SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Bone* [2014] QCA 179
PARTIES:	**LEGAL SERVICES COMMISSIONER** (appellant) **v** **PAUL ERNEST BONE** (respondent)
FILE NO/S:	Appeal No 10704 of 2013 QCAT No 213 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	1 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2014
JUDGES:	Fraser, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The orders as to costs made by the Tribunal as to charges 3 to 8 be set aside.** **3. There be no order as to the costs of charges 3 to 8.** **4. There be no order as to the costs of the appeal.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – ORDERS AND COSTS – where the appellant commissioner on 14 June 2012 brought an application for referral of disciplinary proceedings in QCAT under s 452 of the *Legal Profession Act* 2007 (LPA) – where the appellant commissioner particularised eight charges against the respondent practitioner alleging "professional misconduct and/or unsatisfactory professional conduct" arising out of a complaint brought by the beneficiary to a will prepared and administered by the respondent's legal practice – where on 13 March 2013 the appellant commissioner withdrew charges 4 to 8 – where on 29 August 2013 the appellant commissioner withdrew charge 3 – where the matter was heard in QCAT on 11 September 2013 and reasons for its decision were delivered on 16 October 2013 – where QCAT ordered that the application for

disciplinary proceedings referred to in charge 1 and 2 against the respondent be dismissed – where QCAT ordered costs be paid by the applicant commissioner in respect of charge 3 on an indemnity basis after 31 May 2013 and charges 4 to 8 up to the time of their withdrawal on an indemnity basis – whether QCAT erred in finding "special circumstances" existed within the meaning of s 462(4) of the LPA to make an order for costs against the appellant commissioner – whether QCAT erred in making an order for costs on an indemnity basis against the applicant commissioner

Legal Profession Act 2007 (Qld), s 3, s 416, s 433, s 434, s 435, s 439, s 446, s 448, s 450, s 452, s 453, s 455, s 456, s 457, s 459, s 462, s 462(4)(a)
Legal Profession (Solicitors) Rules 2007 (Qld), r 9, r 10, r 28

Attorney-General v Bax [1999] 2 Qd R 9; [1998] QCA 89, cited
Attorney-General (Qld) v Francis (2008) 187 A Crim R 124; [2008] QCA 243, considered
Baker v Legal Services Commissioner (No 2) [2006] 2 Qd R 249; [2006] QCA 145, considered
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 531, considered
Di Carlo v Dubois & Ors [2002] QCA 225, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Johnston & Anor v Herrod & Ors [2012] QCA 361, considered
Legal Services Commissioner v Atkins [2009] LPT 3, considered
Legal Services Commissioner v Atkins [2009] LPT 10, considered
Legal Services Commissioner v Madden [2009] 1 Qd R 149; [2008] QCA 301, considered
Legal Services Commissioner v Scott (No 2) [2009] LPT 9, considered
Legal Services Commissioner v Sing (No 2) [2007] LPT 5, considered
LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors [2013] QCA 305, considered
Ross v Leach [2014] QCA 144, cited
Schache & Ors v GP No 1 Pty Ltd & Ors [2012] QCA 233, cited
Walsh v Law Society (NSW) (1999) 198 CLR 73; [1999] HCA 33, cited

COUNSEL: J Bell QC with D Kent QC for the appellant
C Wilson with L Clark for the respondent

SOLICITORS: Legal Services Commission for the appellant
Cartwrights Lawyers for the respondent

[1] **FRASER JA**: I have had the advantage of reading the comprehensive reasons of Morrison JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** The Legal Services Commissioner ("**the Commissioner**") appeals from a decision of the Queensland Civil and Administrative Tribunal ("**the Tribunal**") given on 16 October 2013. That decision followed the hearing of disciplinary proceedings against the respondent on two charges. Those two charges were originally part of eight charges brought against the respondent by the appellant, in a discipline application filed 14 June 2012. On 13 March 2013 charges 4 to 8 were withdrawn. Charge 3 was withdrawn later on 29 August 2013.

[4] The application based on charges 1 and 2 was dismissed. The balance of the proceedings concerned the costs orders that were sought in respect of the withdrawn charges. The appellant was ordered to pay the respondent's costs in respect of charge 3, to the extent that they were incurred after 31 May 2013, to be assessed on an indemnity basis. Further, the appellant was ordered to pay the respondent's costs in respect of charges 4 to 8, up to the time of their withdrawal, also to be assessed on an indemnity basis.

[5] The appeal concerns the orders for costs. No appeal is brought against the dismissal of charges 1 and 2, and in respect of them there is no issue as to costs.

Background

[6] At all relevant times the respondent had practised as a solicitor, and had done so for about 36 years. In 2008 he was practising on his own account when his articled clerk, Mr Markert, took instructions from a client, Mrs Q, to prepare new wills for her and her husband, Mr Q.

[7] On 10 September 2008 Mrs Q contacted the respondent's office by telephone, on two occasions. She told members of the staff that her husband was gravely ill in Nambour Hospital, and asked that someone attend to take instructions for his will. Arrangements were made for Mr Markert to attend at the hospital at 9.30 am on 15 December 2008. However, on 12 December Mrs Q rang again, and spoke to Mr Markert, telling him that her husband was too ill to see him on 15 December. She asked that Mr Markert wait for a few days before making a further arrangement.

[8] On 16 December Mrs Q again telephoned Mr Markert to make an appointment for 3.00 pm the following day, to give instructions for her husband's will. She told Mr Markert that her husband would attend one day after 18 December when he was released from hospital. Alternatively, if he was not well enough, arrangements could be made for Mr Markert to attend at Mr and Mrs Q's residence.

[9] On 17 December 2008 Mrs Q attended at the respondent's office and gave instructions to Mr Markert for wills to be drawn for both herself, and her husband.

[10] At that time Mr Markert knew that Mr Q was gravely ill and that earlier arrangements for him to attend upon Mr Q at the hospital had been cancelled. When Mrs Q came into his office on 17 December, Mr Markert knew that he was going to be taking instructions for her will, and a new will for her husband. He was also aware of the urgency, given Mr Q's state of health.

[11] When Mr Markert saw Mrs Q they discussed the appointment of an executor and trustee in each will. Mrs Q's instructions were to prepare wills on the basis that she would act as her husband's executor, and he as hers. Mr Markert recommended an additional, and alternate executor, at which point Mrs Q asked Mr Markert to assume that role. He declined but recommended that if she required a legal professional member of the firm to act, that it should be the respondent.

[12] He then told Mrs Q that she should appoint a solicitor as executor, only as a last resort:

> "as they will charge for absolutely everything they do, whether professional or personal, at their current rate and there can be a considerable charge to the estate for the Solicitor to administer".[1]

[13] Mrs Q told Mr Markert that she understood and accepted that a solicitor would charge for everything undertaken in the estate administration. Mr Markert recommended she appoint a family member or a friend, but she declined because they had no one they would wish to appoint. Mrs Q showed Mr Markert her husband's previous will, in which he appointed a solicitor as his executor. That will also contained a charging clause for the solicitor executor to charge for work done.

[14] Mr Markert explained to Mrs Q that the respondent "would only charge professional fees", and "no commission would be sought by [the respondent] if appointed as Executor".[2]

[15] Mr Markert then discussed a number of matters with Mrs Q concerning aspects of the two wills he was to prepare. She told him that she needed the wills to be done that day, and she would collect the drafts on 18 December 2008. She advised Mr Markert that if her husband was well enough she would bring him in to see him on 18 December, otherwise she would make arrangements for Mr Markert to attend at their property if her husband was too unwell.

[16] Mr Markert made a file note of his conversation with Mrs Q.[3] It runs for two and a half pages and covers matters of advice as well as matters to be put into the draft wills. Relevantly to this appeal it records the following note: "Explained Paul will only charge professional fees – OK."[4]

[17] The circumstances in which he took instructions and prepared the wills were described by Mr Markert in evidence:[5]

> "The circumstances in which I took instructions from [Mrs Q] and prepared both Wills were the product of extreme urgency. I took instructions from [Mrs Q], on [Mr Q's] behalf, for Mr Q's Will and I explained everything to [Mrs Q] for both her Will and [Mr Q's] Will. In my mind, explaining everything in this manner, particularly in relation to Solicitor-Executors and providing draft Wills, containing the clause for Solicitor-Executors was sufficient explanation. I was not aware at the time that Rule 10 of the Solicitors Rules required such explanation by way of separate correspondence. The clause in the Will setting out basis for payments to an executor/solicitor were prominent and explicit and reflected what I had told her verbally."

[18] The wills were prepared by Mr Markert and on the next day, 18 December 2008, Mrs Q attended at the respondent's firm where she read her will and duly executed it. She took away a copy of the draft will for Mr Q, together with a letter from the respondent's firm, which she said she would take to her husband who was still in hospital.

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1 Affidavit of Mr Markert, dated 7 August 2013, para 10; AB 72.
2 Mr Markert's affidavit, para 12; AB 72.
3 AB 90.
4 AB 90.
5 Mr Markert's affidavit, para 24; AB 74.

[19] Both wills contained a charging clause permitting the respondent to charge professional fees for his work administering the estates, notwithstanding that he had also been appointed as executor under both wills.

[20] Mr Q was released from hospital on 18 December and returned home with Mrs Q. He properly executed his will at his home, that day.

[21] That day, or shortly thereafter, both Mr and Mrs Q committed suicide. As a result the respondent embarked upon his duties as executor under both wills, and continued to act as executor under those wills from 24 December 2008 until 15 October 2010.

[22] In his capacity as executor the respondent retained himself to act as solicitor for the estates. For that purpose he entered into a costs agreement on behalf of each estate, permitting recovery of fees for legal and non-legal services. Under those costs agreements the respondent rendered invoices for fees totalling $87,469.85 (inc GST),[6] which included components for care and consideration. The costs agreements did not provide that the respondent could charge a fee for care and consideration. Acting as executor of the estates, the respondent did not object to the charging of the care and consideration charges, the total of which was $3,436.54 (inc GST).[7] That component was repaid to the sole beneficiary under the estates, on 8 May 2013. The respondent's willingness to repay the amount overcharged had been signified since 16 August 2011.

Charge 3

[23] Charge 3 alleged that between 24 December 2008[8] and 15 October 2010 the respondent failed to avoid a conflict of interest contrary to both Rule 9 of the *Legal Profession (Solicitors) Rules* 2007 ("**the Rules**") and his fiduciary obligations.[9] The essence of the charge was that:

(a) the respondent inserted the charging clause into the wills, which he or his firm had drafted, without bringing the clause to the attention of Mr or Mrs Q, and explaining the effect of it to them;

(b) further or in the alternative, the respondent inserted the charging clause into the wills to permit the recovery of fees for both legal and non-legal work, without making disclosure in writing, or at all, to Mr and Mrs Q of his intention to charge for non-legal work at professional rates;

(c) by entering into the costs agreements with himself, the respondent allowed his personal interests to conflict with the duties and interests of the executor of the estates;

(d) the costs agreements did not identify the rates for the performance of non-legal work; and

(e) as executor of the estates the respondent did not object to the rendering of fees for non-legal work at hourly rates for professional fees, and did not object to the rendering of fees including components of care and consideration.

[24] The charging clause referred to was in these terms:[10]

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6 Reasons [29] and [30]; AB 649.

7 Reasons [29] and [30]; AB 649.

8 The date on which the respondent became executor under the wills.

9 AB 126.

10 AB 157.

> "2(i) I hereby declare that [the respondent] … shall be entitled and is hereby authorised and empowered to charge and retain and receive out of my estate their usual professional costs and charges as well as by way of remuneration for all work done or business transacted by him or his partner or partners personally or by their clerks or agents in relation to my estate (including all business of whatsoever kind not strictly professional but which might have been performed in person by an executor or trustee not being a solicitor) as costs and charges out of pocket in the same manner as if the said [respondent] or such other persons aforesaid had not been an executor hereof but employed and retained by the executors hereof as solicitors in the matter of my estate."

[25] Rule 9 of the *Legal Profession (Solicitors) Rule* 2007 ("**Rule 9**") provides as follows:[11]

> "9.1 A solicitor must not, in any dealings with a client:
>
> 9.1.1 allow an interest of the solicitor or an associate of the solicitor to conflict with the client's interest;
>
> 9.1.2 exercise any undue influence intended to dispose the client to benefit the solicitor or an associate in excess of the solicitor's fair remuneration for the legal services provided to the client.
>
> 9.2 A solicitor must not accept instruction to act or continue to act for a person in any matter when the solicitor is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the solicitor's own interest or the interest of an associate."

[26] The respondent's defence to the charge was that the conflict of interest was drawn to the attention of Mrs Q and Mr Q, and consented to by them, and further that the charging clause was specifically drawn to the attention of Mrs Q (acting for both herself and her husband) who agreed to the content of the clause and its effect. Particulars of the defence were given, including that the charging clause was explained to Mrs Q, was prominent in each will, and read by her. Further, the costs agreement was entered into in the way suggested by leading practice texts in the field and therefore was not "prescribed conduct" within the meaning of the *Legal Profession Act* 2007. Further, the professional fees rate was to apply to all work undertaken in relation to the estates.

Charges 4 to 8

[27] Charges 4 and 5 both related to an application made by the respondent, in his capacity as executor of the estates, to the ANZ Bank to borrow $75,000 on the security of an equitable mortgage over the estates. In the loan application the respondent specified the requirements as including a component for cleaning up the property ($20,000) and funeral expenses ($11,866) and then some additional items as follows:[12]

> (a) repair and completion of home, $20,000;
> (b) replace hot water system and pump and associated works, $10,000;

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11 AB 271.
12 AB 128.

