SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Dempsey* [2009] LPT 20
PARTIES:	**LEGAL SERVICES COMMISSIONER (applicant)** **AND** **PAUL ANTHONY DEMPSEY (respondent)**
FILE NO/S:	9435 of 2008
DIVISION:	Legal Practice Tribunal
PROCEEDING:	Discipline Application
DELIVERED ON:	27 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	1-4 June 2009
JUDGE:	Atkinson J
PRACTITIONER PANEL MEMBER	Ms C Endicott
LAY PANEL MEMBER	Dr M Steinberg
ORDER:	**1. The Tribunal finds the respondent guilty of unsatisfactory professional conduct in relation to charges 1 and 5.** **2. The Tribunal finds the respondent guilty of professional misconduct in relation to charges 2,3,4 and 6.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – GENERALLY – where respondent charged with failing to meet or maintain a reasonable standard of competence and diligence and dishonestly or recklessly misleading his client – where respondent allegedly failed to advise client of right to obtain independent legal advice in relation to entering into a litigation funding agreement and amendments to a client agreement – whether respondent guilty of professional misconduct or unsatisfactory professional conduct PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL

MISCONDUCT – TRUST MONEY – where respondent charged with dishonestly or recklessly drawing funds from trust account to general account when he was not entitled to – where discrepancy between invoices issued to client and total monies transferred from the applicant's litigation loan account to the respondent's trust account – whether respondent guilty of professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – GENERALLY – where respondent charged of misleading the Queensland Law Society in relation to professional fees and disbursements payable to him by his client – whether respondent guilty of professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – GENERALLY – where respondent charged with charging excessive fees to client in relation to a personal injuries matter – where matter was a 'speculative personal injury claim' – where respondent allegedly rendered fees in excess of permitted prescribed amount – whether respondent guilty of professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – GENERALLY – where respondent charged with preferring his own interests to those of his client – where respondent allegedly purported to require his client to waive the benefit of the "50/50" rule – whether respondent guilty of professional misconduct or unsatisfactory professional conduct

COUNSEL: GP Long, SC with BI McMillan for the applicant
PJ Davis, SC with C Ryall C for the respondent

SOLICITORS: Legal Services Commission for the applicant
Bottoms English Lawyers for the respondent

[1] The Legal Services Commissioner (the "Commissioner") has brought a discipline application pursuant to s 452 of the *Legal Profession Act* 2007 ("the 2007 Act") containing six charges against a legal practitioner, Paul Anthony Dempsey, which relate to two of his clients, Roma Simmons and Rafaela Oats.

[2] Mr Dempsey has practised since his admission as a solicitor on 16 September 1975. He has been in sole practice in Townsville since January 1983. His practice is known as Dempseys Your Lawyers ("Dempseys"). Since the late 1980s or early 1990s his practice has been almost exclusively in personal injury matters although

he has never held specialist qualifications in that area. After the arrival in Townsville in 2005-2006 of law firms specialising in personal injury, Shine Lawyers and Carter Capner, he decided to diversify into family law matters. His wife, Jutta Dempsey, a psychologist, is his Practice Manager.

[3] The Commissioner alleges that the charges constitute professional misconduct and/or unsatisfactory professional conduct. The first four charges concern Roma Simmons; and the last two Rafaela Oats. Ms Simmons was a family law client and Mrs Oats a personal injury client. Ms Simmons was Dempseys' first family law client for some four years.

[4] The allegations against Mr Dempsey were summarised in the applicant's submissions as:

> That the respondent is guilty of professional misconduct (or unsatisfactory professional conduct) in that he:
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> **a.** Failed in a number of respects to reach or maintain a proper standard of competence and diligence in the conduct of Ms Simmons' matter when purporting to affect a change to their client agreement and the way Ms Simmons was billed for the matter (**Charge 1**);
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> **b.** Dishonestly or recklessly misled Ms Simmons in various respects regarding the reasons for and changes to her billing arrangements and a litigation loan to fund her action (**Charge 2**);
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> **c.** Dishonestly or recklessly withdrew funds from his trust account on account of fees and disbursements in the Simmons matter when he knew or ought to have known he was not entitled to draw those funds (**Charge 3**);
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> **d.** Dishonestly or recklessly misled the Queensland Law Society by representing that certain invoices had been billed to Simmons when in fact they had not (**Charge 4**);
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> **e.** Charged excessive fees to Mrs Oats in breach of s.481C of the *Queensland Law Society Act* 1952 ("the 50/50 Rule") (**Charge 5**);
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> **f.** Preferred his own interest to those of Mrs Oats in purporting to have her 'waive' the 50/50 rule so that he could charge more for her matter than he was entitled to charge pursuant to the rule (**Charge 6**)."

The statutory regime

[5] When the conduct complained of occurred it was governed by the *Legal Profession Act* 2004 ("the 2004 Act"). The charges were all brought under the 2007 Act which came into effect on 1 July 2007 since the transitional provisions found in s 423 and Part 9 of the 2007 Act apply that Act to the relevant conduct so long as it occurred, as it did, after 1 July 2004.[1]

[6] The onus of proof is upon the applicant. Section 649 of the 2007 Act provides:

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[1] *Legal Services Commissioner v Richardson* [2009] LPT 17 at [4]-[8].

"**649 Standard of proof**
(1) If an allegation of fact is not admitted or is challenged when a disciplinary body is hearing a discipline application, the body may act on the allegation if the body is satisfied on the balance of probabilities that the allegation is true.
(2) For subsection (1), the degree of satisfaction required varies according to the consequences of the relevant Australian legal practitioner or law practice employee of finding the allegation to be true.
(3) In this section –
Australian legal practitioner includes a person to whom chapter 4 applies as mentioned in section 417."

[7] Despite the fact that s 649(2) is not completely reflective of the principles explained by Dixon J (as his Honour then was) in *Briginshaw v Briginshaw*,[2] as Mr Davis SC for the practitioner submitted, the *Briginshaw* principles apply to the Tribunal's assessment of disciplinary applications.[3]

[8] The conduct which falls within the meaning of unsatisfactory professional conduct is set out in s 418 of the 2007 Act which provides:

"**418 Meaning of unsatisfactory professional conduct**
Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner."

[9] The meaning of professional misconduct is set out in s 419 of the 2007 Act which provides:

"**419 Meaning of professional misconduct**
(1) ***Professional misconduct*** includes –
(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
(b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to

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2 (1938) 60 CLR 336 at 360-361.

3 *Legal Services Commissioner v Baker* [2005] LPT 2 and [26]. This decision was overturned on appeal in *Legal Services Commissioner v Baker (No 1)* [2006] 2 Qd R 107 but not on this point.

> the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate."

"Suitability matters" are dealt with in s 9 of the 2007 Act.

[10] Section 420 of the 2007 Act deals with examples of conduct capable of constituting unsatisfactory professional conduct or professional misconduct. It provides:

> "**420 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct**
>
> The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct –
>
> (a) conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the commencement of this section;
>
> *Note –*
>
> Under the *Acts Interpretation Act 1954*, section 7, and the *Statutory Instruments Act 1992*, section 7, a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the *Legal Profession Act 2004*.
>
> (b) charging of excessive legal costs in connection with the practice of law;
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> (c) conduct for which there is a conviction for –
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> (i) a serious offence; or
>
> (ii) a tax offence; or
>
> (iii) an offence involving dishonesty;
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> (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
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> (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
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> (f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body made under this Act or an order of a corresponding disciplinary body made under a corresponding law, including a failure to pay wholly or partly a fine imposed under this Act or a corresponding law;
>
> (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.
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> (2) Also, conduct that happened before the commencement of this subsection that, at the time it happened, consisted of a contravention of a relevant law or a corresponding law is

capable of constituting unsatisfactory professional conduct or professional misconduct.

(3) This section does not limit section 418 or 419."

Roma Simmons

[11] It is convenient to deal with the charges against Mr Dempsey relating to Ms Simmons' matter together.

Charges 1 - 4

[12] The charges are italicised. The charge and the practitioner's response is as follows. Where no response is mentioned, the allegation was admitted and therefore taken as proved.

Charge 1: Competence and diligence

1. While representing Roma Simmons in matrimonial matters the respondent failed to meet or maintain a reasonable standard of competence and diligence in that he:-

(a) Failed to advise Simmons of her right to obtain independent legal advice as to entering into a litigation funding agreement.

Mr Dempsey denied this allegation.

(b) Made application on behalf of Simmons and obtained litigation loan funding in the amount of $40,000 notwithstanding his advice to her that the loan would be for $30,000.

The respondent admitted that he made application on behalf of Simmons and obtained litigation loan funding in the amount of $40,000 but denied that he advised the respondent Simmons that the loan would be for $30,000.

(c) When requiring an amendment to their client agreement, failed to advise Simmons of her right to obtain independent legal advice regarding the changes.

Mr Dempsey denied this allegation.

(d) Failed to give effect to the amendment to the client agreement in writing as required by the said agreement.

Mr Dempsey said he was unable to admit or deny this allegation as it was unclear and/or confusing.

(e) Attempted to effect an amendment to the client agreement by omission.

Mr Dempsey also said he was unable to deny this allegation because, he said, it was unnecessarily vague. He relied on his responses to paras 1.12, 1.13 and 1.14 below to the extent that they were relevant.

PARTICULARS

1.1 *At all material times the respondent was an Australian Legal Practitioner.*

1.2 *In February 2006, Roma Simmons engaged the respondent to act as her solicitor in matrimonial matters.*

1.3 *On 23 June 2006, Simmons entered into a client agreement with the respondent.*

1.4 *That agreement provided inter alia:-*

> *"Accounts will be issued monthly."*
>
> …
>
> *"Accounts will be paid at the conclusion of the matter immediately upon receipt of settlement monies."*
>
> …
>
> *"Estimate total fees of $10-15,000."*
>
> …
>
> *"Any amendments to this agreement must be made in writing."*

1.5 *In August 2006, the respondent advised Simmons that the terms of the client agreement had to be changed and she would have to pay his fees before the proceedings were determined.*

Mr Dempsey denied this allegation.

1.6 *On 29 August 2006 the respondent told Simmons that:*

(a) *The government had changed the way solicitors could claim their money in family law matters.*

(b) *That she would have to take out a loan to pay his fees and that he had made arrangements with a loan company [Impact Capital] for her to take out a loan for that purpose.*

(c) *That the loan would be for $30,000.00.*

(d) *That if the cost of the proceedings exceeded $30,000 he would bear that cost over $30,000.*

(e) *That he would pay any interest payable on the loan.*

Mr Dempsey denied all except para 1.6(e).

1.7 *On 29 August 2006 Simmons executed a loan application in the presence of the respondent.*

1.8 *By letter to Simmons dated 30 August 2006, the respondent stated:-*

(a) *The loan was to be obtained from Impact Capital.*

(b) Simmons would not be responsible for any expense, interest or fees from the advance.

The respondent admitted a letter was sent to Simmons dated 30 August 2006 but denies it stated "(a) the loan was to be obtained from Impact Capital."

1.9 On 30 August 2006 the respondent submitted to Impact Capital a litigation loan application on behalf of the respondent for an advance of $40,000.

1.10 On 30 August 2006 Impact Capital approved the loan to Ms Simmons in the amount of $40,000.

Mr Dempsey said he was unable to admit or deny the particular because it was not within his knowledge but otherwise said the loan documents contain dates and signatures relevant to the particulars.

1.11 On 29 August 2006, Simmons again executed a trust account authority which was dated 29 August 2007 [*sic*]*. This authority read:-*

"I, Roma Simmons, authorize Dempsey's to take their fees as they are billed."

