to do with the accounting for the partnership but on one occasion in 1971 after he had completed the distribution in an estate he checked the entries on the trust ledger cards relating to it and found an amount of money had been transferred to another account thus putting the account in debit. He accepted Cole's explanation that this was an error and that he would adjust the card immediately. The Statutory Committee constituted under s 75 of the 1898 Act found that Mayes had been guilty of professional misconduct.

158 On appeal Mayes challenged the finding that his failure to comply with ss 41 and 42 of the 1898 Act was "wilful". Reynolds and Hutley JJA referred to Viscount Maugham's statement in *Myers v Elman* (at 289) that "mere negligence, even of a serious character, will not suffice" to constitute professional misconduct. Their Honours said (at 25) that despite his Lordship's dictum "there is no reason in principle why conduct which can be classified as negligent cannot amount to professional misconduct." They referred with approval to Dean J's judgment in *Re a Solicitor* (at 622) where his Honour characterised the conduct of a solicitor who allowed his clerk to receive moneys and deal with them without any supervision as being:

> "... more than neglect; it is a deliberate failure to exercise any control or supervision on the clerk who handled his clients' moneys."

159 Applying that principle, Reynolds and Hutley JJA held (at 25) that it was no answer for Mayes to claim he had left the conduct of the financial affairs of the firm to his partner. They also concluded (at 26) that Mayes had been put on notice that he should check the office records in particular by the events concerning his perusal of the trust ledger cards for the estate. They concluded that Mayes' disregard of his obligations was "so gross as to amount to professional misconduct at common law." Their Honours also considered whether Mayes' conduct was a "wilful failure" within the terms of s 43. They said (at 26–27):

> "Wilful misconduct can be established by evidence that a person acts with reckless carelessness, not caring what the results of his carelessness may be. The whole question has

> been discussed by Hardie J in *Re Hodgekiss* and his judgment has been twice approved by this Court: *Re Miles* and *Re Munro. By the tests there laid down his failure was wilful despite his personal innocence*." (emphasis added)

They dismissed the appeal.

160 Hardie JA also agreed that the appeal should be dismissed but considered the matter only in the context of whether Mayes' conduct was a wilful breach of the relevant provision of the 1898 Act. His Honour said (at 21):

> "It is well settled law that there can be wilful failure within the meaning of the section without any positive intention to breach the law; breaches committed over a period of time can, in the light of the relevant circumstances, be so substantial and reckless and show such complete indifference on the part of the solicitor to his important obligations to his clients and to the public, as to amount to wilful failure: *Re Hodgekiss*. In the present case the committee, after a consideration of the facts of the case and a reference to some of the leading authorities on the relevant sections, stated that: 'The Committee considers that the solicitor has been recklessly careless in his conduct over a long period and in his failure to see that the requirements of the Legal Practitioners Act and the regulations were complied with by the partnership'."

161 His Honour concluded:

> "...in the special circumstances of this case, I am satisfied that the existence of that trust was accompanied by a complete indifference on the part of the solicitor as to the performance of his statutory obligations in relation to the trust account. The matters brought to his notice over a period of years were such that failure to inquire and ascertain what was happening in relation to the trust account was, under the circumstances, recklessly careless and properly found to constitute wilful failure within the meaning of the section."

162 The final case in the *Veron* line of authorities is *New South Wales Bar Association v Evatt* [1968] HCA 20; (1968) 117 CLR 177. Evatt had been briefed by Veron and Miles and had acted for clients and been paid fees from the amounts they had charged to their clients. The Court (Barwick CJ, Kitto, Taylor, Menzies and Owen JJ) described (at 179) Veron and Miles as having "engaged in a systematic course of action in charging extortionate and grossly excessive sums as costs to lay clients". They said that if professional misconduct was demonstrated if Evatt had "knowingly assisted in and facilitated the disgraceful conduct of the two solicitors" and if he had "knowingly shared in the proceeds of such extortionate charges made by his solicitors by charging and being paid excessive fees out of what the solicitors took from their clients".

163 Finally I note that in *Veghelyi v the Law Society of New South Wales* the question again arose as to whether a solicitor had been guilty of wilful failure to comply with s 42(2) of the 1898 Act in circumstances such as to amount to professional misconduct for the purposes of s 43. The complaint concerned the entry of an incorrect date in the solicitor's trust account ledger as to which there was no evidence that the appellant had any "direct part in or knowledge". Priestley JA (with whom Kirby P agreed and Mahoney JA generally agreed) disagreed (BC9505459 at 29) with the Tribunal's conclusion that the solicitor's conduct was deliberate and therefore a breach of s 42(2) and professional misconduct in accordance with s 43. Mahoney JA added some illuminating observations about the general nature of a complaint of gross over-charging and the proof of such complaints.

164 It is apparent from this review of authorities dealing with over-charging that in each case in which the complaint was made good, the solicitor had either knowingly engaged in systematic overcharging or, as in the cases of *Miles* and *Re a Solicitor* had been reckless as to whether or not excessive fees had been charged through failure to exercise adequate supervision.