(c) clean and repaint interior, $7,000;
(d) probate and advertising costs, $3,000; and
(e) contingencies, $3,134.

[28] Charge 4 alleged that at the time he made the application to the bank, the respondent knew or ought to have known that: expenses actually incurred (other than legal costs) totalled about $13,000; that the legal costs exceeded the two components of $3,000 and $3,134; and that there was no reasonable basis for estimating the three components relating to repair and maintenance of the home.[13]

[29] Charge 5 was linked in the sense that it relied upon the same particulars and alleged that the respondent, by applying in the way he did, had failed to comply with his duty of candour to the bank.[14]

[30] Charges 6 and 7 were similarly linked, and concerned the alleged provision of misleading information to the beneficiary under the wills, the AKF. This concerned a letter written on 16 February 2009, 10 days after application was made to the ANZ Bank. The respondent informed the AKF of their entitlement as residuary beneficiary of the estates, and said:[15]

> "I currently estimate that the cleanup work on the real estate and then the finishing-off work on the home to make it saleable, will not be completed until probably the end of March 2009, and I then propose to sell that real estate.
>
> The real estate is located at … Gheerulla and consists of a home in reasonably good order subject to the above, and approximately 100 acres of bushland.
>
> The current estimate of the value of the real estate is in the order of $600,000, but there will be expenditure on repairs and renovation with the expenditure in the order of $70,0000 which funds I will borrow in my position as executor for the purpose of achieving the best available sale outcome for the property."

[31] Charge 6 was that the letter was misleading because the respondent had not applied to borrow funds of $70,000 for "repairs and renovation to the property", but instead had applied to borrow funds of $70,000 for the paying of his professional costs ($20,049.68) and accounts ($14,714).[16] The second part of the charge concerned a telephone call three days later between the respondent and the Chief Executive Officer of the AKF. In that conversation the CEO said her board was concerned at the proposal to spend in the order of $70,000 from the estates. The respondent then advised her that "a good part of that had already been spent and it was [the respondent's] assessment as trustee that it needed to be spent".[17] The complaint under the charge was that it was misleading to say that a good part of the $70,000 "had already been spent" on repairs and renovations, as it had not.

[32] Charge 7 was linked in that it relied on the same facts and said that the respondent had thereby failed to comply with his duty of candour to the AKF.

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13 AB 129.
14 AB 130.
15 AB 131.
16 AB 128, 131.
17 AB 131.

[33] Charge 8 relied on all the same facts and particulars for charges 4 to 7 and contended that in the circumstances the communications with the bank and the AKF were in breach of Rule 28 of the *Legal Profession (Solicitors) Rule* 2007. That rule relevantly provides:

> "28. A solicitor must not, in connection with the practice of law, in any communication with another person:
>
> 28.1 represent to that person that anything is true which the solicitor knows, or reasonably believes, is untrue; or
>
> 28.2 make any statement that is calculated to mislead … the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the solicitor's client …"[18]

The nature of the appeal

[34] The decision of the Tribunal which is the subject of the appeal is as to the question of costs. It was made in the exercise of a discretion conferred by s 462(4) of the *Legal Profession Act* 2007 ("**the Act**"). In respect of such an appeal, error in the exercise of the discretion needs to be shown. The oft cited decision in *House v The King*[19] sets out the accepted grounds:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."[20]

The statutory provisions and their construction

[35] The resolution of the issues in the appeal require some analysis of the provisions of the Act, particularly those concerning the issues in s 462(4), which is the section relied on by the Tribunal to make an order for costs against the Commissioner.[21]

[36] One of its main purposes of the Act is:

> "…to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally."[22]

[37] The Act makes quite extensive provision in relation to many aspects of the ability of legal practitioners to engage in legal practice, including eligibility and suitability for admission, admission to the legal profession, the issue of practising certificates,

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18 AB 283.

19 *House v The King* (1936) 55 CLR 499; [1936] HCA 40. ("***House***").

20 *House* at 504-505; *Schache & Ors v GP No 1 Pty Ltd & Ors* [2012] QCA 233, at [43].

21 In the discussion which follows I will refer to the Tribunal, although to a large extent similar provisions apply to the Legal Practice Committee.

22 Section 3.

regulation of interstate legal practitioners, how practices are conducted, making of rules governing practice and practitioners, trust accounts and trust money, costs agreements and the ability to recover costs, and claims on the fidelity fund in the event of defaults on the part of a practitioner. Chapter 4 deals with complaints and discipline, and provides as follows:

> "The main purposes of this chapter are as follows –
>
> (a) to provide for the discipline of the legal profession;
>
> (b) to promote and enforce the professional standards, competence and honesty of the legal profession;
>
> (c) to provide a means of redress for complaints about lawyers;
>
> (d) to otherwise protect members of the public from unlawful operators."

[38] Chapter 4 has a very wide operation, with very broad provisions in relation to the sort of conduct about which complaint may be made and detailed provision as to the way in which a complaint is dealt with. Section 435 applies if the Commissioner believes that an investigation should be started into the conduct of a practitioner. It grants power to refer the complaint or the investigation to, relevantly, the Queensland Law Society ("**QLS**"). Section 439 makes provision in relation to the role of the QLS if it is involved in the investigation.

[39] Powers for investigations are conferred by s 433, and s 447 makes provision in relation to the Commissioner's decision to start proceedings under Chapter 4:

> "As the commissioner considers appropriate in relation to a complaint or investigation matter that has been or continues to be investigated, other than a complaint or investigation matter about the conduct of an unlawful operator, the commissioner may start a proceeding under this chapter before a disciplinary body."

[40] Pursuant to s 448, the Commissioner is given power to dismiss a complaint in certain circumstances:

> "(1) The commissioner may dismiss the complaint or investigation matter if satisfied that –
>
> (a) there is no reasonable likelihood of a finding by a disciplinary body of –
>
> (i) for an Australian legal practitioner – either unsatisfactory professional conduct or professional misconduct; or
>
> (ii) for a law practice employee – misconduct in relation to the relevant practice; or
>
> (b) if it is in the public interest to do so."

[41] The commission has an obligation under s 450, to deal with complaints as efficiently and as expeditiously as is practicable. However, there is specific provision, under s 434, for circumstances in which the Commissioner may delay dealing with a complaint.

[42] Specific provisions are made in relation to starting proceedings before a disciplinary body, such as the Tribunal: starting with s 452. Those provisions include sections dealing with hearings, decisions of the Tribunal and enforcement of orders.

Section 453 requires the Tribunal to "hear and decide each allegation stated in the discipline application". Section 455 gives power to vary a discipline application if it is "satisfied that it is reasonable to do so having regard to all the circumstances", and in doing so the Tribunal "must have regard to whether varying the application will affect the fairness of the proceeding". Power to make orders against a practitioner is given by s 456, but only after the Tribunal "has completed a hearing of a discipline application". Those orders provide a very wide ambit for relief, including removal from the roll of practitioners, suspension of practising certificates, imposition of conditions, public reprimands and the like. Enforcement of orders is dealt with by s 457, and that section applies to an order under s 462. Those orders are enforced by filing them in the Supreme Court and giving the minister a copy of that order and the reasons for making it.[23]

[43] It is in that context that s 462 appears. It makes provision in respect of costs that may be ordered by a disciplinary body:

> "(1) A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.
>
> (2) A disciplinary body may make an order requiring a person whom it has found not to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, if the disciplinary body is satisfied that –
>
> (a) the sole or principal reason why the proceeding was started in the disciplinary body was the person's failure to cooperate with the commissioner or a relevant regulatory authority; or
>
> (b) there is some other reason warranting the making of an order in the particular circumstances.
>
> …
>
> (4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that –
>
> (a) the Australian legal practitioner or law practice employee has not engaged in prescribed conduct; and
>
> (b) the body considers that special circumstances warrant the making of the order.
>
> (5) An order for costs –
>
> (a) may be for a stated amount; or
>
> (b) may be for an unstated amount but must state the basis upon which the amount must be decided.
>
> (6) An order for costs may state the terms on which the costs must be paid.

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23 Sections 457 and 459.

…

(8) In this section –

engaged in prescribed conduct means engaged in unsatisfactory professional conduct or professional misconduct, or engaged in misconduct in relation to a relevant practice, as mentioned in section 456(1) or 458(1)."

[44] One can immediately see the difference in wording between subsections (1) and (2), and (4). The first two require that the Tribunal make a finding about whether or not the practitioner has engaged in prescribed conduct. If the practitioner has been found to have engaged in prescribed conduct, then the Tribunal must make an order requiring that practitioner to pay costs, unless there are exceptional circumstances. Where the Tribunal founds that the practitioner has not engaged in prescribed conduct, there is a discretion to order the practitioner to pay costs in certain circumstances. By contrast subsection (4) does not use the word "found", but rather "satisfied".

[45] Subsection (4) is the only provision under which the Tribunal can order the Commissioner to pay costs. Section 462 appears in Part 4.9, which is entitled "Proceedings in disciplinary body". Because of the framework in which a discipline application may be commenced and heard, and the way in which orders can be made, it seems plain that when s 462(4) provides that an order may be made requiring the payment of costs, those costs are the costs of the proceeding before the Tribunal. That is not to say that the phrase "costs" means the costs of the entire proceeding, as the subsection does not use those words. It simply says "pay costs". Further, because subsection (5) provides that the order for costs may be for a stated amount, that seems clearly to comprehend that the costs ordered may be only part of the overall costs.

[46] For similar reasons, in my view, s 462(4)(a) has a meaning constrained to the proceedings in which the order can be made. That subsection requires a state of satisfaction on the part of the Tribunal that the practitioner "has not engaged in prescribed conduct". In context that can only refer to the conduct which is the subject of the proceedings. In other words, the phrase "has not engaged in prescribed conduct" should be read as "not engaged in prescribed conduct as charged".

[47] Apart from the plain words of the subsection, and the context in which it appears, there is another reason for that conclusion. Whilst the Act has, as its purposes, the regulation of the legal profession in the interests of the administration of justice and for the protection of clients of the practitioners, and the public generally, proceedings in the Tribunal will always be in respect of specific conduct, and specific allegations of breach of a practitioner's obligations. They are akin to criminal proceedings, although not requiring the same standard of proof. In my view it would be an affront to the administration of justice that a practitioner might be absolved of the offences with which he was charged, but denied the ability to obtain a costs order merely because he could be shown to have engaged in other prescribed conduct which was not the subject of any charge. If the intention was that such a result should follow, specific words would need to be found in the statute, and they are not.

[48] Support for the conclusion that the "prescribed conduct" referred to in s 462(4)(a) is the prescribed conduct in the charge or charges, and no wider, is given by the decision of this Court in *Legal Services Commissioner v Madden*.[24] The Court held that the Tribunal's jurisdiction was limited to hearing and determining the allegations in the discipline application, and no more than that.[25] In other words, the Tribunal's jurisdiction was confined by reference to the particular allegations made in the discipline application. As to that the court said:

> "[72] This statutory context provides strong support for the construction of s 601 propounded for the appellant. The procedural provisions in pt 4.9 of the 2007 Act, notably ss 452, 453, 455 and 456, confirm that the legislative intention was to confine the Tribunal's jurisdiction by reference to the particular allegations made by the Commissioner in the discipline application. That appears clearly from the requirement in s 453 that the disciplinary body must hear and decide "each allegation stated in the discipline application". It is that which the Tribunal is "empowered to deal with under this Act" in terms of s 598, the provision that identifies the purpose of s 601.
>
> [73] Further, under s 456(1), the power of the Tribunal to make any of the orders stated in s 456 arises only after the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct; and s 456(1) provides that the Tribunal may only decide it is satisfied and make an order "after the tribunal has completed a hearing of a discipline application". The context makes it clear that that hearing and decision are those identified in s 453, that is to say the hearing and decision of each allegation stated in the discipline application.
>
> [74] The scheme of the 2007 Act is that the Commissioner investigates possible misconduct, decides whether to bring a charge, and decides what to charge. The Tribunal's role is adjudicative. Section 455 is consistent with that scheme, in that any amendment of the discipline application may be made only upon the Commissioner's application; the Tribunal then exercises a judicial discretion in deciding whether the amendment sought by the Commissioner is to be allowed."

[49] The Court referred to the High Court decision in *Walsh v Law Society of New South Wales*[26] which concerned similar legislation in New South Wales. The High Court held that the New South Wales Court of Appeal had exceeded its jurisdiction in an appeal from the Tribunal by making findings which went beyond the particular allegations formulated and particularised in the complaint heard by the Tribunal.[27] As to the New South Wales scheme, which is similar to that in Queensland, the High Court said:

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24 *Legal Services Commissioner v Madden* [2009] 1 Qd R 149; [2008] QCA 301 ("***Madden***").

25 *Madden* at [77].

26 *Walsh v Law Society (NSW)* (1999) 198 CLR 73; [1999] HCA 33. ("***Walsh***").

27 *Walsh*, at [59]-[67] per McHugh, Kirby and Callinan JJ.

> "In this scheme of discipline, a number of protections are included for the legal practitioner brought before the Tribunal. Proceedings may only be instituted "with respect to a complaint" by "an information laid by the appropriate Council or the Commissioner" in accordance with Pt 10 of the Act.[28] The function of the Tribunal is confined to that of conducting a hearing "into each allegation particularised in the information."[29]

[50] The Tribunal's function is confined to hearing allegations particularised in a given discipline application, which is one of the protections included for the benefit of a legal practitioner. Given this, there is no warrant for construing s 462(4)(a) as requiring or permitting an exploration of "prescribed conduct" outside the counts of the discipline application.[30]

Does section 462(4) depend upon a not guilty finding?