Mr Dempsey denied the particular in 1.11 and said that Simmons signed a trust account authority on 29 August 2006 in his presence.

1.12 By letter to Simmons dated 2 October 2006 the respondent stated:-

(a) "I have discovered it is to my advantage to change the client agreement without in any way impacting on you."

(b) "With client agreements, a solicitor can do two things, he can either do an itemized bill along the way as we are doing and at the end of the day the total of those bills is what the bill is or he can quote a figure."

(c) "What I propose to do on your file is to change the client agreement to quote, quoting my professional fee at $30,000 but as part of the administration of your file I will continue to send you monthly bills/reports for the work that is actually done and at the end of the case, what I am paid will be only what the total of those bills are. If the bills come to more than the quote then anything more than the quote I will not be paid. If the bills come

to less than the quote then I will only be paid what the bills total."

(d) "The client agreement can only be varied by agreement, so if I don't hear from you within 7 days disagreeing with this proposal then we will take it that this client agreement is varied on this basis."

Mr Dempsey admitted these particulars but relied upon the whole letter to put these passages in context.

1.13 Simmons did not respond to the letter of 2 October 2006 within 7 days or at all.

1.14 The respondent did not:-

(a) Advise Simmons of her right to independent legal advice.

(b) Provide for an amendment for the client agreement to be executed by both parties incorporating the deemed amendment to quote and the method of payment of fees.

(c) Sought to rely on Simmons' silence as the basis for amending the client agreement.

Mr Dempsey admitted 1.14(b) but denied 1.14(a) and (c).

[13] **Charge 2: Mislead client – Complaint of Simmons**

2. In the course of representing Roma Simmons in matrimonial matters, the respondent dishonestly or recklessly misled his client, Roma Simmons.

Mr Dempsey denied this allegation.

PARTICULARS

2.1 The applicant repeated and relied on particulars 1.1 to 1.6 and 1.11 above.

The respondent relied on his response to those particulars.

2.2 The representations set out in paragraph 1.6(a)-(d) were false and misleading because, as the respondent knew or ought to have known:

(a) "The government" had not in fact changed the way solicitors could claim their money in family law matters; and

(b) By reason of the existing client agreement, there was no obligation on Simmons to take out a litigation loan.

The respondent denied the particulars in 2.2 and repeated and relied upon his answers to particulars 1.6(a) to (d). In respect of 2.2(a) and (b) the respondent admitted the particulars but denied that those matters were said to Simmons.

2.3 By reason of the matters set out in paragraphs 1.9 and 1.10, the representation set out in paragraph 1.6(c) was false and misleading.

The respondent denied the particulars in 2.3 and repeated and relied upon his responses to particulars 1.6(c), 1.9 and 1.10.

[14] **Charge 3: Trust Monies – Complaint of Simmons**

3. That on 5 October 2006, the respondent, while representing Roma Simmons in matrimonial matters, dishonestly or recklessly drew funds from his trust account to his general account, in purported payment of professional fees owing to him, when he was not entitled to draw said funds.

Mr Dempsey denied this allegation.

PARTICULARS

3.1 The Applicant repeated and relied on particulars 1.1 to 1.11 above.

The respondent repeated and relied upon his answers to those particulars.

3.2 Between 1 September 2006 and 4 October 2006 Impact Capital, at the request of the respondent or made on his behalf, transferred sums totalling $33,000 from Simmons' loan account to the respondent's trust account.

This was denied by the respondent.

3.3 Between 11 May 2006 and 4 October 2006 the respondent issued the following invoices which were received by Simmons for professional fees and disbursements; invoice # 1754 dated 11 May 2006; invoice #1938 dated 7 June 2006 and invoice #2383 dated 22 August 2006. These invoices amounted to $2,329.31.

Mr Dempsey said he was unable to admit or deny this particular since it was not within his means of knowledge.

3.4 *On 5 October 2006 the respondent issued Invoice #2682, which purported to bill Simmons for professional fees in the sum of $30,000. Simmons did not receive this invoice.*

The respondent denied the particular and said that on 5 October 2006 invoice #2682 was issued to Simmons for professional fees in the sum of $30,000.

3.5 *On 5 October 2006, the sum of $27,578.85 was drawn from the respondent's trust account to his general account in purported satisfaction of outstanding professional fees and disbursements owed by Simmons in this matter.*

This particular was denied.

3.6 *On 5 October the respondent knew or ought to have known that he was not entitled to draw the amount of $27,578.85 from his trust account because;*

(a) *Simmons was not advised of the draw downs to the respondent's trust account from the Impact Capital loan account, nor did she receive any notice of the drawing from the trust account to the general account of the sum of $27,578.85 on 5 October 2006.*

(b) *Invoices issued to Simmons between 11 May 2006 and 4 October 2006 amounted to only $2,329.31.*

The respondent denied this particular.

3.7 *By Invoice #235272910 dated 8 November 2006, the respondent billed Simmons the sum of $4,224 for professional fees for the period 10 October 2006 to 31 October 2006. Simmons received this invoice.*

The respondent admitted this particular but denied that the invoice included disbursements.[4]

3.8 *By Invoice #3204 dated 11 December 2006, the respondent billed Simmons the sum of $5,907.55 for professional fees and disbursements for the period 1 November 2006 to 29 November 2006. Simmons received this invoice.*

3.9 *On a date between 29 November 2006 and 12 January 2007, Simmons terminated her client agreement with the respondent and engaged Ruddy Tomlins Baxter to complete her matrimonial affairs.*

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[4] The particulars of the charge were amended after the response was received.

3.10 On 12 January 2007, Ruddy Tomlins Baxter sent a facsimile to the respondent requesting his client file in relation to Simmons' matrimonial matters.

The respondent admitted that on 12 January 2007 Ruddy Tomlins and Baxter sent a facsimile to him requesting the file in relation to Simmons' matrimonial matter but denied the facsimile requested the respondent to "transfer to them all monies drawn from Impact Capital in respect of the loan" and otherwise says that the facsimile speaks for itself.[5]

3.11 On 15 January 2007, the respondent wrote to Ruddy Tomlins Baxter advising that the matter appeared to be finalised but that there was a problem with the Impact Loan and confirming that his total fees were not $30,000.

The respondent admitted on 15 January 2007 he wrote to Ruddy Tomlins and Baxter advising that the file was "literally finished" and that "the only thing to be tidied up is the actual payment and that will be it" and "with respect to the Impact loan, there is something wrong there, and that is what I am trying to sort out" and that "our fees are absolutely not $30,000."

3.12 On 16 February 2007, Ruddy Tomlins Baxter wrote to the respondent requesting the balance of the loan money held in his trust account.

Mr Dempsey said he was not able to admit or deny the particular because he was not in possession of the letter referred to.

3.13 On 5 March 2007, the respondent wrote to Ruddy Tomlins Baxter stating that he was only entitled to some $13,860.90 in fees and that he had been overpaid the sum of $19,139.10 which he would repay.

The respondent admitted this particular and said that the sum of $13,860.90 was for fees and disbursements.

3.14 On 9 March 2007, the respondent paid to Ruddy Tomlins Baxter on behalf of Simmons the sum of $19,139.10.

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5 The particulars of the charge were amended after the response was received.

[15] **Charge 4: Mislead QLS – Complaint of Simmons**

4. On 13 March 2007, the respondent dishonestly or recklessly misled the Queensland Law Society, in relation to the amount of professional fees and disbursements payable to him by Roma Simmons in relation to matrimonial matters.

The respondent denied this allegation.

PARTICULARS

4.1 The Applicant repeated and relied on particulars 1.1 to 1.11 and 3.1 to 3.14 above.

The respondent relied upon his responses to those paragraphs.

4.2 On 13 March 2007 Grenville Hughes, an auditor employed by the Queensland Law Society, conducted an audit of the respondent's trust account pursuant to Section 31 of The Queensland Law Society Act 1952.

4.3 In the course of that audit, the respondent:

(a) Presented to Hughes or caused to be presented to Hughes the following tax invoices:-

i) … #2682 dated 5 October 2006 in the amount of $30,000 for professional fees;

ii) #2461 dated 4 September 2006 in the amount of $3,050.80 for professional fees and disbursements in the period 7 April to 24 August 2006;

iii) #2495 dated 12 September 2006 in the amount of $762.30 for professional fees and disbursements in the period 6 to 13 September 2006;

iv) #2529 dated 13 September 2006 in the amount of $155.38 for disbursements.

v) #2629 dated 22 September 2006 in the amount of $646.80 for professional fees in the period 6 to 13 September 2006;

vi) #2648 dated 28 September 2006 in the amount of $517.59 for professional fees and disbursements in the period 6 to 13 September 2006.

(b) By presenting the above invoices, represented to Hughes that those amounts had been billed to Simmons.

The respondent denied the particulars in 4.3(a) and (b) but admitted that the invoices referred to 4.3(b)[6] were shown to Grenville Hughes.

4.4 None of the invoices referred to in paragraph 4.3 above were sent to or received by Simmons.

The respondent said that he was unable to admit or deny the particular because those facts were not within his knowledge but said that if the bookkeeper had followed the standard book keeping procedures those invoices would have been sent to and received by Simmons.

4.5 The respondent told Hughes that he relied upon the trust account authority of 29 August 2006 to draw upon monies held in trust as billed.

4.6 The respondent's representations to Hughes as set out in paragraph 4.3 above were false and misleading because, as the respondent knew or ought to have known:

(a) The invoices he presented to Hughes were not invoices which had been sent to or received by Simmons;

(b) The total amount of the invoices in fact sent to Simmons as at the date of Hughes' audit was only $12,460.86.

The respondent denied these particulars.

Findings with regard to Roma Simmons

[16] As was admitted by the respondent, Ms Simmons engaged him to act as her solicitor in her matrimonial matter in February 2006 following her separation from her husband. She wrote to him in that month and then subsequently saw him in his office in Flinders Mall in Townsville on 14 March 2006. During that consultation Mr Dempsey told her that another lawyer who was present, Cleo, would be handling her matter. He also informed her that he was tape recording the meeting and she observed what appeared to be recording equipment to the left of his desk. He told her that he had read her letter and that he would be able to handle her case and that she had good prospects of receiving about 70 per cent of the matrimonial assets. So far as fees were concerned, he explained that he would send her a client agreement which would explain all the costs involved and that he would send her monthly accounts, but payment of those accounts would not be required until the end at settlement. He informed her that he required a copy of her marriage certificate.

[17] Ms Simmons rang Cleo about her case and in particular about not being able to locate a copy of her marriage certificate since she had been married in England. Ms Simmons enquired whether she should write to England to get a copy. Cleo told her

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6 The particulars of the charge were amended after the response was received.

she was not able to speak about her case because she did not have Ms Simmons' file and Ms Simmons would have to speak with Mr Dempsey. Ms Simmons tried to contact Mr Dempsey but without success.

[18] The next contact Ms Simmons had with the respondent's firm was when she received a letter from Dempseys written by Caroline Hay dated 18 April 2006 enclosing for her consideration a draft letter that was to be forwarded to Ms Simmons' husband. Ms Simmons telephoned Ms Hay after receiving the letter and Ms Hay told her she had taken over her matter and they agreed to meet. Ms Simmons saw her at Dempseys and Ms Hay told her the reason the letter was to be sent to her husband and Ms Simmons agreed for it to be sent. Ms Simmons did not see Mr Dempsey on that day. Following that meeting, Ms Simmons received a letter from Dempseys with some credit union statements that Ms Hay had received from Ms Simmons' husband. There was no further correspondence until June 2006.