Consideration

165 The case the Commissioner presented to the Tribunal was, as Mr Lindsay submitted, that the appellant had charged excessive amounts of costs because the disputed Bill was reduced on assessment from $28,365.60 to $5,820.60. That is apparent from the particulars of Ground 2 and Mr Hadley's opening. The Tribunal found the appellant's conduct was "deliberate" in its Second Judgment (at [80]) because:

> "...the Practitioner, although not the original author of the Bill, at all relevant times adopted the Bill in the same way as if he were the author and that his course of conduct was deliberate."

166 As I understand that finding, it embraces both the appellant's conduct in permitting the Bill to be rendered on his behalf as well as his conduct in submitting it for assessment and propounding its correctness throughout the disciplinary proceedings. To the extent this finding encompasses conduct which occurred after the Bill was rendered, it conflicts with the Tribunal's conclusion (with which I agree) that "'sending' completed the act of overcharging": Third Judgment (at [151]).

167 I accept Mr Lindsay's submission that the Tribunal also appeared to find in the Second Judgement that the appellant had deliberately charged excessive amounts of costs because he had failed to exercise adequate supervision over his staff who prepared the Bill and, in its Third Judgment, added that he had acted recklessly as to whether the Bill charged excessive amounts of costs. Ground 2 did not encompass conduct of this nature and, to the extent that the Tribunal reached its conclusion relying upon such a characterisation of the appellant's conduct, in my view it exceeded its jurisdiction: *Walsh v Law Society of New South Wales*.

168 The question, therefore, is whether a complaint of "deliberate charging of grossly excessive amounts of costs" can be made good by the appellant rendering a Bill the costs in which were substantially reduced on assessment and which, in the Tribunal's opinion, exercising its own professional experience of its members, constituted gross overcharging.

169 Beazley JA has approached the meaning of "deliberate" in the information on the basis that the information was intended to prefer a charge pursuant to s 208Q of the 1987 Act. While the information reflected the language of that provision, the case was not conducted before the Tribunal as if it turning upon s 208Q. The Tribunal did not reach its conclusion that the appellant had engaged in "deliberate overcharging" by considering the meaning of "deliberate" in its statutory context. If it had regarded itself as deciding the question in the statutory context, then, once it concluded the appellant's conduct had been "deliberate", s 127(1)(c) would have relieved it of the burden of determining whether the proven conduct amounted to professional misconduct. Instead, as I earlier observed, the Tribunal decided this question by applying the common law test of professional misconduct. However, for reasons I explain, the same conclusion would follow whether the Tribunal had been considering the case in terms of s 208Q or as common law professional misconduct.

170 Beazley JA has concluded (at [80]) that " 'the deliberate charging of grossly excessive amounts of costs' in s 208Q means that the solicitor must have intended to charge the client the costs set out in the bill". I respectfully disagree. In my opinion in order to find the practitioner has deliberately charged the client grossly excessive amounts of costs it is necessary to prove that he or she intended to so charge or was recklessly careless as to that consequence. There was no evidence that the appellant knew, or if it were relevant (which in my view it is not as the case was presented) ought to have known the Bill contained excessive amounts of costs.

171 I accept that the word "deliberate" is, as her Honour has said (at [77]) "a word of ordinary English meaning", whose dictionary meaning includes "intentional". However recourse to that meaning does not, as her Honour recognises, provide the solution to the critical question: whether the intention must accompany the act of charging, or the act of excessive charging. However the literal meaning of the legislative text is the beginning, not the end, of the search for the legislature's intention: *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at [98] per McHugh J; see also *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 (at [59]) per Gleeson CJ; (at [170] – [174]) per Gummow and Hayne JJ. The meaning of s 208Q must be answered by reference to the traditional tools of statutory interpretation, context, purpose, policy, consistency and fairness: *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390 at 397 per Dixon CJ; *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 (at [78]) per McHugh, Gummow, Kirby and Hayne JJ.

172 However, if one starts with a textual analysis, the question arises as to why, if Beazley JA's interpretation is correct, the legislature needed to insert the word "deliberate". "Charging grossly excessive amounts of costs" would sufficiently describe the conduct of a practitioner rendering a Bill and intending to charge the costs set out in it. It is difficult to imagine the case in which a practitioner could successfully resist the proposition that he or she intended to charge the costs in a bill. Accordingly an interpretation of s 208Q which concludes it describes the intention to charge, rather than the intention to overcharge, renders the word "deliberate" otiose. This is inconsistent with the presumption against surplusage and the principle that prima facie all words must be given some meaning and effect: *Project Blue Sky Inc v Australian Broadcasting Authority* at 382; *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW* [2004] NSWCA 200; (2004) 60 NSWLR 558 (at 74]); DC Pearce and R Geddes, *Statutory Interpretation in Australia* (2006), Australia, LexisNexis at [2.22].