[51] Section 462(1) and (2) both require that the Tribunal has "*found*" that the practitioner has or has not engaged in prescribed conduct. That wording is not replicated in s 462(4), which merely depends upon the Tribunal being "s*atisfied* that [the practitioner] has not engaged in prescribed conduct". Reaching a state of satisfaction seems to me to require less than, and does not require that, the Tribunal making a finding that the conduct has been engaged in.

[52] In *Legal Services Commissioner v Scott (No 2)*[31] the Tribunal considered s 462(4)(a) as it was then, where instead of requiring that the Tribunal be satisfied that the practitioner had not engaged in prescribed conduct, it required it to be "satisfied that … the … practitioner … is not guilty". That case involved a series of eight charges which were amended to four during the hearing, and to which a plea of guilty was made. Fryberg J said:

> "I reject Mr Scott's submission that there is a proper basis for an order for costs in his favour. The power to make such an order depends upon a finding of not guilty. No such finding has been made."[32]

[53] Given the difference in the wording of s 462(4)(a) and that there was a finding of guilty to all charges pressed, I do not consider that statement assists. At best it is authority for the proposition that the withdrawal or abandonment of charges does not permit the Tribunal to be satisfied that the practitioner is not guilty, where a finding of guilt is necessary for that state to be reached. It is not authority governing the question whether, under s 462(4)(a) as it now stands, the Tribunal can be satisfied that the practitioner has not engaged in the prescribed conduct where charges are withdrawn or abandoned.

[54] In my view the Tribunal can reach a state of satisfaction under s 462(4)(a) even though a particular charge has not proceeded to the point where there is a finding that the practitioner has not engaged in prescribed conduct. Such a construction permits a state of satisfaction to be reached in situations where, as here, the charge has been withdrawn or abandoned, and the Tribunal has not been called upon to

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28 Referring to s 167(1) of the *Legal Profession Act* 1987 (NSW).

29 *Walsh* at 94 - 95 [61]; referring to s 167(2) of the *Legal Profession Act* 1987 (NSW).

30 See also *Legal Services Commissioner v Atkins* [2009] LPT 3, at [51].

31 *Legal Services Commissioner v Scott (No 2)* [2009] LPT 9 ("***Scott (No 2)***").

32 *Scott (No 2)* at [16].

determine it. However, as set out above, the state of satisfaction relates to the prescribed conduct the subject of the charge or charges which were the subject of the proceedings. There is no occasion for a wider enquiry into the conduct of the practitioner beyond the charges.

Legal principles – "special circumstances"

[55] The question of what might constitute "special circumstances" within the meaning of s 462(4) of the Act, has received some attention. In *Legal Services Commissioner v Atkins*[33] the Legal Practice Tribunal[34] had to consider a case where six charges were brought and of those one was withdrawn and the others failed. The practitioner sought his costs on an indemnity basis contending that there were special circumstances within s 462(4). There were a variety of arguments advanced to support that contention, but one central theme was that, in one way or the other, the various charges were such that the LSC knew facts indicating that they would fail, that they had no real prospects of success, or were hopeless. On one charge which depended upon cleared funds being made available in a trust account, it was contended that by a particular date the LSC knew that the funds could not have been cleared by the relevant date, and therefore should have conceded that the charge was unmaintainable. Instead the LSC persisted.[35] It was also argued that there was excessive delay between when the charges were file and the hearing began.

[56] Byrne SJA had this to say about special circumstances:

> "[80] The mere fact that a Discipline Application fails, or that a particular factual allegation is not sustained, cannot establish "special circumstances …". After all, the general rule is that a practitioner found not guilty is not entitled to costs.
>
> [81] But if a charge has no substantial prospect of success, and that ought reasonably to have been appreciated by the Commissioner, such "special circumstances" do arise. Similarly, a practitioner ought not to be vexed with the trouble and expense of defending an allegation of important fact that the Commissioner, as he ought to have realised if properly advised, had no real prospect of establishing.
>
> [82] When the Application was filed, the Commissioner already had information showing that there was no substantial chance of proving to the requisite standard that cleared funds were available on the date for completion. Moreover, the investigation for which Mr Atkins had been pressing for many months before the Application was brought, would – presumably at little expense to the Commission – have demonstrated that the cleared funds contention was baseless."

[57] Then, under the heading "Absence of Reasonable Likelihood of Success", Byrne SJA made the finding that there were special circumstances in this way:

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33 *Legal Services Commissioner v Atkins* [2009] LPT 10 ("***Atkins***"). There are two Legal Practice Tribunal decisions called *Legal Services Commissioner v Atkins*, namely [2009] LPT 3 and [2009] LPT 10, both of which are about the same charges. Unless otherwise indicated, *Atkins* will be a reference to [2009] LPT 10.

34 Constituted by Byrne SJA, assisted by Ms Keating and Mr Mullins.

35 *Atkins* at [64]-[67].

> "[83] In the result, the deceit charges 1, 3 and 5 had a sufficiently substantial prospect of success to have justified their prosecution before the Tribunal. But the cleared funds issue should never have featured in the Application; charge 4 should not have been brought; the withdrawn charge should have been abandoned about three months before it was; and charge 2 should not have been prosecuted beyond the stage where agreed facts inevitably meant that there was no longer a substantial prospect of an adverse finding against Mr Atkins on it.
>
> [84] The circumstances are sufficiently special as to warrant an order for costs."

[58] In *Baker v Legal Services Commissioner*[36] this Court held that in respect of s 462(1) as it then stood[37] the fact that a practitioner succeeded on some charges, but failed on others, did not amount to "exceptional circumstances". McPherson JA[38] said:

> "Even though he succeeded in some of the charges against him, the practitioner was found guilty of some seven charges that resulted in the ultimate sanction being imposed upon him of removal from the roll. No exceptional circumstances existed to defeat the mandatory requirement imposed by s 286(1) that he pay the costs including those of the Commissioner. That being so, the Tribunal was required to make the order that was made in this matter. In any event, if his Honour had discretion, it was or would have been appropriately exercised by making the order he did."[39]

[59] If success on some charges is not enough to create "exceptional circumstances" for the purpose of s 462(1), it is difficult to see why that would create "special circumstances" for the purpose of s 462(4). In any event *Atkins* provides support for the view that it does not.

[60] In *Legal Services Commissioner v Sing (No 2)*[40] a practitioner was absolved, and it was contended that because the judgment would have some broader utility than simply the resolution of the position between the LSC and the practitioner, that amounted to "special circumstances", partly because the delineation of the obligations in that case drew on established authority and in the end the result involved a value judgment on the facts of the case. As to that, de Jersey CJ said:

> "In those circumstances, albeit this matter has not been agitated judicially for a long time, there is nothing particularly special in the outcome.
>
> The statutory provision assumes that ordinarily, notwithstanding the success of the respondent, the Commissioner will not be ordered to pay costs. That no doubt recognises the public interest which motivates the Commissioner in approaching the Tribunal.
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> In that context especially, "special circumstances" means just that. They must be special, and in the end I am not satisfied that there are

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36 *Baker v Legal Services Commissioner* [2006] 2 Qd R 249; [2006] QCA 145 ("***Baker***").

37 Then numbered s 286(1).

38 With whom Jerrard JA and Douglas J agreed.

39 *Baker* at [57].

40 *Legal Services Commissioner v Sing (No 2)* [2007] LPT 5 ("***Sing***").

> in this case circumstances of that character to warrant my ordering costs against the Commissioner."[41]

[61] In *Scott (No 2)* the Tribunal considered an application for costs where eight charges were brought but in the end only four charges were pressed. On the day of the hearing major amendments were made to the eight charges, substantially scaling back one, and deleting another. At the hearing one charge was struck out. During the course of the hearing deficiencies were identified and the Commissioner undertook to examine them. On day two of the hearing it was announced that a settlement had been reached, which involved the presentation of an amended application and a plea of guilty to the amended charges. On the third day leave was granted to file and serve the amended application, which contained only four charges. Fryberg J examined the question of whether "exceptional circumstances"[42] existed. He adopted the passage from *Attorney-General (Qld) v Francis*[43] which examined the phrase "exceptional circumstances" in a different context. The passage is as follows:

> "The issue of what are exceptional circumstances in a particular case is one that depends on judicial determination. It is fruitless to attempt to define what exceptional circumstances might be but a practical working approach to it is to be found in the following passage from *R v Kelly (Edward)* [2000] QB 198 at 208, where Lord Bingham of Cornhill CJ had to construe the term in a statutory context. He said:
>
> > 'We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.'"[44]

[62] His Honour noted that at a very late stage the Commissioner withdrew three of the charges and the fourth was struck out, and of the ones which remained, allegations of intentional misleading were withdrawn and other charges were substantially reduced. Fryberg J then said:

> "No evidence was placed before me which would enable me to make an evidence-based finding about whether such circumstances form an ordinary part of proceedings in the Tribunal. My own experience in the Tribunal is too limited for me to take judicial notice of the frequency of any such circumstances. However it is I think reasonable for me to apply a presumption of regularity. I presume that a change of tack on the part of the Commissioner of the nature and magnitude as occurred in this case is an extraordinary event in proceedings in the Tribunal, and is not something which "is regularly, or routinely, or normally encountered". In my judgment the present proceedings fall within the exception to s 462(1)."[45]

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41 *Sing (No 2)* at p 2-3.

42 As s 462(1) then required.

43 *Attorney-General (Qld) v Francis* [2008] QCA 243 ("***Francis***").

44 *Francis* at [92].

45 *Scott (No 2)* at [21] (internal citations omitted).

[63] It is of interest to note that Fryberg J did not order that the practitioner receive a costs order in his favour. Instead the practitioner was ordered to pay the Commissioner's costs, but limited to those matters on which the Commissioner was successful. The other matter to note about that case was that there was no finding that any charge fell in the category where it might be said that the Commissioner knew or ought to have known it had no prospect of being established, or that, properly advised, the Commissioner should have recognised there was no reasonable likelihood of success. In that sense *Scott (No 2)* involved proceedings which were regularly instituted and justifiably pursued to the point when one charge was deleted and the others substantially scaled back. Those circumstances did not warrant, in the exercise of the discretion, a costs order in favour of the practitioner.

[64] In *Atkins* costs were awarded on an indemnity basis. The reason for applying that basis of assessment was explained by Byrne SJA as follows:

> "The "special circumstances" that warrant the costs order involve the notion that, at various times before the hearing, the Commissioner, appropriately advised, should have recognised that there was no reasonable likelihood of success on the failed charges or the cleared funds allegation. On this basis, there is a proper foundation for the costs to be assessed on an indemnity basis."[46]

[65] It appears from that passage, in my respectful opinion correctly, that consideration of the basis of assessment of the costs is a separate matter from establishing that special circumstances exist to reverse the general rule. It may be that what constitutes "special circumstances" in order to enliven the ability to order costs, is the same as the ground or foundation for enlivening the discretion to order costs on an indemnity basis, but that will not necessarily be the case. It should not be assumed that if "special circumstances" exist so as to enliven the power to order costs, that that automatically means on an indemnity basis. Separate consideration needs to be given to that issue.

[66] In my view *Atkins* and *Baker* establish the following propositions:

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

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

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

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

Legal principles – indemnity costs

[67] In *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo*[47] this Court recently referred to the principles applying to the award of indemnity costs, in these terms:

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[46] *Atkins* at [89]. Footnote in original: "cf *Di Carlo v Dubois & Ors* [2002] QCA 225, [36]-[40]; *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337, [44]-[46]; *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353, [106]-[113]. It was not argued that indemnity costs should not be ordered if a charge or the cleared funds contention had no reasonable likelihood of success."

[47] *LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors* [2013] QCA 305.

> "[21] The applicable principles for the awarding of indemnity costs were usefully summarised by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*.[48] However, those principles operate as a guide to the exercise of the relevant discretion. They do not define all of the circumstances in which the discretion is to be exercised and do not limit the width of that discretion.[49] Further, the categories in which the discretion to award indemnity costs may be exercised are not closed.[50]
>
> [22] Whilst the awarding of costs on an indemnity basis will always ultimately depend upon the exercise of a discretion in the particular circumstances of each individual case, the justification for an award of indemnity costs continues to require some special or unusual feature of the particular case. As was observed by Basten JA in *Chaina v Alvaro Homes Pty Ltd*,[51] the general rule remains that costs should be assessed on a party and party basis, and the standard to be applied in awarding indemnity costs ought not "be allowed to diminish to the extent that an unsuccessful party will be at risk of an order for costs assessed on an indemnity basis, absent some blameworthy conduct on its part"."

[68] The principles or guidelines referred to from *Colgate Palmolive*[52] appear in the following passage from that decision:

> "I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp* (supra)); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson* (1987) 10 NSWLR 525; *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724 (Court of Appeal); *Crisp v Keng* (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) … . Other categories of cases are to be found in the reports. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis."[53]

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48 (1993) 46 FCR 225 at 232-234.

49 *Ingot Capital Investment & Ors v Macquarie Equity Capital Markets & Ors (No 7)* [2008] NSWSC 199 at [26].

50 *Di Carlo v Dubois & Ors* [2002] QCA 225 at [37].

51 [2008] NSWCA 353 at [113].

52 *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 ("***Colgate Palmolive***").

53 *Colgate Palmolive*, at 233-234 per Sheppard J.