[19] In June 2006 Ms Simmons received a letter dated 15 June 2006 from Mr Dempsey with regard to the costs of her matter. That letter provided as follows:

> "As I said to you at the start of the Family Law case, the law in Queensland changed as of 1 July 1998, in that all solicitors must now have a cost agreement.
>
> My Cost Agreement is **enclosed** in duplicate, one copy for you to keep, and one to be returned to me.
>
> It is a document designed by the government, so it's a classic government document which doesn't mean much to read.
> …
>
> The cost agreement needs to be signed and dated by you, and your signature witnessed, so if you could do that and send it back to me, I would appreciate it."

[20] Ms Simmons received another letter from Mr Dempsey about the client agreement dated 20 June 2006 which provided as follows:

> "It's time to get things rolling on your file, and before we can do that, at law I need to issue a Client Agreement.
>
> It should have been sent out to you a long time ago, but we've had some computer problems in the firm and it hasn't happened, so I apologize for that.
>
> If you could have a look at it, and if you're happy with it, sign it and then make an appointment to come in and see me and we can go through and fill out the forms necessary to get the Application for Property Settlement going.
>
> The sooner we do this, the better it would be.
>
> I apologise for the delay and trust you understand."

[21] Mr Dempsey said in evidence that the "cost agreement" referred to in his letter of 15 June 2009 and the "client agreement" referred to in his letter of 20 June 2006 were the same document. That document was entitled "Speculative Client Agreement". He said that, while he could not specifically remember, he would have sent out both letters together. He did not give any sensible explanation for sending out two letters with that document. He signed the Speculative Client Agreement on 22 June 2006. I infer that he sent out a signed copy of the Speculative Client Agreement to Ms Simmons on or before that date.

[22] Ms Simmons signed the speculative client agreement on 23 June 2006. Mr Dempsey in his evidence said that calling it a speculative client agreement was an error made by Ms Anderson. He said she neglected to remove the word "speculative" before sending it to Ms Simmons. This was not put to Ms Anderson when she gave evidence and in any event he is responsible for supervising his employees and he signed the agreement and therefore adopted its contents.[7] The agreement sent out to Ms Simmons also included a document entitled "Important Notice to Client" which was said to be issued pursuant to s 48(4) of the *Queensland Law Society Act* 1952 (the 1952 Act). The agreement provided, *inter alia*, that accounts would be issued monthly; accounts would be paid at the conclusion of the matter immediately upon receipt of settlement monies; and that any amendments to the agreement must be made in writing. The estimate of fees and costs of the matter was said to be between $10,000 to $15,000 although the quote was said to be non-binding. It also included the clause that the "client has been informed that it should seek independent advice in relation to this Agreement." In fact the only relevant advice which had been given was in the "Important Notice to Client" which was in the following terms, "You may obtain independent legal advice before signing this client agreement."

[23] Ms Simmons gave the client agreement to Mr Dempsey when she saw him by appointment at his Kirwan office after she had signed it and had it witnessed by a friend at home. Mr Dempsey told her that Ms Hay had left and that he was now personally handling her matter. She had two meetings with Mr Dempsey during June-July 2006 to discuss issues involving her ex-husband's superannuation.

[24] The next contact Ms Simmons had with Dempseys was a telephone call from Sandra Sinclair who advised her that she was now handling her matter and wanted to meet with her. Ms Sinclair commenced working at Dempseys as an employed solicitor in August 2006 predominantly responsible for the firm's family law files. Ms Simmons saw Ms Sinclair and felt comfortable with her conducting the matter and Ms Sinclair then had carriage of Ms Simmons' matter at Dempseys until 29 November 2006 when she resigned her position.

[25] On the morning of Ms Sinclair's first day of employment, Mr Dempsey told her, "It's no secret in Townsville that I have a cash flow problem." She was told to just bill her time and he would determine the fees to be charged. He often pressured her to bill more than she was billing. Much cross-examination was centred on the material in her affidavit about Mr Dempsey's billing practices and her unhappiness with them. It is apparent that Mr Dempsey and Ms Sinclair did not get on with one

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[7] *Thompson v LM & S Railway Co* [1930] 1 KB 41.

another but I have not formed the view that that dislike has caused Ms Sinclair to be anything but honest in her evidence before the Tribunal.

[26] Ms Simmons gave evidence that in August 2006, Mr Dempsey telephoned her and told her there had to be a change to her client agreement and she would now have to pay his fees up front because he had ongoing costs. He asked her to come and see him urgently. He said it was his practice to have his secretary call but I accept that Mr Dempsey called Ms Simmons, particularly as she remembers the detail of what he said to her.

[27] Ms Simmons was very concerned because she did not have any money and did not know how she was going to pay him. She made an appointment and went to see Mr Dempsey on 29 August 2006. Ms Simmons had expected that Ms Sinclair would be there as well but she was not.

[28] Mr Dempsey told her that the government had changed the way solicitors could claim their money in family law matters. He mentioned a date from which that had happened but she cannot now recall what that date was. It was put to her that he did not say this but I accept her evidence which was given clearly, carefully and without embellishment, making concessions when required. Any inconsistencies in her evidence were such as might be expected from a truthful law witness. He did say this to her and it was not true.

[29] Ms Simmons recalls he mentioned something about previously a client was not expected to pay money to the law firm until the case had been finalised or settled. He told her that it had made it difficult for him to operate that way as he had staff and bills to pay. He denied saying this or that it was true but there was no reason for her not to be telling the truth about it and he admitted the obvious truth in cross-examination that, "everybody needs cash. You need cash to operate. Income ebbs and flows." It was also consistent with what he told Ms Sinclair when she started work with him and what he later told QLS investigators. He also said in evidence that he wanted to spend money to advertise "to combat the inroads of Shine and Carter Capner into Townsville."

[30] Mr Dempsey told her that he was going to make an arrangement with a loan company and that she would have to take out a loan. He did not tell her but this was the first time he had arranged a litigation loan for a family law client. He began to joke about the name of the company calling it "Shark" or something similar. She was concerned about her capacity to take out a loan but he mentioned that she had a house, by which he presumably meant that it could be used for security. She was concerned she might lose her house. She said he laughed and said "Don't worry about it, I'm not going to take out more than I need to pay the bills on work that I've done. If there is any interest I'll bear that myself." When she expressed concern he appeared to become angry and told her that he would send her a letter showing that he would bear any interest.

[31] Mr Dempsey had a form which contained questions about Ms Simmons' weekly costs of living and whether she had any outstanding debts. He told her that the form was a standard loan form to send to the loan company to see whether she could get a loan or not. Mr Dempsey went through the questions and filled out the form as she

answered his questions. He gave her the completed form to sign which she did. Her evidence was that she felt quite intimidated and believed that she had no alternative but to sign the form and trust him as he was her solicitor. He did not suggest that she should obtain independent legal advice. He said that he has no recollection of telling her, but that such was the invariability of his practice when speaking to clients about litigation lenders to advise them that they should feel free to see another solicitor and seek independent legal advice, that he believes he did tell her that. Given he cannot actually recall doing so and Ms Simmons gave sworn evidence that he did not, the Tribunal is satisfied that he failed to advise her of her right to obtain independent legal advice.

[32] The two page form, which was before the Tribunal and which was signed by Ms Simmons on 28 August 2006, is entitled "Impact Advance Application". It is said to be for matrimonial settlements. There are number of questions which are filled out in different handwriting. There appears to be at least three different sources of handwriting on the form. Ms Anderson, and presumably another employee, filled out formal details. Mr Dempsey filled out other details. The amount of the advance has been filled in as $40,000 by Mr Dempsey. He said he did that in front of Ms Simmons. The amount of the loan was, he said, his decision rather than hers. It appears that it was made up of $30,000 he estimated for his fees and $10,000 for disbursements and GST. He said in cross-examination that it was possible he told her that. He asserted he remembers telling Ms Simmons that the total costs looked like being $40,000. She has no recollection of Mr Dempsey's telling her that the loan was for $40,000 or that that was his estimate of the total costs. The Tribunal does not accept that he did. The explanation in his affidavit was that $40,000 was required "assuming her matter proceeded to trial, as appeared to be likely, or at the very least a strong possibility at that time". This is an *ex post facto* explanation not supported on the evidence. His statement in his affidavit that the sum of $40,000 was recorded on her instructions was untrue.

[33] There is a box on the first page which says

> "Please tick this box if you DO NOT want Impact to send corrspondence [*sic*] to your home address.**
> ** in this event ALL correspondence will be sent to your solicitor's office."

The box was ticked by Mr Dempsey. As a result, all loan documents were sent to Ms Simmons at Dempseys' address. They were not sent on to her by Dempseys.

[34] At the time she signed the form, Ms Simmons did not notice whether the form showed the amount of the loan or if it did, whether that amount was $30,000 or $40,000. She says however that had she realised it was for $40,000 she would not have signed the form. She said she did not know whom the loan was going to be with at that time; that Mr Dempsey did not ask her to read the form before she signed it; and because of his demeanour she was afraid to ask him to read it. She did not receive a copy of the form from Mr Dempsey.

[35] Mr Dempsey took a photocopy of Ms Simmons' driver's licence once she had signed the form and she then left. She estimates that she would have been in his

office for no more than five to ten minutes. He estimated that she was there for 30 to 40 minutes, but he kept no record of the time or notes of the meeting.

[36] It appears she also signed a document on that day that said simply, "I, Roma Simmons authorize Dempseys to take their fees as they are billed." Ms Simmons accepted that this contained her signature although she could not specifically recall signing the document. She said that the consequences of signing the document were not explained to her. Mr Dempsey said in his evidence that the document enabled Dempseys to draw down the loan into their trust account and transfer into their general account their fees after they were billed and sent to the client. He said that he told her that. It did not, however, give *carte blanche* to Dempseys to draw down from the Impact loan into their trust account and withdraw from their trust account sums of money for fees that had not been billed to Ms Simmons by invoices sent to her, and it certainly did not give them authority to transfer amounts for fees that had not only been billed, but had not even been earned.

[37] The Impact Advance Application was faxed by Dempseys to Impact Capital under cover of a letter by Mr Dempsey dated 30 August 2006. Also included were a valuation summary of the property at 15 Carlisle Street, Cranbrook, the Redbook valuation for her motor vehicle and details of Mr Simmons' AMP Superannuation. The documents show that they were faxed at 10.36 in the morning.

[38] On the afternoon of that day, 30 August 2006, Ms Simmons received a telephone call from someone who identified herself as Jaymie from Dempseys who asked her to come in and see her at their office in Flinders Mall. She went into Dempseys' office on the following day, 31 August 2006, and saw Jaymie Anderson at the front desk. Ms Anderson gave Ms Simmons a bundle of documents for the litigation loan. She asked her to sit down and read through them and return to the front counter when she was ready to sign them. Ms Anderson cannot now specifically remember this incident but it was consistent with her usual practice.

[39] Ms Simmons' evidence was that she was still upset but believed that she should trust Mr Dempsey as he was her solicitor. She thought she had to sign the loan documents if she wanted her matter to be finalised. She briefly looked through the documents but says that she was so upset so it did not register with her who the lender was or the amount of the loan. After a brief look at the documents she returned to the front counter and signed them. Although the amount of the loan did not register with her it appears that she must have seen it as it preyed on her mind when the matter came to be settled. By that time Jaymie had gone and another young woman witnessed her signature. Ms Simmons did not receive a copy of the loan documents at that time or at any later time. Ms Simmons' signature witnessed by a K Magarry appears on two pages of a five page application for credit from Impact Capital Limited ("Impact").