173 Although s 208Q appears in Part 11, it should be considered in the context of the Part 10 disciplinary process. If a costs assessor forms the opinion that any conduct of a barrister or solicitor involves the deliberate charging of grossly excessive amounts of costs or deliberate misrepresentations as to costs, the costs assessor must refer the matter to the Commissioner: s 208Q(1). That, as I explained earlier in these reasons, may trigger a Part 10 investigation and, in due course, may lead to Tribunal proceedings.

174 Similarly a finding that a practitioner has wilfully contravened any of ss 61(1), 62(1) – (3) and 63(2), all found in Part 6 of the 1987 Act, is declared to be professional misconduct, with potentially the same consequences as a finding of breach of s 208Q.

175 *Re Hodgekiss* established that in order to prove a "wilful" breach of the 1898 precursors of those provisions it was necessary to establish that the practitioner knew or believed he or she was committing such breaches or was recklessly careless in that regard. *Re Hodgekiss* has been applied to the meaning of "wilful" in the 1987 Act: *Coshott v Council of the Law Society of New South Wales* (Court of Appeal, 17 December 1997, unreported, BC9707048).

176 This construction of s 208Q is consistent with the language and purpose of s 208Q as it applies in the Part 10 context. It recognises the distinction between the two jurisdictions to which I have earlier referred of supervision of the legal practitioner's charges and the disciplinary proceedings. It also recognises the principle which underlies disciplinary proceedings that the legal practitioner be personally implicated in the conduct complained of. This, as I have sought to demonstrate, was the underlying common law principle and is reflected in Pt 10 of the 1987 Act.

177 Although s 208Q appears in Pt 11 of the 1987 Act, it is necessary to bear in mind that deliberately charging grossly excessive amounts of costs was declared to be professional misconduct: s 127(1)(c). Such a finding is extremely serious and has the potential, without more, of damaging a practitioner's reputation. Moreover a conclusion that a practitioner was guilty of professional misconduct established the pre-condition to making orders under either s 171C, s 171D and s 171E. Those orders could include orders removing the practitioner's name from the roll, (s 171C(1)), ordering him or her to pay compensation order up to $10,000 (s 171D) and awarding costs in favour of the Commissioner.

178 While ss 171C-E orders are discretionary, in my view it is improbable that the legislature intended to expose a legal practitioner to such severe consequences unless he or she was personally implicated in the egregious conduct complained of, that is in the intentional charging of excessive costs.

179 The effect of Beazley JA's conclusion is to deprive the appellant of any real opportunity to defeat a charge of professional misconduct. Deliberate charging of grossly excessive amounts of costs would be made out once the practitioner sent the bill, whatever his or her belief as to its quantum and would be professional misconduct without more: s 127(1)(c). As Mahoney JA explained in *Veghelyi* (BC9505459 at 11) "the quantification of costs remains an exercise in judgment, upon the result of which minds may legitimately differ". It would be a harsh consequence if notwithstanding reasonably held differences of opinion about the quantum of costs, a practitioner was guilty of professional misconduct merely by proof he or she intended to charge the costs set out.

180 The conclusion that "deliberate" qualifies the intention to charge the costs set out in the bill is not necessary to secure the protection of the client. That person's interests are prima facie protected by the costs assessment regime in Pt 11 by which he or she can secure a reduction in the bill of costs. There is no reason to infer that the legislature intended to

deprive a legal practitioner of the opportunity to defend a charge of deliberately overcharging in the context of Pt 10 by establishing, for example, that he or she relied upon competent practitioners to prepare the Bill and had no reason to believe the costs charged would be excessive: cf *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18; [2003] 1 AC 384; *Commonwealth of Australia v Cornwell* [2007] HCA 16; (2007) 61 ACSR 118 (at [44] - [45]) per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

181 I cannot, with respect, agree with Beazley JA's conclusion (at [82]) that if a solicitor could defend a charge of deliberate overcharging on the basis the bill was prepared by another, it is unlikely professional misconduct would ever be established. Such cases could be proved if the practitioner failed to exercise adequate supervision or was guilty of recklessness as in *re a Solicitor* or *Miles*.

182 If the position were to fall for consideration at common law then the authorities to which I have referred make it plain that the Commissioner would have had to prove that the appellant knew, or was recklessly careless, as to whether the charges were excessive before his conduct could be capable of constituting professional misconduct.

183 There was no evidence of the former and the Commissioner did not charge the appellant with recklessness or lack of supervision.

Orders

184 I propose the following orders:

(1) Appeal allowed.

(2) Set aside the finding of the Tribunal made on 1 November 2004 that the second complaint was established and that the conduct complained of amounts to professional misconduct.

(3) Set aside the orders made by the Administrative Decisions Tribunal on 25 August 2005 in respect of the second complaint.

(4) Dismiss Ground 2 of the Information.

(5) Respondent to pay the costs of the appeal.

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AMENDMENTS:

14/06/2007 - Typographical error - Paragraph(s) Cover sheet, Order (3)

LAST UPDATED: 14 June 2007