[69] Notwithstanding that the principles in *Colgate Palmolive* do not define all of the circumstances in which the discretion is to be exercised, and do not limit the width of that discretion, nonetheless they provide useful guidance to the type of special or unusual circumstance that will enliven the discretion. As was said in *Di Carlo*:[54]

> "It is important that applications for the award of costs on the indemnity basis not be seen as too readily available when a particular party against whom the order is sought is seen to carry responsibility for the state of affairs calling for a costs order without some further facts analogous to those mentioned in *Colgate* and other considered decisions."[55]

[70] Further, in *Di Carlo* this Court also adopted as correct the proposition that in order to enliven the discretion one is not confined to the situation of an "ethically or morally delinquent party",[56] but "… the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation".[57] Other cases have adopted as the test: "whether there was something irresponsible about the conduct of the losing party which exposed its opponent to costs which should, in fairness, be ordered on the indemnity basis".[58]

[71] In *Johnstone v Herrod*[59] this Court considered a contention that findings of fraudulent misrepresentation or unconscionable conduct would necessarily result in an order for indemnity costs. That proposition was rejected as failing to appreciate the basis on which indemnity costs were normally decided. The Court referred to *Di Carlo* and *Colgate-Palmolive*, and then said:

> "[10] It was said in *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)*[60] that:
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> "[t]he authorities do not support the proposition that simply instituting or maintaining a proceeding on behalf of a client which has no or substantially no prospect of success will invoke the jurisdiction. There must be something more namely, carrying on that conduct unreasonably."
>
> [11] It may be seen from the foregoing that, in determining whether indemnity costs should be ordered, the normal focus is on the conduct in and in respect of the litigation by the party against whom the costs order is to be made. The primary judge appeared to have accepted that the respondents' arguments were not obviously unsustainable. His Honour was entitled to take that view. The respondents, in fact, succeeded on appeal in showing error in some of the primary judge's findings of fact and law."

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54 *Di Carlo v Dubois & Ors* [2002] QCA 225 ("***Di Carlo***").

55 *Di Carlo* at [40].

56 Referring to the description by Gummow J in *Botany Municipal Council v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (1992) 34 FCR 412, at 415.

57 *Di Carlo* at [38], referring to *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 616. *Colgate-Palmolive* and *Rosniak* were also adopted by this Court in *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337.

58 *Todrell Pty Ltd v Finch (No 2)* [2008] 2 Qd R 95; [2007] QSC 386, at [4], referred to in *Ross v Leach* [2014] QCA 144, at [9].

59 *Johnston & Anor v Herrod & Ors* [2012] QCA 361.

60 [1998] 156 ALR 169 at 236 referred to in *Martinovic v Chief Executive, Queensland Transport* [2005] 1 Qd R 502 at 508; *QUYD Pty Ltd Marvass Pty Ltd* [2009] 1 Qd R 41 at 52 per Fraser JA, McMurdo P and Philippides J agreeing.

The competing contentions as to what is required for the Tribunal to reach the stage of satisfaction under s 462(4)(a).

[72] The appellant contended that in reaching a decision about whether it was satisfied that the practitioner had not engaged in prescribed conduct for the purposes of s 462(4)(a), the mere fact that the charges had been withdrawn was insufficient. Therefore, the Tribunal erred when it asked the rhetorical question: "In the absence of a charge, what other conclusion could the Tribunal reach?".[61]

[73] The appellant also contended that in order to reach a state of satisfaction under s 462(4)(a) some sort of proof was required, raising the question of who bore that onus. The contention was that proceedings against a practitioner in the Tribunal should not be seen in the same way as normal litigation, because of the legislative provisions which have the effect that the Commissioner acts in the public interest and to protect the public. Further, the appellant relied on the statutory scheme which meant that ordinarily, notwithstanding the success of the practitioner, the Commissioner would not be ordered to pay costs. The appellant's contention was that if an onus existed, it rested on the practitioner, rather than the Commissioner.

[74] The respondent's primary contention was that in the circumstances of this case two of eight charges had been pressed, and were dismissed. Therefore there were findings that, at least in respect of the first two charges, the practitioner had not engaged in prescribed conduct. It was therefore open for the Tribunal to conclude that s 462(4)(a) had been satisfied.

[75] The respondent's alternative contention was that if it was necessary to be satisfied, beyond the dismissal of the first two charges, of the matters in s 462(4)(a), it was reasonable for the Tribunal to infer that in the absence of a charge, the practitioner did not engage in the prescribed conduct. No evidence was presented on charges 3 to 8 because they were withdrawn, and therefore there was no need for the Tribunal to require any evidence.

What must be shown before the Tribunal can be "satisfied" under s 462(4)(a)?

[76] Consideration of this question should be confined to the type of case the subject of this appeal, namely where a charge has been withdrawn or abandoned, unilaterally by the Commissioner.

[77] Since the only party who would seek an order under s 462(4) is the practitioner, it is the practitioner who bears the onus of persuading the Tribunal to the point of satisfaction of the two matters required to be shown under subsections (a) and (b). Further, as that would be done as part of an application for such an order there is no reason to confine the applicant to material that had already been exchanged to that point. There is no reason why further affidavit or other evidence could not be adduced on the application, provided it was relevant to the questions then to be determined under s 462(4).

[78] As to what is needed by way of proof, the answer must logically be that each case will depend upon its own facts. In every case the exercise of the discretion of s 462(4) will arise in the context where proceedings have already been instituted against a practitioner. That will inevitably mean that there has been some course of correspondence between the Commissioner on one part and the practitioner on the

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61 Reasons [94].

other, in relation to the complaints that led to the formulation of charges, and then the institution of proceedings. Therefore it can be expected that in most, if not all, cases there will be some material before the Tribunal from which inferences might be drawn as to where the merits lay, notwithstanding that the charge has been withdrawn or abandoned.

[79] In some cases the charge might be withdrawn or abandoned early in the proceedings, and therefore there will be little apart from the course of correspondence prior to the institution of the discipline application. In other cases, such as the present, the proceedings will have progressed some way along the path towards a hearing, in which case there may well be more facts from which inferences can be drawn. That would include the response to the discipline application, particulars given, and documents disclosed as between the parties.

Relevance of the appellant's concession?

[80] In submissions before the Tribunal the appellant's outline (which was the first to be delivered) addressed only charges 1 and 2. As to that the appellant said, by way of introduction, that:

> "The [appellant] now presses only the first two of the eight charges, and seeks findings of unsatisfactory professional conduct, a public reprimand and no order as to costs."[62]

[81] A footnote was added to the reference to "no order as to costs", which read:

> "Although the normal order would be that if successful the [appellant] would have its costs pursuant to s462 (1) of the Act, the [appellant] is content to proceed on the basis that exceptional circumstances exist, because only two of the eight charges are proceeding"[63]

[82] Two things can be noted about the concession. First, on its face it was made in respect of charges 1 and 2, and no wider. Secondly, it was a concession as to the applicability of s 462(1), and not s 462(4).

[83] The respondent contended (before the Tribunal and this Court) that the concession was applicable to or had an impact on the question of whether "special circumstances" existed under s 462(4)(b). It was put that the "Tribunal was entitled to take this into account in determining whether there were special circumstances to justify a costs award" in relation to charges 3 to 8.[64]

[84] The concession was adverted to by the Tribunal, but only in the context of considering the costs in relation to charges 4 to 8. As to that, at [113] the following appears:

> "It will be recalled that, in his submissions about charges 1 and 2, the Commissioner signified that even if Mr Bone was found guilty of either or both, the LSC did not seek costs orders because of '*special'* circumstances in the matter. Those circumstances were not expanded but it is compelling that the submission involves a tacit acceptance by the Commissioner that Mr Bone has, in common parlance, been put through the wringer in this matter and to pursue him for costs on the

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62 Appellant's Outline of Submissions, dated 4 September 2013, para 2; AB 609.

63 Appellant's Outline, footnote 1; AB 609.

64 Respondent's Outline of Submissions, filed 4 April 2014, para 61.

> remaining two relatively minor charges would be harsh, and unfair. It is not unfair to observe that, if the circumstances are '*special'* in the event of that outcome, they are more compellingly so when Mr Bone has escaped any adverse finding at all."[65]

[85] One can leave aside for the moment the misdescription in the first line, referring to "special" circumstances rather than the wording of the concession, referring to "exceptional circumstances". The basis of the concession was that "the Respondent has been put to expense when only two out of eight charges proceeded".[66] It may be that the concession involves the tacit acceptance referred to in the next part of [113], but the last sentence expresses a conclusion with which, with respect, I cannot agree. The proposition put is that if there are special circumstances in the event of the practitioner being found guilty, "they are more compellingly so when [the practitioner] has escaped any adverse finding at all". In my view that does not follow. If a practitioner escapes any adverse finding at all, that practitioner will have been found not to have engaged in prescribed conduct within the meaning of s 462(2). That subsection reflects the general rule reflected in *Atkins* and *Baker*, namely that the mere fact that a charge fails, or a particular factual allegation is not sustained, cannot establish "special circumstances", because of the general rule that a practitioner found not guilty is not entitled to costs. That principle is not challenged in this Court by the respondent. Further, the concession was made in an outline of submissions filed at a time when charges 4 to 8 were not proceeding, and there would therefore be no adverse finding as a result of them. It is difficult to follow how the concession in respect of charges 1 and 2 could therefore be translated "more compellingly" to charges 4 to 8 in the face of the general rule which applies to successful practitioners in discipline applications.

The Tribunal's findings as to satisfaction under s 462(4)(a)

[86] The Tribunal's finding in respect of this aspect appears in [94] of the Reasons:

> "There is no compelling basis for concluding, as occurred in *Scott*, that the phrase '*... has not engaged in prescribed conduct*' in s 424(4)(a) must be confined to circumstances in which the practitioner has actually been found not guilty of a disciplinary charge, and cannot extend to those in which a charge has been brought, but withdrawn. The Tribunal must, the provision says, be *satisfied* that the practitioner has not engaged in conduct of that kind. In the absence of a charge, what other conclusion could the Tribunal reach?"[67]

[87] That conclusion was reached after the Tribunal considered *Scott (No 2)* and the *Atkins* decisions.[68] At [90] of the Reasons the Tribunal identified that Fryberg J construed s 462(4)(a) to mean that there must be an actual finding of "not guilty".[69] The Tribunal went on to observe that Byrne SJA reached a different conclusion in *Atkins*. Two passages from *Atkins* were cited by the Tribunal, namely [81] and [89]. However, with respect to the Tribunal, I do not consider that Byrne SJA reached a different conclusion to *Scott (No 2).* There were two categories of charges in *Atkins*. One was called the Forge complaint, which was admitted. There were six charges

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65 AB 662.
66 Appellant's Outline in Reply, dated 10 September 2013, para 8; AB 637.
67 AB 659.
68 [2009] LPT 3 and [2009] LPT 10.
69 *Scott (No 2)* at [16].

arising out of what was called the Steep complaint. One of those charges was withdrawn and the others failed. On the Forge complaint a separate order for costs was made.[70] In relation to the Steep complaint charges Byrne SJA referred to s 462(4)[71] and then said:

> "Mr Atkins has been found guilty of unsatisfactory professional conduct on the Forge complaint. But it is not suggested that the joinder of the Forge charge means that s 462(4)(a) is not satisfied. So the question is whether "special circumstances" warrant making an order for costs in respect of the unsuccessful prosecution arising out of the Steep complaint."[72]

[88] It is plain that what followed was a consideration of whether "special circumstances" existed so that s 462(4)(b) was enlivened. There was no further discussion of whether, and how, s 462(4)(a) was satisfied. The inference which I would draw is that there was no contention before Byrne SJA in *Atkins* that s 462(4)(a) had not been met. Had that been a matter of contention, it is inconceivable that it would not have been dealt with by his Honour. It seems to me that the proper construction of what his Honour was saying is this: that the joinder of the Forge charges did not mean that s 462(4)(a) was not capable of being satisfied.

[89] An alternative view of *Atkins* is that it is implicit in paragraph [11] that Byrne SJA was satisfied that the practitioner was not guilty, notwithstanding that he revealed no analysis of that question, nor reasons for that conclusion. That would be such an unusual course for his Honour to take that I feel unable to accept it.

[90] This consideration aside, I respectfully agree with the conclusion reached by the Tribunal at [94] of the Reasons.

Discussion of Charge 3

Charge 3 – course of correspondence prior to filing the discipline application

[91] The discipline application was filed on 14 June 2012. Prior to that time there was a considerable exchange between the appellant and the respondent in relation to the matters which eventually became the subject of the charges.[73] The course of that correspondence, as it relates to charge 3 is set out below.

[92] Following a complaint from the sole beneficiary under the wills[74] the appellant wrote to the respondent on 20 October 2010. That enclosed the complaint by the AKF, and raised seven issues upon which the respondent was asked to provide an explanation. The issues raised a potential breach of Rule 10 (not Rule 9) and included whether there was a conflict of interest and whether excessive fees had been charged.[75]

[93] On 8 November 2010 the respondent provided the explanations. They included details as to how the instructions were given by Mrs Q and the fact that Mr Markert

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70 *Atkins* at [8].

71 As it then stood; s 462(4)(a) then required that the Tribunal be satisfied that the practitioner "is not guilty", rather than "has not engaged in prescribed conduct".

72 *Atkins* at [11].

73 The exchange ranged wider than those matters but many of them fell by the wayside during the course of the correspondence.

74 The Australian Koala Foundation ("**the AKF**").

75 AB 434.

had made file notes recording his advice that if the respondent acted as executor, the office would charge for such work in accordance with their standard charges, and Mrs Q's acknowledgement and acceptance of that fact.[76] A copy of the letter sent to Mr and Mrs Q (enclosing the draft wills) was attached.[77] It did not specifically draw attention to the charging clause. In relation to the fees an explanation was given that the rates were the usual and reasonable rates of charge and in accordance with the costs agreements entered into.[78]

[94] On 2 March 2011 the QLS[79] wrote to the respondent. It asked a number of questions about the circumstances surrounding the time when the wills were prepared, and for an explanation as to how Rule 10 could have been satisfied if no written advice was given about the inclusion of the charging clause in the wills.[80] It did not raise a breach of Rule 9. The letter also asked a number of questions in relation to the costs agreements and the basis for charging.[81] A request was made for a copy of Mr Markert's file notes concerning his taking instructions from Mrs Q.