[40] The maximum amount of credit is said to be $40,000 which would be advanced progressively. The only detail of those advances which was filled in was the first stage which provided for $4,000 to be advanced on 30 August 2006. The total ascertainable credit fees and charges were said to be $200 and unascertainable credit fees and charges said to be an assessment fee of $2,000, and an annual fee of $2,200 payable to the lender on the yearly anniversary of the first progressive advance

pursuant to this credit contract. So far as the mortgage was concerned the loan contract provided, "The Borrower will grant or procure the granting of certain mortgages ("Mortgage") namely an Irrevocable Instruction, an equitable mortgagee's caveat and first ranking registered mortgages to the Lender from [Ms Simmons] over [the land at 15 Carlisle Street, Cranbrook Queensland 4814]." Ms Simmons also signed an Irrevocable Instruction to her solicitors to pay the lender the amount of credit then outstanding and any further sum being fees, interest, charges and other monies owing as soon as the matter settled.

[41] Ms Simmons later received a letter from Mr Dempsey dated 30 August 2006 saying:

> "Just a note to confirm with you what I said to you today, 29 August 2006 that with respect to the Impact Funding, the arrangement with you is that you will not be responsible for any of their expenses or interest or fees or anything from the advance.
>
> I will bear that because this was not part of the deal when we started the file so I can't impose on you to pay something which wasn't part of the deal when we started the file."

[42] Mr Dempsey said that during his meeting with Ms Simmons on 29 August 2006 the need to comply with the term of his costs agreement with Ms Simmons that any amendments must be made in writing did not occur to him "but [he] deliberately sent [his] letter of 29 August 2006 to evidence in writing the change to the Agreement, so Ms Simmons was protected in writing." It was curious that he did not inform Ms Simmons in that or any other letter that another variation to the original agreement was that she had applied for a loan for $40,000 to pay fees and disbursements as they were billed before the matter concluded. He said in evidence that he did not include those details in the letter because he "didn't think anything had changed."

[43] On 1 September 2006, Mr Dempsey sent an email to Jaymie Anderson at 8.40am saying "Re Greenland Moneys & Simmons Moneys" "Have IMPACT SENT THESE MONEYS YET?" After further emails between them and Impact, Dempseys were informed by Impact that $4,000 had been deposited into their trust account with regard to the Simmons' litigation loan, which had by then been approved in the sum of $40,000. Unbeknownst to Ms Simmons, $4,462.44 was drawn on the Impact loan. That was made up of $4,000 for Dempseys and fees, charges and interest on the loan of $462.44. At that time Ms Simmons had only received invoices totalling $2,328.87 ($412.06 on 11 May 2006 for work done from 7 to 19 April 2006 (invoice #1754); $527.51 on 7 June 2006 for work done from 5 to 24 May 2006 (invoice #1938) and $1389.30 on 22 August 2006 for work done from 5 to 30 July 2006 (invoice #2383)). The first two of those invoices provided:

> "As I said t [*sic*][8] would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is <u>not payable</u> until the end of the case, and then only if we win, as per our agreement."

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[8] This error is repeated in every invoice where this phrase is used.

[44] The invoice for 22 August 2006 provided:

> "As I said t would in the Costs Agreement, I enclose a bill of costs for the work done in period below.
>
> A Costs Notice under the Family Law Act has been provided to you with your Client Agreement."

[45] A few days after she had applied for the loan Ms Simmons attended an appointment with Ms Sinclair who did not appear to know anything about Ms Simmons' taking out the loan. During September 2006, invoices were issued with regard to Ms Simmons but not sent to her. On 4 September 2006, #2461 for $3,050.08 for work done from 7 April to 24 August 2006. This invoice required the deletion of the earlier invoices sent to Ms Simmons from the Open Practice system because it included the periods covered by those invoices. The earlier invoices were deleted because this prevents clients being billed more than once for the same work. This invoice had the same text as the first two sent, ie:

> "As I said t [*sic*] would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is <u>not payable</u> until the end of the case, and then only if we win, as per our agreement."[9]

[46] The next invoice issued on 12 September 2006, #2495 for $762.30. It was for work done from 6 to 13 September 2006. Table 2 shows three different versions of that invoice. The next invoice issued on 22 September 2006, #2629, was for $646.80. It was for work done from 6 to 13 September 2006. The copy produced pursuant to the warrant was said not to be payable until the end of the case.[10] On 28 September 2006, invoice #2648 was issued for $517.59.[11] It was for fees of $435.27 from 6 to 13 September 2006 and disbursements of $82.32. None of invoices #2461, #2495, #2629 or #2648 were sent to Ms Simmons.

[47] An invoice #2529 dated 13 September 2006, which in fact issued on 5 March 2007, was for $155.38 was for disbursements. Invoice #2609 dated 19 September 2006, which was also created on 5 March 2007, was for $203.60 for disbursements and was said to be "<u>not payable</u> until the end of the case." Ms Simmons did not receive these invoices. This does not necessarily mean that the disbursements were not incurred but it does mean that in all likelihood the invoices for them were not created until 5 March 2007.

[48] On 26 September 2006, another $4,413.96 was drawn on the Impact loan. This was made up of $4,000 for Dempseys and $413.96 for fees, charges and interest.

[49] Ms Simmons said that her matter progressed with Ms Sinclair and she did not have any further contact with Mr Dempsey until she received a further letter from him dated 2 October 2006 regarding what he said was an administrative change that he wanted to make to her client agreement. That letter provided as follows:

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9 The version produced pursuant to the warrant had a different narrative from that produced to the QLS Auditor and given to counsel: see Table 2.

10 See Table 2.

11 For the narrative on the invoice, see Table 2.

> "Just a note in relation to an administrative charge I would like to make.
>
> On your file we have a Client Agreement, and of recent times I have discovered it is to my advantage to change that Client Agreement without in any way impacting on you.
>
> With Client Agreements a solicitor can do two things, he can either do an itemised bill along the way as we are doing and at the end of the day the total of those bills is what the bill is, or he can quote.
>
> He can quote a figure.
>
> What I propose to do on your file is to change the Client Agreement to a 'quote' quoting my professional fees at $30,000, but as part of the administration of your file I will continue to send you monthly bills/reports for the work that is actually done and at the end of the case, what I am paid will be only what the total of those bills are.
>
> If the bills come to more than the quote, then anything more than the quote I will not be paid.
>
> If the bills come to less than the quote, then I will only be paid what the bills total.
>
> That way you are no in any way disadvantaged.
>
> So that you can monitor the work being done, I will continue to send the bills so that you can read them and you can see what work is being done. If you think I am doing unnecessary work then, as is part of the client agreement, you just have to report it to the Law Society and they will discipline me.
>
> I don't 'pad' my fees, I never have and I never will. I am only doing this because there is advantage to me in it income tax wise, and there is no disadvantage to you at all.
>
> The client agreement can only be varied by agreement, so if I don't hear from you within 7 days disagreeing with this proposal, then we will take it that the client agreement is varied on this basis.
>
> If you have got any questions please do not hesitate to contact me or come in and see me. I have been trying to get you in to discuss this with you, but we have been missing each other."

Mr Dempsey said in a letter to QLS on 16 March 2007 that he wrote that letter only after taking advice from a number of practitioners and thinking about that carefully. It is, however, abundantly clear and it must have been obvious to any competent legal practitioner that an agreement which specifically provided that any

amendments must be in writing could not be amended in the way set out in the second last paragraph.

[50] Ms Simmons said she did not respond to this letter as she thought that everything was going smoothly with her matter under Ms Sinclair and it was only an administrative change.

[51] Mr Dempsey's evidence was inconsistent with that of Ms Simmons. He gave evidence that he met with Ms Simmons on 28 September 2006 at his Thuringowa office where he told her that it would be to his advantage to give a quote for his fees and she said she had no difficulties with that. Unfortunately it appears that he was being untruthful. None of the independent evidence supports his version. There was an appointment in his electronic diary for 10-11am on 28 September 2006 where Jaymie Anderson sent the message "Left message on Roma Simmons phone. Has not phoned me back." Mr Dempsey asserted to QLS in a letter dated 5 April 2007 that he overlooked the clause in the client agreement that any amendment must be in writing. "However, I explained the process fully to her, and she agreed. I have a diary entry for 10am on 28 September 2006, where I met with her." He must have known that his diary entry did not support his assertion that he met with her.

[52] Ms Simmons' evidence was that no such meeting had taken place. Mr Dempsey's letter of 2 October 2006 is entirely inconsistent with the meeting's having taken place. He said he believed he dictated that letter on the afternoon of 28 September. Not only does it not refer to a meeting which on Mr Dempsey's version had occurred only hours earlier on the day it was dictated, it concludes with the words, "If you have got any questions please do not hesitate to contact me or come in and see me. I have been trying to get you in to discuss this with you, but we have been missing each other." Given the difficulty this placed him in, he then posited that perhaps he drafted the letter before he saw her and signed a letter which said they had not seen each other without really reading it. This was an adventitious explanation. This contemporaneous document under Mr Dempsey's hand reveals the truth. There was no such meeting and Mr Dempsey's protestations in evidence that he clearly remembers such a meeting were false.

[53] His evidence reveals why he said there was a meeting when there was not. He agreed that the letter did not inform Ms Simmons that he would be immediately charging her a lump sum for the fee he had quoted. He said that he told her that and she agreed to that orally when he met her on 28 September. He could not possibly justify taking the $30,000 unless he had told her about it and she had agreed to it. The letter of 2 October 2006 did not even mention any such agreement made at any such meeting. He falsely told first the Queensland Law Society ("QLS"), then the Commission and then the Tribunal that he had a meeting with Ms Simmons where such an agreement was made to justify his subsequent behaviour in transferring the money to his general account, not because such a meeting had actually taken place.

[54] That he did not tell the truth to the Tribunal was not of course part of the charge against him. It is relevant at this stage only to determining the truth of what actually occurred where there is a conflict in this evidence between himself and Ms

Simmons. It will also be relevant to subsequent findings regarding penalty if the charges presently laid against him are proved.[12]

[55] Notwithstanding the letter of 2 October 2006, Mr Dempsey had no agreement whether orally or in writing as required, to vary his client agreement with Ms Simmons. The letter was not apt to achieve that outcome unless it was countersigned by her. There was no provision in the document for her to do so and she was not asked to. Rather she was, inappropriately, just given seven days to disagree with his proposal or be taken to have agreed to it.

[56] Mr Dempsey said at the time he wrote the letter he instructed Ms Anderson to send Ms Simmons an invoice for $30,000. This is at odds with the terms of the letter which he had just sent to her which refers to monthly bills for the work actually done so she could monitor them. The Tribunal does not accept Mr Dempsey's evidence about what he instructed Ms Anderson to do.

[57] On 4 October 2006, a further $27,490.99 was drawn by Dempseys on the Impact loan without Ms Simmons' knowledge. Ms Anderson emailed Mrs Dempsey to let her know this was to happen on the following day. It was made up of $25,000 for Dempseys and $2,490.99 fees, charges and interest on the loan. The evidence shows that Ms Anderson was instructed to draw down the $25,000 by Mr Dempsey. This instruction was given even before the seven days referred to in the letter of 2 October 2006 had elapsed. At this time, Ms Simmons had not received any accounts since 22 August 2006. Mr Dempsey said that the bills were supposed to be sent and blamed Ms Anderson for not sending them out but it was his law firm and therefore his responsibility to ensure that procedures were followed.