[95] On 23 March 2011 the respondent wrote to the QLS.[82] A copy of Mr Markert's file note was provided. As to the questions about the charging clause, this was said:[83]

> "1.1 **Charging clause**
>
> Whilst the covering letter of 17.12.2008 to Mrs Q did not refer to the charging clause, the Will itself was provided to Mrs Q for her perusal before execution, and it contained the charging clause, **so that [Mr and Mrs Q] were notified in writing of the substance of the charging clause**.[84]
>
> The charging clause is clear as to its intention.
>
> The contents of the charging clause were in accordance with Mr Markert's oral advice to Mrs Q as recorded in his Mr Markert's notes."

[96] The respondent also provided an explanation in some detail about the charging of a commission and professional fees.[85] However, no doubt because Rule 9 had not been raised, the letter did not address Rule 9.

[97] By 21 April 2011 the appellant had received reports from the QLS giving advice about the matters the subject of the investigation. They did not identify a breach of Rule 9. On 28 June 2011 the appellant sent those reports to the respondent inviting submissions.[86]

[98] The respondent provided submissions on 19 August 2011.[87] The response addressed all of the conduct issues raised in the reports sent to the respondent, but, because it had not been raised, did not address a breach of Rule 9. In relation to the charging of care and consideration items the respondent accepted that they were incorrectly

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76 AB 437.
77 AB 94.
78 AB 442, 445.
79 Who had been retained by the appellant to investigate the complaints.
80 AB 460-461.
81 AB 462.
82 AB 464.
83 AB 464.
84 Emphasis added. This contention (that the written notice could be constituted by handing over the will with the charging clause prominent) was not pressed before the Tribunal: AB 22.
85 AB 467-468.
86 AB 514-515.
87 AB 538.

charged having regard to the provisions of the costs agreements, which provided for time charging only. An offer was made to refund the amount of those charges to the residuary beneficiaries of each estate.[88]

[99] The appellant wrote to the respondent on 28 November 2011[89] setting out its views on the various matters of concern. Issue seven was identified as a potential conflict arising from the fact that the respondent as executor has retained himself as solicitor.[90] For the first time the potential breach of Rule 9 was raised.[91] However, the focus of the concern was the potential for conflict of interest, not the failure to make disclosure in writing. That was raised only in the context of Rule 10.[92] Response was invited as to the matter raised.

[100] That response was given on 6 February 2012.[93] Insofar as it concerns charge 3, the response was that it was not unusual, particularly in a solicitor's practice in rural Queensland, for a solicitor to act as both executor and solicitor for the deceased estate. Reference was made to the text, "Wills and Administration Practice" by Mr de Groot, and the suggestion of conflict of interest was rejected in these terms:

> "In conclusion, in circumstances where [the respondent] followed common practice, adopted a course of action recommended by the leading publication in the field, and did not overcharge, there is no reasonably likelihood of a finding of unsatisfactory professional conduct or professional misconduct."[94]

[101] The appellant wrote to the respondent again on 23 April 2012.[95] That letter provided draft particulars of charges to be the subject of a disciplinary proceeding. One of the identified draft charges was the one which became charge 3. Further submissions were invited.

[102] On 15 May 2012 the respondent advised that no further submissions would be made.[96]

Charge 3 – proceedings in the Tribunal, withdrawal and reasons for withdrawal

[103] The matter then proceeded in the Tribunal and various steps were taken including disclosure and consideration of the exchange of statements. By 11 January 2013 the appellant had signified that it was reconsidering its position in relation to charge 4.[97] On 13 March 2013 the appellant wrote, announcing its decision "not to proceed with charges 4 – 8 in the discipline application".[98] It went on to note that the respondent "essentially concedes charges 1 and 2", and continued:

> "That leaves charge 3. The Commissioner has decided that charge will remain on foot. However, the Commission is open to discussion as to how best to proceed with that charge."[99]

The appellant invited "your client's views as to how charge 3 should proceed".

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88 AB 541.
89 AB 543.
90 AB 544.
91 AB 545.
92 AB 548.
93 AB 552.
94 AB 553.
95 AB 556.
96 AB 570.
97 AB 599.
98 AB 600.
99 AB 600.

[104] On 17 May 2013 the Tribunal held a compulsory conference. At that conference a direction was made that:

> "The Legal Services Commission must inform the representatives for [the respondent] as to which of the charges 1 to 3 will be proceeded with by: 4:00pm on 31 May 2013."[100]

No notice was given by the appellant as directed by the Tribunal. However, the respondent clearly accepted that charge 3 was to proceed; the respondent made the submission to the Tribunal that:

> "[The respondent] submits that in the intervening period he went to considerable effort and expense through his legal representatives to prepare and meet that charge, including obtaining lay and expert evidence. The delay by the Commissioner has not been explained."[101]

[105] Charge 3 was withdrawn on 29 August 2013.[102] During the hearing in the Tribunal, the following exchange occurred between the Tribunal and counsel for the appellant:[103]

> "MEMBER: Mr Kent, charge 3 was withdrawn [on] the 29th of August; is that correct? Is there any explanation by the Commission as to, having regard to the directions made by the Senior Member on the 17th of May, why that wasn't done earlier?
>
> MR KENT: There's an explanation that's not based on any evidence before the tribunal, so I'm not sure that my learned friend would be happy for me to give it.
>
> MEMBER: All right."

[106] When the appellant notified that charge 3 was to be withdrawn the reason given was:

> "As a result of a review of your client's affidavit material (in particular, the sworn evidence of Mr Andrew Markert) the Commissioner has decided not to proceed with charge 3 in the Discipline Application."[104]

Discussion – withdrawal of charge 3

[107] The respondent's affidavits were filed on 6 and 7 August 2013. The appellant's contention was that the decision to withdraw the charge was in response to those affidavits. In particular the following evidence was identified as material:[105]

(a) that the practice of the respondent was to include care and consideration charges in each costs agreement, which practice had mistakenly not been followed, without his knowledge;[106]

(b) that the practice of the respondent was to inform a client in writing of a charging clause in a draft will, which practice had not been followed by the articled clerk, Mr Markert;[107]

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100 AB 253.
101 Reasons [99]; AB 660.
102 AB 607.
103 AB 62.
104 AB 607.
105 Appellant's Outline of Submissions, filed 27 March 2014, para 16.
106 Respondent's affidavit, dated 6 August 2013, para 16; AB 66.
107 Respondent's affidavit, paras 20-24; AB 67.

(c) that detailed information had, however, been given orally by Mr Markert;[108] and

(d) Mr and Mrs Q had given consent to the inclusion of the charging clause.[109]

[108] Of those points it may be accepted that the first two had not been notified in the course of correspondence, or otherwise, prior to receipt of the affidavits. The third and fourth, however, were known from as early as 8 November 2010, as a detailed account of Mr Markert's conference with Mrs Q had been given. However, when the appellant was asked specifically whether there was any explanation as to why the charge had not been withdrawn earlier than it was, the response did not rely upon the information revealed in the affidavits. Rather, the response was:

> "There's an explanation that's not based on any evidence before the tribunal, so I'm not sure that my learned friend would be happy for me to give it."[110]

[109] That exchange is probably the basis of the comment by the Tribunal[111] that "[t]he delay by the Commissioner has not been explained", and also the comment[112] that "[t]he process of reasoning by which the Commissioner came to conclude that charge 3 should be withdrawn is not disclosed …".[113]

[110] The Tribunal proceeded on the basis that charge 3 could not be said to have been so plainly unmeritorious as to mean that it should not have been brought or proceeded with at all.[114] However, the Tribunal regarded the delay after 31 May as different. That was the date by which the appellant was to announce to the respondent which of charges 1, 2 and 3 were proceeding. Ten days earlier than that the matter was set for hearing. The Tribunal's view was expressed in this way:

> "While charge 3 remained on foot [the respondent] was compelled to prepare to meet it, and to do so until a date within a fortnight before the hearing was to commence, when the Commissioner notified him it was withdrawn. That delay, in breach of a Tribunal order, may fairly be categorised as something falling within the meaning of the phrase '*special circumstances*' and to warrant an order that the Commissioner should pay [the respondent's] costs after 31 May 2013 in respect of charge 3, on an indemnity basis."[115]

[111] The Tribunal was not left with two conflicting explanations as to the reason why charge 3 was withdrawn. The exchange with the appellant's counsel set out at [108] above was directed to why notice of withdrawal had not been given earlier than 29 August. That question was not directed to the reason for withdrawal, as opposed to the timing of it. The question of timing had an explanation that was not in the evidence, but the explanation for the withdrawal of the charge was, namely that it was "as a result of the review of your client's affidavit material (in particular the sworn evidence of Mr Andrew Markert) …".[116] No attempt was made to impugn the truth of that explanation.

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108 Respondent's affidavit, para 31; AB 68; Mr Markert's affidavit, dated 7 August 2013, paras 10-30; AB 72-76.

109 Respondent's affidavit, para 31; AB 68; Mr Markert's affidavit paras 10-30; AB 72-76.

110 AB 62.

111 Reasons [99]; AB 660.

112 Reasons [100].

113 AB 660.

114 Reasons [100]; AB 660.

115 Reasons [101]; AB 660; emphasis in original.

116 AB 607.

[112] The position before the Tribunal was, therefore, as follows:

(a) the Tribunal had found that charge 3 was not so plainly unmeritorious that it should not have been brought or proceeded with;[117]

(b) on 17 May the Tribunal directed that the appellant must inform the respondent as to which of charges 1 to 3 would be proceeded with, by 31 May 2013;[118]

(c) the appellant did not give such notice but the respondent acted on the basis that all three charges were proceeding; whilst there was a breach of the direction, in that the appellant did not give the notice that it was required to do, the breach had no impact except in so far as the respondent took the silence to mean that all three charges were being proceeded with, and acted accordingly;

(d) then the matter was set down for hearing under a Tribunal notice dated 21 May 2013;[119]

(e) subsequently the parties settled a statement of agreed facts;[120]

(f) on 6 and 7 August 2013 the affidavits of the respondent and Mr Markert were filed (respectively); the respondent's affidavit raised, for the first time, new explanations turning on the practice in his firm and how, without his knowledge, that practice was not followed by Mr Markert;[121]

(g) on 29 August 2013 the appellant announced that as a result of a review of the affidavit material it had decided not to proceed with charge 3;[122] and

(h) as at 13 March 2013 the appellant took the view that charge 3 concerned an area of conduct "in which the professional and ethical obligations of practitioners are unclear and should be clarified";[123] in that sense the respondent characterised the proceedings for charge 3 as being in the nature of a "test case", both before the Tribunal and in this Court; that was a description not resisted by the appellant.

[113] Before the Tribunal the submission made by the respondent in respect of costs concerning charge 3 was:[124]

> "It is submitted that, where the applicant has brought serious charges which are not proceeded with, and where there is no explanation of the evidence in support of those charges or the delay in abandoning them, it is appropriate that the applicant pay the respondent's costs on the indemnity basis. Such an order is appropriate where charges are abandoned."[125]

[114] In my respectful view it was not correct to say that there had been no explanation of the evidence in support of charge 3. The facts establishing the conduct were largely admitted, and it was a question of characterising whether that conduct offended Rule 9. True it was that there was no explanation of the delay after 31 May 2013 in

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117 Reasons [100]; AB 660.
118 AB 253.
119 Reasons [101]; AB 660.
120 AB 155.
121 Respondent's affidavit, paragraphs 16 and 20; AB 66-67.
122 AB 607.
123 AB 600.
124 Reasons [83]; AB 633.
125 See eg *LSC v Atkins* [2009] LPT 10.

announcing that charge 3 would be abandoned, but the reason for the abandonment had been given, and was not challenged.

[115] The Tribunal's reasoning for the grant of costs on an indemnity basis turned on characterising the delay after 31 May 2013 as being in breach of the Tribunal order. Whilst technically that was so, it did not, for reasons outlined above, disadvantage the respondent. The respondent proceeded on the same basis as if the appellant had notified that it **would** proceed. Had the appellant given notice that charge 3 would proceed, and then the respondent was successful in respect of it, that would not, of itself, constitute "special circumstances". It is true that the respondent incurred costs in meeting charge 3 after 31 May 2013 and until 29 August 2013, but he was in no worse position than if by the deadline of 31 May, the appellant had said that charge 3 would proceed. The subsequent filing of the affidavits and a review of them led to the charge being withdrawn.

[116] It is also true that on 17 May the respondent put the appellant on notice that he would seek indemnity costs of charge 3. However, such notice was given in advance of the deadline for when the appellant was to notify whether it would proceed with charge 3 or not, and could only have been directed to the outcome if charge 3 was proceeded with and then dismissed. It could hardly have been notice that if the charge was proceeded with and then abandoned because of a review of material filed by the **respondent**, that such costs would be sought. In any event, the terms of that notice were not in evidence before the Tribunal, and not referred to by the Tribunal in its reasons.

Conclusion – charge 3 – "special circumstances"?

[117] In *Atkins* and *Baker* it was established that the mere fact that a charge fails, or a particular factual allegation is not sustained, cannot establish "special circumstances". The basis for that principle is the general rule that a practitioner found not guilty is not entitled to costs. Before this Court the respondent accepted[126] that simply withdrawing a charge would not amount to "special circumstances".