[58] On 5 October 2006 invoice #2682 for $30,000 was issued but not sent to Ms Simmons. Ms Andersen denied creating this invoice. However it seems likely that she must have because she would not have been able to transfer the moneys out of the trust account unless an invoice was posted in the Open Practice software that was used. It was said to be to be for professional fees. The version produced on the warrant also said, as before:

> "As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is <u>not payable</u> until the end of the case, and ten only if we win, as per our agreement."[13]

[59] Like all of the other invoices, it concluded:

> "If you have any queries with it, please do not hesitate to contact me."

[60] As the invoice was not in fact sent to her, this was a hollow invitation.

[61] On the same day $27,867.85 was transferred from Dempseys' trust account to the general account for Ms Simmons' matter. Ms Anderson said that this was on Mr Dempsey's instructions. I accept that this is what happened. Mr Dempsey in an email to Mrs Dempsey on 6 October 2006 referred to a debt that required immediate

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12 *Legal Services Commission v Maddern* (No. 2) [2008] QCA 301.

13 As to the version given to the QLS auditor: see Table 2.

payment saying "I know we are broke but is there any way we can pay him." He referred to taking "the $25 from Impact for Simmons." Referring to the debt he said, "He has been quite good I guess, as the bill, though very high, is about 6 months old – I just have an aversion to him as a dirty -----! But, we do owe him." It appears that it was the need to pay that debt rather than fees generated on Ms Simmons' file that led to the transfer of $25,000 to Dempseys trust account from Ms Simmons' Impact loan and then out of the trust account to his personal bank account. It must be inferred that his behaviour in having those moneys to which he was not entitled drawn from Impact and then transferred from his trust account was dishonest by the standards of ordinary decent people and he must have known that it was.

[62] On 8 November 2006, Ms Simmons received an invoice (#235272910) for $4,224 for professional fees for the period 10 to 31 October 2006. The invoice stated:

> "I enclose a statement of costs for the work done in period below."

[63] On 28 November 2006, Ms Sinclair acted for Ms Simmons in negotiations with regard to her property settlement at the Federal Magistrates Court. When an offer was made by Mr Simmons' solicitors, Ms Simmons expressed concern because she said she owed Mr Dempsey $40,000 or more. She told Ms Sinclair that she was upset because she had been pressured by Mr Dempsey into taking out a loan.

[64] Ms Sinclair reassured Ms Simmons that, notwithstanding what she might have been told by Mr Dempsey, her fees were nothing like $40,000. Little had been done on her file before Ms Sinclair had started work on it and since then they had issued proceedings and very quickly got to a pre-trial conference. Ms Sinclair told Ms Simmons that she would check what her fees were and let her know. However, Ms Sinclair resigned from Dempseys on the following day before she had the opportunity to revert to Ms Simmons about her fees.

[65] On 11 December 2006, Ms Simmons received invoice (#3204) for $5,907.55 for professional fees of $5643 for the period from 1 to 29 November 2006 and disbursements of $264.55. The invoice said:

> "I enclose a statement of costs for the work done in the period below."

[66] In January 2007 Ms Simmons decided to change solicitors in her family law matter. She discovered that Ms Sinclair was then working with Ruddy Tomlins & Baxter Solicitors ("RTB"). She had previously been happy with Ms Sinclair's conduct of her matter so she contacted her and asked her if she would take over. Ms Sinclair agreed and Ms Simmons asked her to notify Dempseys to terminate her instructions. Ms Simmons was concerned that Mr Dempsey had not furthered her matter even though it had effectively settled on 28 November 2006. All that had to be attended to were the tax implications in regard to capital gains tax on the proposed settlement.

[67] On Ms Sinclair's advice, Ms Simmons then contacted Impact and asked them to transfer her loan to RTB. She completed a new loan application form and signed an Irrevocable Instruction addressed to RTB. Both of these documents were signed on

4 January 2007. The loan application was for $30,000.[14] It appears to have been filled in by one person as it is all in the same handwriting. The box preventing correspondence to be sent to her home address was not ticked and the reason for the loan was said to be "This is for the transfer of my litigation loan from Paul Dempsey Law Firm to RTB c/- of Sandra Sinclair."

[68] Ms Sinclair later informed Ms Simmons that Dempseys had drawn down $33,000 from her loan on account of their professional fees. Ms Simmons was shocked as she had only received invoiced amounts from Dempseys for a far less amount. Ms Sinclair too was surprised as she had done the majority of work on the matter and knew that it had not generated anything like that amount of legal fees. Ms Sinclair provided Ms Simmons with a copy of a statement from Impact dated 12 January 2007 in respect of her loan. That showed the draw downs that had been made on:

1 September 2006	$4,462.44
26 September 2006	$4,413.96
4 October 2006	$27,490.99
TOTAL	$36,367.39

[69] On 12 January 2007, RTB sent a letter by facsimile transmission to Dempseys about their repeated attempts to collect the Simmons file from Dempseys. Dempseys had failed to contact RTB. They required production of the file on that day. Mr Dempsey provided the file under cover of letter dated 15 January 2007 querying why "this woman has pulled the pin on this file at this time, because it is literally finished." He said he was not sure what had happened with the Impact loan as too much had been taken for their fees. Ms Sinclair's review of the Simmons file showed that documents including her handwritten notes and notes of Mr Dempsey's first conference with Ms Simmons were missing.

[70] Ms Sinclair finalised Ms Simmons' property settlement and paid out the Impact loan on receipt of the settlement moneys. Included in that amount was $3,367.39 in interest, fees and charges on the $33,000 advanced to Dempseys by Impact. Mr Dempsey said he would pay the interest, fees and charges on the loan but had not. On 16 February 2007, RTB wrote to Mr Dempsey saying:

> "We note from a security contract between Impact Capital and our client that a total amount of $33,000 was advanced by them to your trust account and that your fees totalled only $5,907.55. Would you therefore, as a matter of urgency, provide us with a cheque payable to Ruddy Tomlins & Baxter trust account in an amount of $27,092.45."

[71] Mr Dempsey replied on 5 March 2007 as follows:

> "Thank you for your letters of 16th February, 2007, and I apologise for the delay in answering, but as I said to you (Alex) when I spoke to you, there is something wrong on this file, and I think it is that we have drawn down too much on account of fees.

[14] This was consistent with the amount referred to in Dempseys' letter of 2 October 2006.

> My delay is that I was waiting on data from our new bookkeeper that we pinched from Raoul Guides, but it didn't come, and I sent her away, and it is only this afternoon that I got something.
>
> Enclosed is what I got this afternoon.
>
> It seems that our fees (being fees rendered by Sandra Sinclair who now works for you) come to $13,419.50 inclusive of GST. Outlays are $441.30 – a total of $13,860.90.
>
> It seems you are right in your letter of 16th February in that $33,000 (albeit $32,762.30) has been advanced to us.
>
> However, that seems to be $19,139.10 too much.
>
> I have to repay your client, or Impact, (whoever you choose) $19,139.10 plus the interest on that component.
>
> I am raising a loan to do that and should be able to do that by the end of this month.
>
> Your second letter of 16th February challenges the quantum of my fees – I think that is a bit much.
>
> Sandra Sinclair is obviously running this file and the fees are literally as she billed them. For her to turn around now and attack her own billings is a bit much. She did the work so surely it must be fairly done?
>
> I said to you when you pinched this file that there was something wrong on the file and so it has proven.
>
> Do you, Alex Baxter, not Sandra Sinclair, agree with my figures, or do you see it differently.
>
> It has to be straightened out, it has taken far too long on my end [*sic*], but that is because of serious ability problems in my book keeping department which hopefully I have now resolved.
>
> I await our response."

[72] Under cover of an undated handwritten letter by Mr Dempsey sent on 9 March 2007, Dempseys sent a cheque for $19,139.10. The letter was in the following terms:

> "Further to my letter of 5th March, I enclose my cheque in the sum of $19,139.10.
>
> You have apparently reported me to the Legal Services Commission, and the Law Society is trying very hard now to strike me off.

> I have not, as I thought done anything wrong, I quoted Roma Simmons $30,000 and I enclose my letter of 2/10/06 in that regard.
>
> I, in fact, think Sinclair settled this woman short by 10% ($90,000), and it would be interesting to see what your fees now amount to, I'll bet the total of yours and mine comes to more than $30,000."

[73] Ms Simmons had sent a complaint to the Commissioner on 17 January 2007, which was received on 19 January 2007. On 23 January 2007, the Commissioner referred Ms Simmons' complaint to the QLS for investigation pursuant to s 265 of the *Legal Profession Act* 2004 ("the 2004 Act"). On 6 March 2007, QLS informed Mr Dempsey of the complaint and on 9 March 2007 issued two notices for him to show cause as to whether he was no longer a fit and proper person to hold a practising certificate.

[74] On 13 March 2007 in his role as a QLS auditor, Grenville Hughes conducted an audit of the law practice of Mr Dempsey pursuant to s 31 of the 1952 Act. He provided an analysis of the financial dealings with regard to Ms Simmons. The audit confirmed that the sum of $33,000 had been received into Mr Dempsey's trust account from the litigation loan funds and that amount had been transferred into his general account in accordance with the signed trust authority dated 29 August 2006. Mr Dempsey produced a series of invoices including an invoice for $30,000 justifying the withdrawals from his trust account. He admitted in cross-examination that he did not check that the invoices had in fact been sent to Ms Simmons before giving them to Mr Hughes. His behaviour was in this respect reckless.

[75] The invoices provided to the auditor appeared to be different from the invoices provided by Ms Simmons. As a result a warrant was issued and executed on Mr Dempsey's office during which computer records and other documentation were seized. Subsequent computer forensic analysis lead to the identification of four different sets of invoices in respect of this matter.

[76] Graham Inch, an investigator employed by QLS, conducted an investigation and prepared a report dated 29 October 2007. Mr Inch's report showed that the independent forensic technology company, McGrathnicol, engaged by the Commissioner to analyse the computer material seized under warrant, discovered that two of the invoices (#2529 and #2609) dated 13 September 2006 and 19 September 2006 respectively had only been created on 5 March 2007 and that seven invoices had been accessed and modified on 13 March 2007. The nature of the modification was not able to be identified.

[77] He reported that the search warrant was executed under s 551 of 2004 Act on Mr Dempsey's business at Flinders Mall on 14 May 2007. A quantity of documents was seized and a number of computer hard drives forensically imaged. Mr Dempsey cooperated in the search and volunteered the information that a number of documents regarding the complainant were with his counsel, Ken Fleming QC, in Brisbane. That documentation was subsequently provided to QLS.

[78] There appears to have been four sets of invoices created. They were firstly the invoices sent to Ms Simmons, which totalled $12,460.86; secondly those recorded

in Dempseys' ledger and provided to the auditor, which totalled $35,132.15; a third set found when the warrant was executed relating to Ms Simmons' file. These were similar to the invoices produced to Mr Hughes as the QLS auditor on 13 March 2007 with the addition of an extra invoice #2609 in the amount of $203.60 for disbursements and changes to the narrative within the invoice as set out in Table 2. The total for the third set of invoices was $35,180.37. A fourth set was obtained from the chambers of Mr Fleming QC on 17 May 2007. The total of those invoices was $14,883.94. None of these amounts is the same as what Mr Dempsey asserted in his letter to RTB on 5 March 2007 were the fees and outlays on Ms Simmons' file of $13,860.90. Table 1 showing the various invoices is set out below.

TABLE 1

DATE	**Inv #**	**Invoices sent to SIMMONS**	**Invoices produced to QLS Auditor**	**Invoices held by COUNSEL**	**Invoices produced on WARRANT**
11/05/06	1754	$ 412.50		$ 412.50	
07/06/06	1938	$ 527.51		$ 527.51	
22/08/06	2383	$ 1389.30			
04/09/06	2461		$ 3 050.08	$ 3050.08	$ 3050.08
12/09/06	2495		$ 762.30	$ 762.30	$ 762.30
13/09/06	2529		$ 155.38		
19/09/06	2609				$ 203.60
22/09/06	2629		$ 646.80		$ 646.80
28/09/06	2648		$ 517.59		$ 517.59
05/10/06	2682		$ 30 000		$ 30 000
08/11/06	235272910	$ 4224		$ 4 224	
11/12/06	3204	$ 5 907.55		$ 5 907.55	
TOTAL		**$ 12 460.86**	**$35 132.15**	**$ 14 883.94**	**$ 35 180.37**

[79] In addition some invoices which have the same invoice number, date and amount, nevertheless inexplicably have a different narrative in the invoice. Table 2 illustrates these variations.[15]

[15] All also include the notation, "If you have any queries with it, please do not hesitate to contact me."

TABLE 2

Inv #	Simmons	QLS Auditor	Counsel	Warrant
1754	"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win, as per our agreement."		"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win, as per our agreement."	
1938	"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win, as per our agreement."		"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win, as per our agreement."	
2383	"As I said t would in the Costs Agreement I enclose a bill of costs for the work done in period below. A Costs Notice under the Family Law Act has been provided to you with your Client Agreement."			
2461		"As I said t would in the Costs Agreement, I enclose a tax invoice for the work done in period below."	"As I said t would in the Costs Agreement, I enclose a tax invoice for the work done in period below."	"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win, as per our agreement."
2495		"As I said t would in the Costs Agreement, I enclose a tax invoice for the word done in period below."	"I enclose statement of costs for the work done period below."	"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win as per our agreement."
2529		"As I said t would in the Costs Agreement I enclose a tax invoice for the work done in period below"		
2609				"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win as per our agreement."
2629		"As I said t would in the Costs Agreement I enclose a tax invoice for the work done in period below."		"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the

				end of the case, and then only if we win as per our agreement."
2648		"As I said t would in the Costs Agreement I enclose a tax invoice for the work done in period below."		"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win as per our agreement."
2682		"As I said t would in the Costs Agreement I enclose a tax invoice for the work done in period below."		"As I said t would in the Costs Agreement, I enclose a statement of costs for the work done in period below. This is not payable until the end of the case, and then only if we win as per our agreement."
235272 910	"I enclose a statement of costs for the work done in period below."		"I enclose a statement of costs for the work done in period below."	
3204	"I enclose a statement of costs for the work done in period below."		"I enclose a statement of costs for the work done in period below."	

[80] Mr Hughes said his general impression of Jaymie Anderson was that she was an inexperienced bookkeeper in a legal office. She had been employed in July 2005 as a typist/legal secretary and was then asked to assist in processing accounts and to help out with bookkeeping. Mr Dempsey's wife, Jutta Dempsey, was the practice manager. Ms Anderson had never previously worked in accounts for a legal firm and had no previous experience with trust accounts. She was however enthusiastic and willing. She was never given any formal training by Mr or Mrs Dempsey in the operation of the trust account or made aware there was a Trust Accounts Act to be complied with. After about three months she was made office manager which involved managing work flow, monitoring the staff and delegating duties. Her evidence was from the time she commenced work at Dempseys she was aware there were cash flow problems with the business. It was usual that she would be directed, as soon as moneys were received into trust from a litigation loan, to raise a final invoice for the amount of funds to be transferred from the trust account to the general account. Mr Dempsey sought to explain what went on in the Simmons' file by his inadvertence and Ms Anderson's incompetence. However, his explanations given to the Tribunal were, as detailed in these reasons, sometimes untruthful. To the extent that problems were due to Ms Anderson's inexperience or lack of competence, she was Mr Dempsey's employee and he was responsible for her actions.

[81] Table 3 showing the payments from the Impact loan and from Dempsey's trust account is set out below. The total amount debited on the Impact loan by 4 October 2006 was $36,367.39 of which Dempseys received $33,000 into its trust account and $3,367.39 was attributable to fees, interest and charges on the loan. $33,203.58 was transferred from Dempsey's trust account to its general account. Mr Dempsey repaid Ms Simmons $19,139.10, meaning he effectively charged her $17,228.29, being $36,367.39 (her total indebtedness to Impact) less $19,139.10.

TABLE 3

DATE	IMPACT LOAN DEBIT	FEES, INTEREST AND CHARGES	RECEIVED INTO TRUST ACCOUNT	TRANSFER FROM TRUST ACCOUNT	REPAID TO MS SIMMONS
04/09/06	$4 462.44	$462.44	$4 000	$3 050.08	
13/09/06				$758.92	
14/09/06				$3.38	
14/09/06				$155.38	
21/09/06				$203.60	
22/09/06				$582.24	
26/09/06	$4 413.96	$413.96			
27/09/06			$4 000		
28/09/06				$64.56	
30/09/06				$517.57	
04/10/06	$27 490.99	$2 490.99			
05/10/06			$25 000	$27 867.85	
09/03/07					$19 139.10
TOTAL	**$36367.39**	**$3 367.39**	**$33 000**	**$33 203.58**	**19 139.10**

[82] Mr Dempsey asserted in a letter to QLS on 5 April 2007 that he had subsequently repaid the interest component on her loan once counsel had brought to his attention that QLS had provided him with the figure owing in the complaint from Ms Simmons which he had received under letter from QLS on 6 March 2007.

[83] In oral evidence Mr Dempsey said he did not know now much money he had paid for the interest on Ms Simmons' loan, which he had agreed to pay. He referred to the payment of $19,139.10 paid by cheque to RTB on 9 March 2007 which was his estimation of moneys owed by him to Ms Simmons. He then gave evidence that he subsequently paid $3,000 to RTB and then a further $4,000 to RTB on dates not specified.

[84] **Charge 5: Overcharging – Complaint by Oats**

5. That on or about 15 October 2004, the respondent charged excessive fees in connection with the practice of law to his client Rafaela Oats.

The respondent denied this allegation.

PARTICULARS

5.1 At all material times the respondent was an Australian Legal Practitioner.

5.2 In August 2003 Rafaela Oats engaged the respondent to act as her solicitor in a personal injury matter.

5.3 The claim by Oats was a 'speculative personal injury claim' within the meaning of ss.481A and 481C of the Queensland Law Society Act 1952.

5.4 On 30 September 2004, the claim settled following a compulsory conference.

5.5 On or about 19 November 2004, the practitioner rendered an account for professional fees and outlays.

5.6 At all material times, the respondent was bound by the provisions of s.481C of the Queensland Law Society Act in relation to the fees he could render to Oats.

Mr Dempsey denied this allegation because it particularises a conclusion of law.

5.7 In breach of those provisions, the respondent rendered fees to Oats in excess of the amount permitted by s.481C of the Queensland Law Society Act, particulars of which are as follows:

Settlement received after deduction of refunds by defendant		*$41,883.99*
Less disbursements (including GST but not photocopying or fax fees)	*$13,654.48*	
Balance settlement		*$28,229.51*
Maximum professional fees (including GST permitted by s.481C)		*$14,114.75*
Fees actually charged including GST	*$32,765.04*	
Overcharge		***$18,650.29***

The allegation in this particular was denied.

[85] **Charge 6: Preferred Own Interest – Complaint of Oats**

6. On or about 30 September 2004 the respondent, while representing Rafaela Oats ('Oats') in a personal injury matter preferred his own interests to those of his client by purporting to require Oats to agree to 'waive' the benefit of s.481C of the Queensland Law Society Act in respect of his professional fees in the matter.

The respondent denied this allegation.

PARTICULARS

6.1 The applicant repeated and relied on particulars 5.1 to 5.7 above.

The respondent also relied on his answers to those particulars.

6.2 *On 30 September 2004, the respondent represented Oats to a compulsory conference in Brisbane. Oats and her husband, Jeffrey Clive Oats, were present at the conference.*

6.3 *In the course of that conference, the respondent prepared a hand-written document, which stated, inter alia:-*

> *"Paul Dempsey has explained the '50/50' rule to me, my husband Geoff (sic) and I understand it, and I waive the benefit of the 50/50 rule. I am happy to pay Dempseys (sic) costs."*

6.4 *At the request of the respondent, Oats and her husband signed the document.*

The respondent denied this particular.

6.5 *Contrary to the purported terms of the document, the respondent:-*

(a) *Did not in fact explain the '50/50 rule' to Oats or to her husband; and*

(b) *Represented to them that the document was an 'indemnity against negligence'.*

The respondent denied these allegations.

6.6 *The sole, or alternatively, the dominant purpose for the respondent purporting to have Oats 'waive' the benefit of s.481C of the Queensland Law Society Act was so that the respondent could charge Oats an amount of fees which would likely exceed the amount allowable pursuant to the section.*

The respondent denied these allegations.

Findings with regard to Oats

[86] In August 2003, Mrs Oats retained Mr Dempsey to act for her in a personal injury claim arising from her work as a pre-school teacher's aide. Mr Dempsey dealt with both Mrs Oats and her husband, Jeffrey Oats, who held an enduring power of attorney from her. As Mr Dempsey admitted, the claim was conducted on a speculative basis. The fees that could therefore be charged were governed by s 48I of Div 2A of the *Queensland Law Society Act* 1952 ("the 1952 Act"). Section 48IC of the 1952 Act set out what is colloquially referred to as the 50/50 rule, whereby a legal practitioner acting for a client in a speculative personal injury claim could not charge in legal fees more than half of the client's damages once statutory refunds and disbursements were deducted. The purpose of this statutory provision was to protect litigants for whom legal practitioners act on a speculative basis by regulating and restricting the practitioner's capacity to charge those clients and setting out the

only way in which those restrictions could be varied, i.e. by written approval in the particular case by the Council of the QLS. There was a clear public policy reason for this provision[16] which precluded a client's contracting out of it or waiving its benefit.[17] To have contemplated that a client could contract out of it or waive it would be to defeat not only the only mechanism set out in the section for enabling a practitioner to charge more, but also its public policy objectives.

[87] Section 48IC provided:[18]

> "**48IC Maximum payment for conduct of speculative personal injury claim**
>
> (1) The maximum amount of fees that a practitioner or firm may charge and recover from a client for work done in relation to a speculative personal injury claim must not be more than the amount worked out using the formula –
>
> $$[E – (R + D)] X 0.5$$
>
> where –
>
> **"E"** means the amount to which the client is entitled under a judgment or settlement.
>
> **"R"** means the total amount the client must, under an Act, or a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.
>
> **"D"** means the total amount of disbursements the client must pay, or reimburse, to the practitioner or firm in relation to the speculative personal injury claim.
>
> (2) If –
>
> (a) the amount of fees that a practitioner or firm may charge and recover from a client is more than the amount calculated under subsection (1); and
>
> (b) the practitioner or firm wishes to charge and recover the amount (the **"greater amount"**) from the client:
>
> the practitioner may apply, in writing, to the council for approval to charge and recover the greater amount.
>
> (3) The council may, in writing, approve an amount up to the greater amount.
>
> (4) This section applies despite part 4A and section 48I.
>
> (5) This section applies to any request for payment made on or after the day this section commences, whether or not a client agreement was entered into before that date."

[88] On 23 and 27 September 2004 Mr Dempsey had two meetings with Mr and Mrs Oats where he explained various aspects of the claim including quantum and likely

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16 See Explanatory Notes to the Justice and Other Legislation Amendment Bill 2003.

17 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 404, 486.