[118] Therefore one must start with the position that the withdrawal of charge 3 would not, of itself, constitute "special circumstances". Therefore the question which must be addressed is whether anything else in the attendant circumstances would change that approach? The Tribunal pointed to the delay after 31 May, in breach of the Tribunal order.[127]

[119] In my respectful view that characterisation was erroneous. On 17 May 2013 the Tribunal made its direction. However, even though notice was not given in accordance with that direction, the breach had no practical consequence because the respondent continued as if notice had been given that the charge would proceed. Subsequently in July the parties settled an agreed statement of facts which included all of the correspondence leading up to the time when the discipline application was filed. None of that material contained the explanations given on 6 and 7 August when the affidavits by the respondent were filed. Those affidavits identified, for the first time, the explanations turning on the respondent's practise in his firm, and how it had not been followed, but without his knowledge. Within about three weeks, upon review of that material, the decision was made to withdraw the charge.

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126 Transcript 1-65.

127 Reasons at [101].

[120] In those circumstances it does not seem to me that the matter is taken so far out of the normal rule that it can be characterised as "special circumstances". It must be borne in mind that the "special circumstances" are those which would reverse the normal position, which is that the commissioner will not be ordered to pay costs even if the practitioner succeeds. Here proceedings regularly instituted and justifiably pursued were eventually withdrawn once the respondent filed material to show that there was a compliant practise in his firm, but it was not followed by the articled clerk in this case.

[121] Further, the Tribunal's conclusion that special circumstances existed in respect of charge 3 is, with respect, difficult to reconcile with their findings in respect of charges 1 and 2. In respect of them the Tribunal said:

> "[96] Charges 1 and 2 have been dismissed in circumstances where (whatever the tension between the decisions in *Scott* and *Atkins*) Mr Bone has, in truth, been found not guilty. It cannot be said that either charge was, in the phrase which is sometimes used, plainly without merit or bound to fail. They involved non-compliance with a statutory rule, and a (void) costs agreement. They might, at worst, be described as adventurous; but, as these reasons show, they did require earnest consideration.
>
> [97] Once that is recognised, it cannot be said that the circumstances are '*special*' in the sense that word is used in s 462(4)(a), and construed by the Chief Justice in *Sing*. As his Honour observed, the provision must also be applied in the light of the public interest which motivates the Commissioner in approaching the Tribunal."[128]

[122] Clearly the Tribunal found that if charges fall into the category whereby one cannot say that they were plainly without merit or bound to fail, notwithstanding they might be described as adventurous, that would not constitute special circumstances. The Tribunal made the same finding in respect of charge 3.[129] That is why, it seems, that the Tribunal focussed on delay and breach of the direction, as outlined above.

[123] In my view the Tribunal erred in concluding that there were "special circumstances" in respect of the withdrawal of charge 3.

Conclusion – charge 3 – indemnity costs?

[124] The situation is one, therefore, where proceedings in respect of charge 3 were regularly instituted, were not so plainly unmeritorious that they should not have been brought or proceeded with (as the Tribunal found), and then were withdrawn upon a review of the material put forward by the respondent. That hardly warrants an order on an indemnity basis. Nothing in the conduct of the appellant comes close to the circumstances which warrant the order of indemnity costs.[130]

[125] That is particularly so given the special role which the appellant plays and the public interest which motivates the appellant in approaching the Tribunal. So much was recognised in *Sing* where the Chief Justice, referring to s 462(4), said:

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128 AB 659.

129 Reasons [100].

130 See paragraphs [67]-[71] above.

> "The statutory provision assumes that ordinarily, notwithstanding the success of the respondent, the Commissioner will not be ordered to pay costs. That no doubt recognises the public interest which motivates the Commissioner in approaching the Tribunal."[131]

[126] That also reflects the fact that the primary purpose of disciplinary proceedings is to maintain public confidence in the integrity and competence of the legal profession by protecting the public.[132]

[127] Support is also found in the reasons of Byrne SJA in *Atkins*:

> "[80] The mere fact that a Discipline Application fails, or that a particular factual allegation is not sustained, cannot establish "special circumstances …". After all, the general rule is that a practitioner found not guilty is not entitled to costs.
>
> [81] But if a charge has no substantial prospects of success, and that ought reasonably to have been appreciated by the Commissioner, such "special circumstances" do arise. Similarly, a practitioner ought not to be vexed with the trouble and expense of defending an allegation of important fact that the Commissioner, as he ought to have realised if properly advised, had no real prospect of establishing.
>
> …
>
> **Basis of assessment**
>
> [89] The "special circumstances" that warrant the costs order involve the notion that, at various times before the hearing, the Commissioner, appropriately advised, should have recognised that there was no reasonable likelihood of success on the failed charges … On this basis, there is a proper foundation for the costs to be assessed on an indemnity basis."

[128] In respect of charge 3, the Tribunal found that "it cannot be said that it was always so plainly unmeritorious as to mean that it should not have been brought or proceeded with". The delay after 31 May 2013 did not change the character of the proceedings. Even though the appellant committed a technical breach of the Tribunal's direction, that also did not change the character of the proceedings, or disadvantage the respondent beyond the normal incurring of costs to meet a charge brought by the Commissioner. In the absence of a finding that the decision to withdraw charge 3 was conduct of the sort that would normally attract an indemnity costs order, or that the notified reason for withdrawing charge 3 was suspect or untrue, the situation is: this is a regularly brought proceeding, not so unmeritorious that it should not have been proceeded with, and it has been abandoned for justified reason. They are not circumstances that warrant a costs order on an indemnity basis.

[129] When one has regard to the Reasons at [101], it is difficult, with respect, to identify that the Tribunal gave separate consideration to the question of the basis upon which costs might be ordered, i.e. the standard basis or indemnity basis. The final sentence of [101] expresses a finding in respect of "special circumstances" and then proceeds to find that those circumstances warrant an order for costs in the first place,

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131 *Sing* at p 2 per de Jersey CJ.

132 *Baker* at [46] per McPherson JA; *Attorney-General v Bax* [1999] 2 Qd R 9 at 23.

and on indemnity basis in the second. What constitutes "special circumstances" might in some cases also be grounds for ordering costs on an indemnity basis, but that does not necessarily follow. Further, to not separately identify the considerations that apply to the basis for the costs, as opposed to whether special circumstances exist, runs the risk that inappropriate weight will be given to the separate principles which apply to the question of whether costs are awarded on an indemnity basis. That risk is manifest in this case, as the reasons above demonstrate.

Respondent's submission – costs on indemnity basis not challenged

[130] The respondent contended before the Tribunal that the appellant did not oppose an order that, if costs were awarded, they should be assessed on an indemnity basis. I do not accept that contention. The respondent's submissions in respect of costs included: in respect of charges 4 to 8, submissions that there could be no real suggestion of mala fides on the appellant's part in bringing those charges; and in respect of charge 3, submissions to the effect that the appellant could, in the circumstances, reasonably form the view that a finding of unsatisfactory professional conduct was reasonably likely, meaning it was appropriate to pursue the complaint. These are matters which are applicable to the question of a basis of an order for costs, as well as special circumstances. Those matters were expanded upon in oral address before the Tribunal.[133] Whilst it might be correct to say that a separate submission was not addressed specifically to the question of indemnity versus standard costs, the respondent plainly opposed the orders on all bases. The Tribunal must have accepted that to be so, as otherwise one would have expected the Tribunal to record the non-opposition to the basis for costs.

Charges 4 to 8 – the Tribunal's approach

[131] The Tribunal held that the appellant at no time disclosed the evidence to support the allegation that the respondent knowingly misled either the bank or the AKF, or breached his duty of candour. Further that nothing had occurred from the time that the discipline application was filed that added to what the appellant already knew about those matters before that time. Therefore the decision to withdraw the charges on 13 March 2013, was simply in effect, a change of heart on the part of the appellant. The central findings are in paragraphs [103] to [107] of the Reasons:[134]

> "[103] Correspondence contained in a large bundle of agreed documents filed by the parties shows that these matters were prominent in investigations undertaken by the QLS in 2010, having been raised in the AKF's original letter of complaint of 20 October 2010. [The respondent], through his solicitor, sought details of the allegation that both the bank and AKF had been misled on 6 February 2012 and, in particular, detailed particulars of any allegation that [the respondent] knew the representations were untrue. The Commissioner did not respond. Further, when the disciplinary application was first filed, [the respondent] complained about the absence of particulars in charge 8 and the Tribunal directed that they be supplied.
>
> [104] The Commissioner has never disclosed any evidence to support the allegation that [the respondent] knowingly misled either the bank or the AKF, or breached his duty of

133 AB 59 and following.

134 AB 660-661.

> candour. Allegations of this kind involve, effectively, a charge of fraud, and are very serious. It is a trite proposition that they should not be made lightly.[135]
>
> [105] On 12 December 2012 the Commissioner asked [the respondent] not to '*progress*' matters relating to these charges and they were discussed again in January 2013. In a letter of 13 March 2013 the Commissioner said that he had '*... reviewed the evidence in this matter and taken into account the submissions made on behalf of [the respondent]*' and that '*... following that review, the Commissioner has decided not to proceed with charges 4 - 8 in the discipline application*'.
>
> [106] Amongst the Commissioner's documents is one relating to its internal work in evaluating the case against [the respondent] and also, showing occasions in which advice was sought from both senior and junior counsel. It shows no more than that the matter did not, as it were, go to sleep in the Commissioner's office – there were, for example, five advices from senior and junior barristers between 12 December 2012 and 30 May 2013, but their purpose is not disclosed.
>
> [107] What is disclosed is that after the disciplinary charge was brought on 14 June 2012 there was no material communication about charges 4 – 8 or their particulars between the parties save for [the respondent's] Response, filed in QCAT on 20 August 2012. The inescapable conclusion is that the '*review of the evidence*' and the '*submissions made by [the respondent]*', referred to in the Commissioner's letter of 13 March 2013, can only be references to evidence gathered, and submissions made by [the respondent] or on his behalf, *before* the discipline application was even filed."

Discussion of charges 4 to 8

The ANZ loan

[132] The first category of misleading conduct charged against the respondent was that he had provided misleading information to the ANZ Bank on 6 February 2009, when seeking to obtain a loan for the estates. The essence of the charge is that he told the bank that the loan was to be used for a purpose other than to meet his legal fees (leaving aside probate). The appellant advanced submissions in this Court that the conduct was misleading and lacked candour[136] and that was to be inferred from facts in existence as at 6 February 2009, namely:

(a) the respondent appreciated that the estates had no liquid assets;
(b) he acted for the estates as executor, as well as solicitor for the executor, and had signed a costs agreement for each estate as executor and as solicitor;
(c) he had commenced to undertake work and charge for it;
(d) he appreciated that he would undertake further work in administration of the estates and would render accounts to the estates accordingly;

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135 Dal Point, *Lawyers' Professional Responsibility* (2012, 5th Ed, Thomson Reuters), 17.220.

136 Thus picking up charges 4, 5 and 8.

(e) he intended to use part of the loan for the purpose of paying his professional costs and outlays, as demonstrated by the fact that when the loan was approved on 9 April 2009 the respondent was on that day paid $20,049.68 from the loan monies for his legal fees.[137]

State of professional fees and expenses as at 6 February 2009

[133] Before going to the correspondence, a couple of matters can be noted from the documents that were held by the appellant before the discipline application was filed. As at 6 February 2009:

(a) the respondent had paid $943.48 (exc GST) in estate expenses,[138] and had incurred professional fees amounting to $1,618.35 (exc GST);[139]

(b) an account, dated 29 January 2009, had been rendered for professional fees in the sum of $8,827.43 (inc GST);[140]

(c) on the estate of Mrs Q, the respondent had rendered his first account, dated 22 January 2009, totalling $5,471.18 (inc GST);[141] that included a care and consideration component of $436.31 (exc GST), and outlays of $247.09 (exc GST);

(d) on Mrs Q's estate additional professional costs were incurred up to 6 February, in the sum of $763.45 (exc GST);[142] and

(e) an entry concerning the letter to the ANZ Bank on 6 February 2009[143] was recorded as "Letter to ANZ Bank, Noosa Heads in relation to borrowing funds to pay numerous estate outlays."[144]

[134] The invoices on each estate reveal activity that one might expect at the commencement of the administration of a deceased estate. Included in that was contact with the ANZ Bank starting on 3 February in relation to seeking a loan on behalf of the estate to pay for various outlays. The more mundane activities concerned establishing superannuation entitlements, ensuring that insurance was in place, paying electricity accounts, organising skips to be delivered (for the purpose of cleaning up the property), inspection of the property and motor vehicles, and steps taken to sell off the motor vehicles and other items.

Charges 4 to 8 – the course of correspondence

[135] In early correspondence with the AKF the respondent gave answers to a number of questions about the administration of the estates. Objection was taken to the incurring of interest on borrowed funds and it was asserted that the respondent had:

> "sought to sell the property as early as 7th January, 2009, when you took advice from Mr John Harding of Countryside Realty in relation to the condition of property and eventual value once (the) property is maintained and repaired."[145]

[136] The response was detailed and included the following:

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137 Respondent's Outline, para 21.

138 AB 211.

139 AB 225-227.

140 This invoice appears at AB 242-251. It contains a care and consideration component of $688.27 (exc GST), and outlays of $283.64 (exc GST). See also AB 239.

141 AB 323-328.

142 These are reflected in the second account, dated 19 March 2009, at AB 329-331.

143 In an invoice rendered later on 20 March 2009; AB 225.

144 AB 227.

145 AB 425.

(a) the estate of Mr Q did not have sufficient funds to pay for funeral expenses and other liabilities; the available funds of one estate could not be used to meet the liabilities of the other;
(b) the property and surrounds were in a badly run down state and required urgent attention both for hygiene reasons as well as fire safety; repair expenses were necessary because the house was unsafe for habitation and its water pump did not work;
(c) the respondent investigated the sale of the property in January 2009, but once advised by the AKF that they wished to receive title of the property, rather than the proceeds of sale, that position changed;
(d) in the respondent's letter of 16 February 2009 the AKF was informed of the proposed expenditure and the need to borrow the funds; and
(e) the loan from the ANZ Bank in the sum of $55,000 was used to pay the respondent's accounts dated 29 January, 20 March and 9 April 2009.

[137] That exchange was provided to the appellant in October 2010. On the basis of that information the appellant wrote to the respondent on 20 October 2010 seeking explanations on various matters including: "[w]hether you have wrongly profited from a fiduciary relationship, particularly in relation to a payment of $50,000 described as repayment of a loan".[146]

[138] On 8 November 2010 the respondent replied.[147] In relation to matters touching on the loan the respondent pointed out the run down nature of the property and the need for repair works to be undertaken so that the house complied with applicable building safety codes, and insurance would not be voided.[148] As to the funds borrowed from the ANZ Bank, the respondent said:

> "As Trustee, I borrowed the funds necessary to pay the expenses incurred in the administration of [Mr Q's] estate, including my internal accounts.
>
> The alternative was that I pay those funds on my own business overdraft account which would have incurred the same recoverable interest on the funds used.
>
> The obtaining of the loans for the purpose of the estate allowed separate and identifiable accounting of the cost incurred."[149]

[139] The detail of the borrowings was then dealt with, and the disbursement of the funds noted in a specific attachment which consisted of copies of ledgers. Then followed this explanation:

> "I have not wrongly profited in any way from the borrowing and repayment of the two ANZ loans[.]
>
> To the extent my professional fees have been paid from those loans, the conduct of the executorship by me comes at a cost both for my fees and for outlays I incurred.
>
> These costs have to be paid from somewhere, or in the alternative, I bear the costs and outlays from my own pocket until completion of the administration of the estate, and I would then charge interest incurred on my outstanding accounts, as per the usual terms of my Costs Agreement. Either way, the same expense is incurred.

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146 AB 434.
147 AB 436.
148 AB 441.
149 AB 441.

> By the distinct borrowing as Trustee, the loans, the expenditure of the loans proceeds, and the cost of that borrowing are kept as a single and distinct account."[150]

[140] In the exchange to this point no complaint had been made that the respondent misled the ANZ Bank in some way, and therefore that allegation did not have to be answered.

[141] On 2 December 2010 the QLS wrote to the respondent raising specific questions about the ANZ loans.[151] None of those questions included the suggestion that misleading conduct was involved when the loan was obtained.

[142] On 16 December 2010 the respondent replied to the QLS.[152] He enclosed his letter to the ANZ Bank dated 6 February 2009 and then said, as to those loans:[153]

> "2.2 The borrowings were for the payment of estate liabilities.
> The only method by which the administration of the estate of [Mr Q] could be progressed was for funds to be raised against the estate, as the estate did not have liquid funds available, or alternatively, the real estate asset be sold.
> The power to borrow is provided by the *Trusts Act 1973.*
>
> 2.3 The liabilities paid were directly arising from my conduct as Trustee and were not my personal liabilities.
> The money necessary to meet the estate liabilities had various borrowing costs which are properly attributable to the estate.
> Alternatively, if I had paid the estate expenses from my own office account, then that would have incurred greater borrowing cost by way of overdraft interest which would have been recoverable against the estate pursuant to the costs Agreement entered into.
>
> 3. **The $50,000 Loan**
>
> (a) As the expenses were already incurred, I understood it to be in order to pay those expenses from the office account
>
> (b) The balance funds of $4,435.41 were deposited from my office account, as unexpended, to an ANZ Investment Account on 14.04.2009 in the name of the estate and then subsequently paid to my Trust Account on 08.05.2009.*"*

[143] On 2 March 2011 the QLS sought further responses.[154] This raised the question of the disparity between what had been said to the bank and the application of the funds. The respondent was asked to explain why he had delayed contacting the AKF until 16 February 2009, why he did not approach them for payment of outstanding liabilities prior to making the loan application, and:

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150 AB 442.
151 AB 452.
152 AB 457.
153 AB 458 (emphasis in original).
154 AB 460.

> "The reasons why you applied the loan moneys towards payment of your professional costs and outlays contrary to the stated purpose of the loan as set out in your loan application letter dated 6 February 2009."[155]

[144] The respondent answered that letter on 23 March 2011.[156] As to the loans the respondent again noted that neither of the estates had liquid funds and the administration of a related estate took some time to realise so that funds could be made available.[157] Detailed explanations were given as to the delay in approaching the AKF, and why they were not approached for funds. Then, as to the disparity in the application of funds from that which had been put forward to the ANZ Bank, the respondent said:[158]

> "Subsequent to the letter by me of 06.02.2009 to the ANZ Bank, Ms Tabard had informed me the AKF did not want to accept the estate liabilities had to be paid from the assets of the estates, and I therefore did not proceed with the expenditures as had been initially proposed by me.
>
> Our costs continued to accrue on the estate files and I was not prepared to act as the long-term financier of the estate liabilities, including legal costs, having regard to the displayed attitude of Ms Tabard on behalf of the AKF."

[145] On 28 June 2011 the appellant sent copies of reports it had obtained in respect of the complaints made against the respondent.[159] It sought any submissions that the respondent cared to make. The first of those reports concluded that there were grounds to proceed against the respondent for failing to provide sufficient disclosure to the ANZ Bank about the true purposes of the two loans.[160] However, that report then formulated three conduct issues, none of which included the allegation that there was a failure to provide sufficient disclosure to the ANZ Bank. Rather, the allegation was that the respondent had "borrowed unnecessarily to fund the estates' debts".[161] The second report did not adopt that as a ground for proceeding against the respondent.[162]

[146] On 16 August 2011 the respondent replied.[163] That response was specifically on the basis that the matters to be addressed were the three conduct issues as formulated in the first report. Therefore, insofar as the ANZ Bank issue was concerned, the response only addressed the question of whether the respondent had "unnecessarily borrowed money from the ANZ Bank to meet the costs of administering the estates".[164]

[147] On 28 November 2011 the appellant wrote to the respondent.[165] It raised for the first time the two issues which are at the heart of charges 4 to 8, and they were expressed as:[166]

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155 AB 462.
156 AB 464.
157 AB 466.
158 AB 467.
159 AB 514.
160 AB 504.
161 AB 507.
162 AB 512.
163 AB 538.
164 AB 540.
165 AB 543.
166 AB 544.

> "12. Lack of candour or misleading conduct in his application to the ANZ Bank about the money to be spent on the renovation to the house property; and
>
> 13. Lack of candour or misleading conduct in his advice to the AKF about the money that had been, and was to be, spent on the renovation to the house property."

[148] Those issues were amplified in the body of the letter[167] and focussed on the fact that in the loan application no mention had been made of the respondent's professional costs as being one of the purposes for the loan, when that was the application of the funds on 9 April 2009. In respect of the lack of candour towards the AKF, this centred on the difference between a letter written on 16 February 2009 informing them of the intention to borrow $70,000 in respect of "repairs and renovation", and a comment made orally on 20 February 2009 to the CEO of the AKF, where the respondent told her that "a good part of that had already been spent and it was my assessment as trustee that it needed to be spent". This comment was recorded in one of the respondent's own file notes, and it is therefore evident that the appellant had a copy of that file note at the time.[168]

[149] The respondent replied on 6 February 2012.[169] As regards the asserted lack of candour, the response was:[170]

> "***Issue 12 – Lack of Candour – ANZ Bank Application***
>
> As noted in your letter, the bank application included anticipated expenses described as "probate costs". On any view that term would include the usual professional charges and costs associated with administering and undertaking legal work for the estate. We do not understand the Commissioner to be contending that the ANZ Bank was misled, and if there is evidence to that effect we ask that we be provided with it before addressing that matter further.
>
> As to the round figure estimates, the suggestion that [the respondent] could not provide such estimates in the absence of quotes without "misleading" the bank is, if made, rejected.
>
> ***Issue 13 – Lack of Candour – AKF***
>
> As we understand it, the concern is that, when approached on 20 February 2009 by the CEO of the beneficiary AKF, [the respondent] advised the AKF's representation that "a good part of [$70,000] had already been spent". Noting that, as referred to above, the costs included probate costs which were the subject of the application to the ANZ Bank, and that significant expenditure had been incurred by 20 February 2009, the statement in question was not untrue within the meaning of rule 28 of the *Legal Professional (Solicitors) Rules* 2007. If it is intended to suggest that [the respondent] knew the statement to be untrue, or that the statement was calculated to mislead, it is appropriate that detailed particulars of that allegation by provided. [The respondent] will not make further submissions at this juncture."

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167 AB 549-550.
168 AB 550.
169 AB 552.
170 AB 554-555.

[150] The notable features of that response are:

(a) the contention that there was no evidence that the ANZ Bank had been misled, and if there was such evidence the respondent wished to be provided with it before having to address the matter further;

(b) the respondent knew that significant expenditure had been incurred by 20 February in which case the comment to the CEO was not untrue; and

(c) if the intention was to suggest that the respondent knowingly misled the CEO, particulars were sought, and further submissions would not be made until they were provided.

[151] On 23 April 2012 the appellant provided its draft discipline application[171] which included formulations of charges 4 to 8 in similar terms to those in which they were eventually filed. Further submissions were invited. On 10 May 2012 the respondent advised that no further submissions would be made.[172]

Charges 4 to 8 – correspondence after discipline application filed

[152] The discipline application was filed on 14 June 2012, and served on 3 July 2012 under a letter which advised that the appellant had "considered all the relevant evidence" and was satisfied that discipline proceedings were warranted.[173] On 22 October 2012 the appellant amended the charges in order to provide particulars which had been sought previously. Charges 4, 6 and 8 were amended. No objection was taken to those amendments by the respondent[174] and the parties proceeded with disclosure.

[153] By 12 December 2012 it appears that the appellant was seeking "to put a halt on progressing this matter".[175] The respondent asked for the appellant to state the basis for that request. There were telephone conversations between the two sides, and the result was that on 11 January 2013 the respondent's solicitor wrote to the appellant, recording that "the LSC is reconsidering its position in relation to charge 4", and advised that:

> "We do not intend to take any further steps with respect to this matter until such time as the LSC has completed its investigations and finalised both the charges and the particulars against our client."[176]

The appellant was asked to advise once it had completed the investigations and finalised the charges.

[154] Then, on 13 March 2013 the appellant advised:

> "As discussed, the Commission has reviewed the evidence in this matter and taken into account the submissions made on behalf of [the respondent].
>
> Following that review, the Commissioner has decided not to proceed with charges 4 – 8 in the discipline application."[177]

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171 AB 556.
172 AB 570.
173 AB 571.
174 AB 596.
175 AB 598.
176 AB 599.
177 AB 600.

Was an explanation given in answer to charges 4 and 6?

[155] The first time that charges 4 and 6 were raised specifically was on 28 November 2011.[178] In each case the ground was accompanied by detailed particulars. In respect of the loan application to the ANZ Bank, those particulars included:

(a) no mention was made, in the list of purposes for the loan, of professional costs, when at that time costs had actually been incurred as to $1,193.68 and funeral expenses of $11,865.70;

(b) whilst the estimated allowance of $20,000 for clean up costs might be considered accurate, the review of the file had not shown any quotes or other information from which the estimates to repair the home, replace the pump and clean and repaint could be justified;

(c) when the loan was approved on 9 April 2009, an amount of $50,000 was drawn down that day and of that $45,569.59 was paid to the respondent, of which the component for professional costs was $20,049.68;

(d) of the $70,000 drawn down, only some $38,000 was put towards the expenses detailed in the loan application letter, and the remainder went to fees; and

(e) thereby it was said that there was an issue as to whether the letter of application was either misleading or lacking in candour.[179]

[156] As to the conversation with the AKF, it was highlighted that the question raised as to the lack of candour was that the respondent had said that "a good part of [the $70,000] had already been spent", when it had not.[180]

[157] In each case the respondent was asked to provide "a further explanation and submissions".

[158] In response, on 6 February 2012, the explanation in each case was quite truncated. As to the loan application it was that the bank application included "anticipated expenses" described as "probate costs" which "would include the usual professional charges and costs associated with administering and undertaking legal work for the estate".[181] The respondent rejected the suggestion that by providing round figure estimates the bank was misled, but did not answer or explain the point raised by the appellant, namely that there was nothing on the file which would indicate how those figures could be justified.

[159] As to the AKF allegation, the only possible explanation given was in the sentence which read:

> "Noting that, as referred to above, the costs included probate costs which were the subject of the application to the ANZ Bank, and that significant expenditure had been incurred by 20 February 2009, the statement in question was not untrue within the meaning of rule 28 …"[182]

That did not really address the disparity raised by the appellant, which was that the comment had been that a good part of the money "had already been **spent**", not just incurred.

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178 AB 543.
179 AB 549.
180 AB 550.
181 AB 554.
182 AB 555.

[160] In each case it would have been relatively simple for the respondent to have proffered some sort of explanation, if it existed. In the case of the loan application, one could imagine an explanation being that the respondent did his best to estimate the figures on 6 February, and events changed so that by 9 April the requirements were different. Alternatively, it might have been said that at 6 February it was not anticipated that the loan would be used for legal costs, but that had changed as at 9 April, because of the AKF's stance. But nothing was said, beyond the fact that the item for "probate costs" would comprehend the more expansive component of professional fees. Likewise, in respect of the conversation with the AKF, one could imagine an explanation which said that using the words "had already been spent" it was intended to mean "incurred" rather than actually paid out. But again nothing was said.