18 The 1952 Act was repealed by s 767 of the 2007 Act; s 48IC of the 1952 Act has been substantially replicated in s 347 of the 2007 Act.

prospects. During those meetings he made notes on a white board in his office. Those notes were printed off. A compulsory conference was set down in Brisbane for 30 September and Mr Dempsey told Mr and Mrs Oats that WorkCover required Mrs Oats to be present.

[89] On 30 September 2004, Mr Dempsey attended the compulsory conference in Brisbane with Mr and Mrs Oats. In the early stages of the conference, allegations were made against Mrs Oats that caused both Mr and Mrs Oats to become upset. Mrs Oats was particularly distressed at being called a liar. Mr Oats was also concerned because his wife was upset and also because of Mr Dempsey's belligerent attitude and use of foul language.

[90] Upon retiring to a private room, Mr Oats asked Mr Dempsey what her chances were. Mr Dempsey told them 30/70, which they took to mean a 30 per cent chance of winning. In view of the fact that Mr and Mrs Oats therefore felt that there was a chance the case would be lost and Mr Dempsey had informed them by letter of 21 September 2004 that going to trial would be likely to cost about $65,000, Mrs Oats wanted the matter to be finalised as soon as possible. In those circumstances Mrs Oats instructed Mr Dempsey that she did not wish to pursue the action any further. At that time, WorkCover were not prepared to make an offer.

[91] Mr Dempsey told the Tribunal he had made an opening offer of $263,232.64 as evidenced on a schedule of damages he took to the conference. WorkCover's solicitors refused the offer and were not prepared to make any offer in return. He said he made notes on the schedule of damages after speaking to WorkCover's solicitors. The large handwritten note made by him on that schedule was "Contributory Negligence" which was not factored in on the original schedule. Mr Dempsey says he explained to Mr and Mrs Oats that it was common for WorkCover to offer strong resistance at the commencement of the compulsory conference but he thought that they would settle down and make a counter offer. He produced notes he made at the conference of various matters raised by WorkCover which he said he explained to Mr and Mrs Oats. This included an explanation of contributory negligence. A handwritten document which supports this is entitled "Contrib Neg". It lists:

> "
> - Liab
> - Quantum
> - Contrib"

At the top is written

> "~~260~~ ←
> 50% contrib. 130."

[92] Mr Dempsey said in evidence that WorkCover was suggesting a 50/50 split on liability. Later in the page after detailed figures on quantum Mr Dempsey has written an allowance for contributory negligence of 25 per cent which would reduce her clear payout figure to $81,107.50 being 75% of $149, 690 less a WorkCover charge of $31,160. On the figures on that sheet, if contributory negligence were assessed at 50 per cent, her clear payout figure would have been $43,685, although that figure was not on the document. After discussing the matter with Mr Dempsey,

Mr Oats instructed him to get whatever he could from WorkCover but that they would certainly not be taking the matter to trial.

[93] Mr Dempsey then went to see the representatives for WorkCover. He returned and said that WorkCover were prepared to offer $25,000 to settle the claim. He thought it was unrealistically low but Mr and Mrs Oats said that they did not want to go to trial. Mr Dempsey told Mr and Mrs Oats that he was sick, that his wife was sick, that two doctors were suing him for something like one and a half million dollars and that he "could not afford to waive his fees if the matter was lost." Mr Oats told him to get what he could.

[94] Mr Dempsey said a number of offers were made on instructions from the Oats. His handwritten notes support that he made a number of counter offers. He did so to try to get WorkCover's settlement offer raised rather than because he had specific instructions to make each offer. After initially making no offer at all, WorkCover then continued to make an offer of $25,000 and finally said they wanted to go to mandatory final offers. Mr Dempsey's version of what then happened is that he returned to the interview room where the Oats were and explained the process of making mandatory final offers. He advised that it appeared to him that $25,000 clear of refund of about $20,000 would be WorkCover's mandatory final offer. He then said that it was silly to settle this case for $25,000 when it was worth $200,000, and that if the case is settled for $25,000, his fees were more than that. Mr Oats said that they did not want to go to trial and were happy to pay his fees. Mr Oats also said that they did not want Mr Dempsey to be out of pocket, but really did not want to go to trial. Mr Dempsey said he understood from those words that Mr Oats was offering to pay him his costs over and above the settlement figure, along with the outlays that were owing at the time.

[95] Up to this point the versions of what occurred do not diverge in any significant way. Where they do diverge is in what Mr Dempsey made of what Mr Oats said. He said that he explained the 50/50 rule to Mr and Mrs Oats and illustrated that by "short-hand schedule showing the worst case scenario in terms of damages following a trial". That handwritten document is in the following terms:

"Gens	35
PEL	48
FEL (60)	
= 30 x 20	60
Spe	10
50/50	____
	85-90"

[96] Mr Dempsey said that this is evidence that he referred to the 50/50 rule as he wrote "50/50" to evidence that he had dealt with the 50/50 rule. This evidence is not without its problems. The first is that the figures for individual heads of damages do not add up to 85,000 – 90,000 (presuming that the figures are meant to represent thousands of dollars). They add up to $153,000. The second problem is that it could easily be inferred that "50/50" may refer to contributory negligence particularly as that is normally the part of the calculation of damages where the discount for contributory negligence is made. The third problem is that the document written by Mr Dempsey which he had Mr and Mrs Oats sign shows that

Mr Dempsey was, as he says, aware of the 50/50 rule but this document, even if the "50/50" does refer to the 50/50 rule, is not evidence that he verbally explained it to them nor that Mr or Mrs Oats understood the rule and that, contrary to what the statute provided, they were waiving it. Had he properly explained the 50/50 rule, he would have had to tell them that the only way he could charge them more would have been for him to apply in writing to the Council of the QLS for approval.

[97] The Tribunal is satisfied that Mr Dempsey did not fully explain the effect of the 50/50 rule and the circumstances in which it could be waived to the Oats. He was content to rely on the Oats' telling him that they did not want Mr Dempsey to be out of pocket. He wrote out the handwritten release setting out that he had explained the 50/50 rule, that they understood it and waived the benefit of it. He did not in fact explain those matters. They did not read or understand what they were signing but signed it at his request when he represented to them that it was an "indemnity against negligence".

[98] Mr Oats said that Mr Dempsey produced a handwritten document which he presented to them to sign. It was several pages in length. Mr Oats asked Mr Dempsey what it was about and he said it was an "indemnity against negligence" that he required to "protect" himself and his employee, Melissa Newport, with whom they had dealt on occasion during the course of the matter. Neither Mr nor Mrs Oats recall reading the document. They said that they assumed that it was what Mr Dempsey said it was. They trusted Mr Dempsey because he was their solicitor and therefore, as they thought, a "man of integrity". Both recognised their signature on a handwritten document which states:

> "I, Rafaela Oats instruct Paul Dempsey to settle my claim.
>
> I instruct him to accept WorkCovers mandatory final offer whatever it is, I expect it to be $25,000 clear of any refund to WorkCover. If it is more than that I am happy.
>
> I am settling my claim because I do not wish to go through the process of going to court.
>
> Paul Dempsey has explained the '50/50' rule to me, my husband Geoff [*sic*] and I understand it, and I waive the benefit of the 50/50 rule. I am happy to pay Dempseys costs."

[99] Neither Mr nor Mrs Oats recalled reading or signing that document. Mr Oats said that it is possible that that document was included in the other pages signed by him at the conference and he recalls that the document presented at the conference was much longer running to four or five pages. Mrs Oats said that she did not sign any handwritten document relating to her case at any other time so she assumes that it must have been in the pages that Mr Dempsey presented to her at the conference.

[100] Both Mr and Mrs Oats said that at no time prior to signing the document did Mr Dempsey mention the "50/50 rule" to them. He did not explain to them what the "50/50 rule" meant in the context of the case. He did not mention or explain that the document he was presenting to them "waived" that rule, or explained the effect of "waiving" that benefit.

[101] As the Commissioner submitted, the sole purpose for Mr Dempsey's purporting to have Mrs Oats "waive" the benefit of s 48IC of the 1952 Act was so that he could charge her an amount of fees which would likely exceed the amount allowable pursuant to the section.

[102] Mr Dempsey then went back to speak with WorkCover's representatives. When he returned, he advised they were now offering an amount of $50,000 including refunds and costs. Mrs Oats gave instructions to Mr Dempsey to accept WorkCover's offer. At the time Mr Oats was happy because he thought his wife would get something out of it. Mr Dempsey did not tell them that the offer had to remain open for 14 days.

[103] Mr Oats said he did not become aware that a "50/50 rule" even existed until July 2005, when he raised the matter of fees with another solicitor. Mrs Oats had never heard of any such rule until her husband told her about it in July 2005. At no time did Mr Dempsey suggest or mention that they could or should take independent legal advice before having them sign the document. He said in evidence it did not seem necessary in the circumstances; but he also conceded that he did not think of it. He accepted in cross-examination that he should have so advised them.

[104] On 15 October 2004 Mr Dempsey sent an account to Mrs Oats for $18,581.02, being $14,543.10 in fees and $4,037.92 in disbursements.

[105] On 19 November 2004, a statement of moneys by Dempseys showed settlement moneys received of $41,883.99 on 15 October 2004, and fees and disbursements of $48,212.92, being fees of $32,765.04 and outlays of $15,447.88 (including disbursements of $13,654.48, photocopying of $1,601.40 and fax fees of $192), leaving Mrs Oats $6,328.93 out of pocket. As she had already paid $11,960.00 into trust for disbursements, Mrs Oats received reimbursement of $5,631.07. That statement and a cheque for $5,631.07 dated 19 October 2004 were sent to Mr Oats under cover of a letter from Mr Dempsey dated 19 November 2004. In that letter Mr Dempsey criticised the inexperience, incompetence and "cupidity" of the solicitor for WorkCover.

[106] Mr Oats made a complaint to the Commissioner on behalf of his wife on 9 January 2006. The complaint was received on 13 January 2006.

[107] On 16 March 2007, Mr Dempsey wrote to QLS responding to the two "show cause" notices served on him. In that letter he said he had paid $7,579 to his trust account in September 2006 on behalf of Mrs Oats after the QLS told him he owed Mrs Oats money. He withdrew it about a month later because he was ill and required urgent medical treatment. He was of the view that Mrs Oats had waived the benefit of the 50/50 rule. Then he sought advice from Queen's Counsel who were of the same view as the QLS so he paid the money into trust again on 30 and 31 October 2006.

[108] On 5 April 2007, Mr Dempsey wrote to Mr O'Donnell at QLS referring to his earlier assertion that he was of the view that Mrs Oats had waived the benefit of the 50/50 rule. He said after taking advice from two Queen's Counsel, he repaid the money.