[161] As to the loan application, one part of the response was to say that the respondent did not understand the appellant to be contending that the bank was misled, but if there was evidence to that effect, "we ask that we be provided with it before addressing that matter further". Whether the bank was actually misled is beside the point. It is the misleading nature of the application itself, or the lack of candour involved in it, that was at the heart of charge 4. It is quite possible for that conduct to have been misleading (or lacking candour), even though the bank was not actually misled in the event, or even misled to its disadvantage by the receipt of it.

[162] As for the conversation with the AKF, apart from the explanation (such as it was), the only other thing required was the provision of particulars if it was intended to suggest that the respondent knew the statement to be untrue, or that it was calculated to mislead. Those particulars were provided when the draft charges were made available to the respondent on 23 April 2012. Relevantly, it was put that when the respondent said that a good part of the money "had already been spent", it had not been "spent" on repairs and renovations, and the respondent either knew or ought to have known that it was untrue. Those particulars were repeated in the charges as filed.[183] At the time the draft charges were provided the respondent was invited to make any further submissions, but declined to do so.

[163] In the absence of a better explanation of either charges 4 and 6 it is, in my view, difficult to criticise the appellant from proceeding with them. In this respect it must be borne in mind that the Tribunal made no finding that any of charges 4 to 6 were charges which should not have been brought or were unreasonable to bring. If there was to be a contention that the appellant, properly advised, should have appreciated that the charges were not sustainable, the onus of proving that lay on the respondent.

[164] The respondent did provide an answer to each of charge 4 and 6, in his response to the disciplinary application.[184] In essence there were three responses in relation to the loan application letter. The first was that the loan was divided between the estates, and therefore only $57,000 would be required on clean up, repairs and renovation, whilst $18,000 would be required for funeral expenses, administrative and contingency expenses. The response goes on to note that each item of expenditure (other than the funeral expenses) was noted as "Est. max" meaning the estimated maximum required. The response also pleaded that the letter included various details of the work required, and a timetable.

[165] Secondly, the respondent said (for the first time) that at the time of the loan application he did not intend the loan proceeds (if approved) would be applied in

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183 AB 587-588.

184 AB 147-149 in respect of charge 4 and AB 151-152 in respect of charge 6.

payment of legal costs, and the estimate of $3,000 for "probate, advertising and application costs" was not an estimate which included professional fees.[185] Further, as at the date of the application, the respondent intended and expected that expenses and expenditure would be as set out in the loan application, and that his costs would not be paid from the loan proceeds, but rather from the sale proceeds of the property.

[166] Thirdly, the respondent said (for the first time) that he had estimates from a builder for the repairs, plumbing and electrical costs, and relied on his own 35 years experience as a solicitor and property owner in respect of the repairs and painting of the house.

[167] As to charge 6 (the conversation with the AKF), the essence of the response was that if he used the phrase "a good part" in relation to the expenditure, he did so simply to indicate a substantial proportion of the total, which had been identified in the letter on 16 February 2009. Further, the respondent pleaded that he used the phrase "already been spent" to indicate that "such expenditure had been committed to, incurred, and (in limited amount) paid for, as was the case".[186] He pointed to the fact that there were two notes of the conversation.[187] One was a type written note that used the phrase "already been spent"; this was the note in the possession of the appellant. The second was described as a "contemporaneous note". The contemporaneous note used the phrase "already incurred". In that respect the respondent believed that "the contemporaneous note is likely to be an accurate record of the words used".

[168] The response to the discipline application was filed on 17 August 2012 some six weeks after the proceedings had been served on the respondent. That response was also filed ahead of a request for particulars, which was made on 28 September 2012. Those particulars, amending the charges were provided on 22 October 2012.[188] The particulars did two things in respect of charge 4. It replaced the schedule of items listed in the letter with one that more accurately reflected what had been said in the letter, splitting the items between the two estates and including the words "Est. max" in each case. Secondly, it added the particulars that:

(a) at the time the application was made the respondent knew that he had already rendered a tax invoice on 29 January 2009 for fees and outlays of $8,827.43, which remained unpaid;

(b) he had incurred costs to 6 February of $2,538.35 and outlays of $684.25; and

(c) the respondent's work was ongoing, he was likely to render interim accounts, and he intended, at the date of the application, to use part of the proceeds of the loan for the purpose of paying professional costs and outlays.

[169] There was no amendment to the particulars of charge 6. Particulars were added to charge 8, reflecting those in charges 4 and 6.[189]

[170] On 3 December 2012 the respondent advised he had no objection to the proposed amendments, but reserved the right to respond to them once they were finalised and filed.[190] Then on 12 December 2012 through to 11 January 2013 the correspondence from the respondent indicated that there was a "halt" on progressing the matter, and charge 4 was being reconsidered by the appellant.[191]

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185 This is directly contrary to the explanation given on 6 February 2012, AB 554.
186 AB 152.
187 AB 550.
188 AB 574.
189 AB 590-594.
190 AB 596.
191 AB 598-599.

Discussion – the Tribunal's findings on charges 4 to 8

[171] The review of the facts above reveals that there are, with respect, difficulties with the findings that the Tribunal made about these charges.

[172] In [103] of the Reasons the Tribunal found that on 6 February 2012 the respondent sought details of the allegations and particulars of any allegation that the respondent knew the representations were untrue. The Tribunal then found that the Commissioner did not respond. That can only be understood as meaning between 6 February 2012 and when the disciplinary application was filed. However, in my respectful view that finding cannot be sustained. On 23 April 2012 the appellant provided draft particulars of charges, including detailed particulars of charges 4 and 6. Those particulars were later replicated in the disciplinary application itself. On any view that step amounted to the appellant announcing to the respondent that they were the particulars to be relied upon in respect of charges 4 and 6. Of course, those particulars had a flow through effect to the other charges.

[173] Secondly, at [104] the Tribunal found that the appellant had never disclosed any evidence to support the allegation that the respondent knowingly misled either the bank or the AKF, or breached his duty of candour. That, too, cannot be sustained. In terms of the actual proceedings once the disciplinary application had been filed, the time to exchange statements or provide some form of evidence had not arrived by the time the charges were abandoned. On 28 September 2012 the respondent sought and obtained directions from the Tribunal for the provision of particulars, which were supplied on 22 October 2012. Those particulars had changed and expanded the particulars of charge 4, and had a flow-on effect to charge 6, and then again to charge 8. It took six weeks for the respondent to reply to the provision of the particulars, and that reply was to propose mutual disclosure in December 2012, and to reserve the right to respond to the amendments.[192] Nine days later the matter went into a "halt"[193] which effectively lasted until 13 March 2013, when charges 4 to 8 were withdrawn. As at 11 January 2013 mutual disclosure was to continue, notwithstanding that the appellant was then reconsidering its position in relation to charge 4.

[174] The case on charges 4 and 6 always was, except as to the conversation with the CEO of the AKF, a documentary one, relying on inferences to be drawn from the loan application, the state of the respondent's invoices and accounts, and the letter to the AKF. Most of the documentary evidence had been disclosed between the parties from an early time, well before the discipline application was filed.

[175] At [107] of the Reasons the Tribunal found that, save for the response to the disciplinary application, there was no material communication about charges 4 to 8 or their particulars after the disciplinary application was filed. Then follows this finding:

> "The inescapable conclusion is that the '*review of the evidence*' and the '*submissions made by [the respondent]*', referred to in the Commissioner's letter of 13 March 2013, can only be references to evidence gathered, and submissions made by [the respondent] or on his behalf, *before* the discipline application was even filed."[194]

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192 AB 596.

193 AB 598.

194 AB 661.

[176] I do not consider that finding can be sustained. To do so is to read the phrase "reviewed the evidence in this matter and taken into account the submissions made" as excluding what was put in the response to the disciplinary application. That response included:

(a) the averment of a positive case by the respondent as to the state of his intention about the loan proceeds and how the respondent expected his costs to be paid;

(b) a direct contradiction of the significance of the item of $3,000 for "probate, advertising and application costs";

(c) for the first time, a positive case that the respondent had obtained estimates from a builder in respect of some of the repairs, plumbing and electrical costs, and advice from a local real estate agent; and

(d) in respect of charge 6, for the first time that there were two notes, and that the contemporaneous note had used the phrase "already incurred" rather than "already spent" and that was the accurate record of the words used.

[177] If the positive case was made out it had an obviously damaging impact on the charges framed.

[178] In my view the reference to reviewing the evidence can only sensibly be understood as including a review of the positive case advanced by the respondent in respect of charges 4 and 6.

[179] At [108] of the Reasons the Tribunal noted the appellant's submission that the evidence had been reviewed, the appellant had taken advice and eventually concluded that the charges should not proceed. Then, at [109] the Tribunal said this:

> "That description of the Commissioner's role, and the burdens attached to it, is readily understood and accepted. It might have more weight here were it not the case, as is apparent, no new evidence appeared and nothing material occurred between the time the discipline application containing these charges was filed, and the time the Commissioner decided not to proceed with them."[195]

[180] That passage repeats the finding, which cannot be sustained, that no new evidence appeared and nothing material occurred. With respect the contrary is the case. In the response to the discipline application the respondent put forward an affirmative case which, if accepted, would have been substantially destructive of the charges. It is, in my respectful view, a most unlikely proposition that the appellant did not take into account that positive case when reviewing the matter.

[181] The conclusions above mean that the Tribunal's finding in [112] of the Reasons cannot be sustained. That finding is the essential element in the Tribunal's decision to grant costs against the appellant, and on an indemnity basis. It said:[196]

> " While it is important that the Commissioner is not dissuaded from bringing proceedings out of fear of adverse costs orders, there is, as Byrne SJA recognised, a point at which fairness to respondents may necessitate costs awards to them. When, as here, serious charges involving allegations of fraud are brought but then withdrawn in circumstances where nothing happens after the charges are laid which

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195 AB 661.

196 AB 662.

> alters their complexion, the practitioner may be said to have a justifiable claim to feel aggrieved and a fair argument to an entitlement to be recompensed in costs."

[182] Contrary to that finding, the situation in respect of charges 4 and 6 (and the flow on charges to 5, 7 and 8) was this:

(a) the proceedings bringing the charges were regularly instituted;

(b) there is no finding that the charges were such that, properly advised, they should never have been brought; to use the wording that the Tribunal used in relation to charge 3, "it cannot be said that it was always so plainly unmeritorious as to mean it should not have been brought or proceeded with";

(c) prior to the discipline application being filed the charges had been fully articulated on 28 November 2011, but the substantive response to them was, in the case of the ANZ Bank application, incorrect,[197] and not forthcoming in respect of the conversation with the AKF;

(d) the charges were provided in draft on 23 April 2012, with considerable particularity;

(e) in response to the provision of those drafts, no further submissions were made;

(f) the discipline application was filed on 14 June 2012 and served on 3 July 2012;

(g) on 17 August 2012 the response to the discipline application was filed, propounding an affirmative case in respect of each of charge 4 and 6;

(h) on 22 October 2012 amended particulars of the charges were provided;

(i) soon after the response to them on 3 December 2012, the matter was put on hold, on the basis that the appellant was reviewing charge 4; notwithstanding that the matter was put on hold the parties progressed mutual disclosure; and

(j) then the charges were withdrawn on 13 March 2013.

[183] That sequence, when properly understood in light of the precise series of steps between the parties, reveals plainly that these were regularly brought, justifiable, proceedings which were abandoned once the respondent's affirmative case had been reviewed.

Conclusion – charges 4 to 8 – "special circumstances"?

[184] For the same reasons as I have articulated in respect of charge 3 above, at paragraphs [55] to [63], I do not consider that the circumstances surrounding the withdrawal of charges 4 to 8 constitute "special circumstances" within the meaning of s 462(4)(a). The Tribunal made no finding that bringing the charges was not justifiable, nor maintainable. The responses which, if accepted, would have been destructive of them did not truly emerge until the response to the discipline application was filed. True it is that there was a time disparity between when the application was made to the bank (6 February 2009) and when the loan was finally drawn down (9 April 2009), but a plain explanation in its final form did not emerge for some time. Indeed, when it did emerge it was, at least in one respect, a contradiction of the explanation already proffered.[198]

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197 This was the response that the description "probate costs" would cover professional charges and costs. That position was abandoned in the response to the discipline application.

198 This is a reference to the significance of the item for "probate costs".

[185] It seems to me that something more than a gradual evolution of the case is required to establish "special circumstances", when one is considering the withdrawal of charges. Such a circumstance might be that seen in *Scott (No 2)* where the particular "nature and magnitude" of the change in tack on the part of the commissioner took matters out of the ordinary. In that case there was a very substantial change in the course of hearing, and as a result of a negotiated position. That does not apply here.

[186] In my opinion the Tribunal erred in finding that there were "special circumstances" in respect of charges 4 to 8.

Conclusion – charges 4 to 8 – indemnity costs?

[187] For reasons similar to those articulated above in respect of charge 3, at paragraphs [67] to [71] and [124] to [129], I do not consider that the circumstances surround the withdrawal of charges 4 to 8 come anywhere near the conduct required to warrant an order of indemnity costs. The Tribunal erred in so finding.

Conclusion – error on the part of the Tribunal.

[188] The Tribunal's conclusion that "special circumstances": existed was an error of law on its part. The matters referred to above at [172] to [182] make it plain that the Tribunal proceeded on erroneous findings of fact. The errors of law and fact mean that the appellant can show relevant error on the part of the Tribunal within the meaning of *House v The King*. Those errors substantially affect the conclusions reached. In the circumstances the decision of the Tribunal must be set aside.

[189] I would order:

1. The appeal be allowed.
2. The orders as to costs made by the Tribunal as to charges 3 to 8 be set aside.
3. There be no order as to the costs of charges 3 to 8.
4. There be no order as to the costs of the appeal.