[109] Section 48IC has been considered by the Court of Appeal in a case concerning the practitioner now before the Tribunal: *Legal Services Commissioner v Dempsey* [2008] QCA 122. McMurdo P said at [8] – [9]:

> "[8] Courts should not interpret statutory provisions as interfering with the contractual rights of parties unless that legislative intent is plain. The legislative intent of Pt 4B Div 2A (which comprises only s 48IB and s 48IC) is contained in s 48IB. This is clear from both the heading and the terms of s 48IB. Relevantly, it is to provide for the maximum payment for Mr Dempsey's conduct of the clients' claims. The heading to s 48IC strongly suggests that the section will specify how that maximum payment is to be calculated. The legislative intent in respect of the amount of fees recoverable by a practitioner or firm from a client for work done in the conduct of speculative personal injury claims is clearly discernable from the terms of Pt 4B Div2A. It is that the amount of fees, as defined in s 3 and calculated according to the formula in s 48IC, cannot be exceeded. It follows that Pt 4B Div 2A is intended to apply notwithstanding a contractual agreement between a client and a practitioner or firm that higher fees will be paid. A reading of s 48IC(1) in its statutory context supports this conclusion. Pt 4B Div 2A displaces the usual position (that the client agreement governs what can be charged) in respect of speculative personal injury claims. The QLS Act does provide a mechanism for a practitioner or firm to charge more than the formula amount under s 48IC(1) for a speculative personal injury claim but only by applying in writing to the Council of the Queensland Law Society for approval: s 48IC(2). There is no suggestion in the QLS Act that any other mechanism, such as a client agreement, will allow a practitioner or firm to charge more than the formula amount under s 48IC(1) in respect of the conduct of speculative personal injury claims.
>
> [9] That view is also supported by the explanatory notes to the *Justice and Other Legislation Amendment Bill* 2003 (Qld), which inserted Pt 4B Div 2A into the QLS Act. The notes state that "[t]he amendments ensure that a practitioner may receive no more by way of professional fees from a judgment or settlement than does his or her client". This does not suggest that the legislature intended to enable a practitioner or firm to charge more than the formula amount under s 48IC(1) through a client agreement. Pt 4B Div 2A was plainly intended to limit the maximum fees able to be charged and recovered from a client by a practitioner or firm for the conduct of a speculative personal injury action."

[110] Mr Dempsey appears to have thought that, notwithstanding the terms of the statute stating that the only way that a practitioner could charge more than the formula set out in s 48IC(1) was by applying to the Council of the QLS for approval; and that there was no suggestion in the 1952 Act that there was any other mechanism, even an agreement with the client, by which more could be charged; that nevertheless the benefit of s 48IC could be waived by the client, thereby allowing the practitioner to

charge more than that allowed under the statutory formula without applying to the Council of the QLS. It was not capable of being waived and any legal practitioner who read the section objectively rather than with an eye to his or her own interests would have known that. The practitioner had to charge in accordance with the statute. The statute aimed to stamp out precisely the problem that arose in this case where the lawyer's costs were more than the damages awarded to the plaintiff by capping the amount that the plaintiff's lawyer could claim in fees according to a statutory formula capable of variation only by the Council of QLS.

[111] The fact that Mr Dempsey had previously held an incorrect view about what constitutes "disbursements" in s 48IC which was litigated in *Legal Service Commissioner v Dempsey* at first instance, [2007] QSC 270, and on appeal by him, [2008] QCA 122, does not assist him. The judgment of Keane JA in the Court of Appeal records that the professional fees charged by Mr Dempsey in the speculative claims therein referred to, which were matters in which he was retained in 1999 and 2002, were sufficiently high to have become of concern to the Legal Services Commissioner.[19]

[112] Applying the formula found in s 48IC of the 1952 Act, the maximum amount of fees that could be charged by Mr Dempsey was $14,114.75 rather than the $32,765.04 he did charge Mrs Oats. He therefore overcharged her $18,650.29.

[113] **Dishonesty**

[114] As Mr Davis SC submitted, charges 2, 3 and 4 each involved allegations of dishonesty. In view of the seriousness of this allegation the Tribunal will apply the test of dishonesty found in *R v Ghosh* [1982] 1 QB 1053 at 1064:

> (1) Whether the conduct was dishonest by the ordinary standards of reasonable and honest people; and
>
> (2) Whether the respondent must have realised that what he was doing was by those standards dishonest;

rather than the purely objective text favoured in *Peters v The Queen* (1998) 192 CLR 493 at 503-504, 508, 526-527.[20]

Conclusion

[115] The Tribunal is satisfied to the relevant standard that Count 1 has been proved, with the exception that the Commissioner has not proved that Mr Dempsey told Ms Simmons the amount of the litigation loan on 29 August 2006, so the Tribunal is not satisfied that he told her that the loan was for $40,000 rather than $30,000 on that date. It appears that he told her in his letter of 2 October 2006 that his fees would be quoted at $30,000 and she would not be charged any more than that.

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19 *LSC v Dempsey* at [14].

20 See also *Harle v Legal Practitioners Liability Committee* [2003] VSCA 133 at [29]-[32].

[116] The Tribunal is satisfied that while representing Roma Simmons in matrimonial matters Paul Anthony Dempsey failed to meet or maintain a reasonable standard of competence and diligence in that he:-

(a) Failed to advise Ms Simmons of her right to obtain independent legal advice as to entering into a litigation funding agreement.

(b) Made application on behalf of Ms Simmons and obtained litigation loan funding in the amount of $40,000.

(c) When requiring an amendment to their client agreement, failed to advise Ms Simmons of her right to obtain independent legal advice regarding the changes.

(d) Failed to give effect to the amendment to the client agreement in writing as required by the said agreement.

(e) Attempted to effect an amendment to the client agreement by omission.

[117] The Tribunal is satisfied that the following particulars of count 1 have been proved.

1.1 At all material times Mr Dempsey was an Australian legal practitioner.

1.2 In February 2006, Roma Simmons engaged Mr Dempsey to act as her solicitor in matrimonial matters.

1.3 On 23 June 2006, Ms Simmons entered into a client agreement with Mr Dempsey.

1.4 That agreement provided inter alia:-

> "Accounts will be issued monthly."
>
> …
>
> "Accounts will be paid at the conclusion of the matter immediately upon receipt of settlement monies."
>
> …
>
> "Estimate total fees of $10-15,000."
>
> …
>
> "Any amendments to this agreement must be made in writing."

1.5 In August 2006, Mr Dempsey advised Ms Simmons that the terms of the client agreement had to be changed and she would have to pay his fees before the proceedings were determined.

1.6 On 29 August 2006 Mr Dempsey told Ms Simmons that:

(a) The government had changed the way solicitors could claim their money in family law matters.

(b) That she would have to take out a loan to pay his fees and that he had made arrangements with a loan company for her to take out a loan for that purpose.

…

(e) That he would pay any interest payable on the loan.

1.7 On 29 August 2006 Ms Simmons executed a loan application in the presence of Mr Dempsey.

1.8 By letter to Ms Simmons dated 30 August 2006, Mr Dempsey stated:-

(a) The loan was to be obtained from Impact.

(b) Ms Simmons would not be responsible for any expense, interest or fees from the advance.

1.9 On 30 August 2006 Mr Dempsey submitted to Impact a litigation loan application on behalf of Ms Simmons for an advance of $40,000.

1.10 On 30 August 2006 Impact approved the loan to Ms Simmons in the amount of $40,000.

1.11 On 29 August 2006, Ms Simmons executed a trust account authority which was dated 29 August 2006. This authority read:-

> "I, Roma Simmons, authorize Dempseys to take their fees as they are billed."

1.12 By letter to Ms Simmons dated 2 October 2006 the respondent stated:-

(a) "I have discovered it is to my advantage to change that client agreement without in any way impacting on you."

(b) "With client agreements, a solicitor can do two things, he can either do an itemised bill along the way as we are doing and at the end of the day the total of those bills is what the bill is or he can quote."

(c) "What I propose to do on your file is to change the client agreement to a 'quote', quoting my professional fees at $30,000, but as part of the administration of your file I will continue to send you monthly bills/reports for the work that is actually done and at the end of the case, what I am paid will be only what the total of those bills are. If the bills come to more than the quote, then anything more than the quote I will not be paid. If the bills come to less than the quote, then I will only be paid what the bills total."

(d) "The client agreement can only be varied by agreement, so if I don't hear from you within 7 days disagreeing with this proposal, then we will take it that this client agreement is varied on this basis."

1.13 Ms Simmons did not respond to the letter of 2 October 2006 within 7 days or at all.

1.14 Mr Dempsey did not:-

(a) advise Ms Simmons of her right to independent legal advice;
(b) provide for an amendment for the client agreement to be executed by both parties incorporating the deemed amendment to quote and the method of payment of fees;
(c) sought to rely on Ms Simmons' silence as the basis for amending the client agreement.

[118] The Tribunal is also satisfied that charge 2 has been proved to the requisite standard against Mr Dempsey in that in the course of representing Roma Simmons in matrimonial matters, the respondent dishonestly misled his client, Roma Simmons. The acts in question were dishonest by the standards or ordinary decent people and Mr Dempsey must have known that.

[119] The Tribunal is also satisfied that the particulars of that charge as set out in 1.1 to 1.6 and 1.11 have been proved. The Tribunal is also satisfied that:-

2.2 The representations set out in paragraph 1.6(a)-(b) were false and misleading because, as the respondent knew:
(a) "The government" had not in fact changed the way solicitors could claim their money in family law matters; and
(b) By reason of the existing client agreement, there was no obligation on Ms Simmons to take out a litigation loan.

[120] Contrary to submissions on behalf of the respondent, it was not an abuse of process to bring both charges one and two since the facts set out in each charge support the different allegations in each charge of incompetence (charge 1) and dishonesty (charge 2).

[121] The Tribunal is also satisfied that charge 3, that on 5 October 2006 Mr Dempsey, while representing Roma Simmons in matrimonial matters, dishonestly drew funds from his trust account to his general account in purported payment of professional fees owing to him when he was not entitled to draw said funds, has been proved to the requisite standard. The withdrawal of the funds from his trust account to his general account were in the circumstances dishonest by the standards of ordinary decent people and he must have known that. He admitted that the authorisation signed by Ms Simmons did not give him authority to transfer money for accounts that had not been billed. She was not billed for that amount. But more importantly he knew she had never agreed to pay the quoted amount up front so he had no right to bill her for that amount and transfer these moneys to his general account from his trust account. He was not protected by s 8(1)(a) of the *Trust Accounts Act* 1973 as he was not entitled to the payment nor was it in accordance with her directions.

[122] The Tribunal is satisfied of the particulars of that charge including:

3.1 Particulars 1.1 to 1.11 to the extent set out above.
3.2 Between 1 September 2006 and 4 October 2006 Impact, at the request of Mr Dempsey or made on his behalf,

transferred sums totalling $33,000 from Ms Simmons' loan account to the respondent's trust account.

3.3 Between 11 May 2006 and 4 October 2006 the respondent issued the following invoices which were received by Ms Simmons for professional fees and disbursements: invoice # 1754 dated 11 May 2006; invoice #1938 dated 7 June 2006; and for professional fees, invoice #2383 dated 22 August 2006. These invoices amounted to $2,329.31.

3.4 On 5 October 2006 the respondent issued Invoice #2682, which purported to bill Ms Simmons for professional fees in the sum of $30,000. Ms Simmons did not receive this invoice.

3.5 On 5 October 2006, the sum of $27,867.85 was drawn from the respondent's trust account to his general account in purported satisfaction of outstanding professional fees and disbursements owed by Ms Simmons in this matter.

3.6 On 5 October the respondent knew or ought to have known that he was not entitled to draw the amount of $27,867.85 from his trust account because:

(a) Ms Simmons was not advised of the draw downs to the respondent's trust account from the Impact loan account, nor did she receive any notice of the drawing from the trust account to the general account of the sum of $27,867.85 on 5 October 2006.

(b) Invoices issued to Ms Simmons between 11 May 2006 and 4 October 2006 amounted to only $2,329.31.

3.7 By Invoice #235272910 dated 8 November 2006, the respondent billed Ms Simmons the sum of $4,224 for professional fees for the period 10 October 2006 to 31 October 2006. Ms Simmons received this invoice.

3.8 By Invoice #3204 dated 11 December 2006, the respondent billed Ms Simmons the sum of $5,907.55 for professional fees and disbursements for the period 1 November 2006 to 29 November 2006. Ms Simmons received this invoice.

3.9 On a date between 29 November 2006 and 12 January 2007, Ms Simmons terminated her client agreement with the respondent and engaged Ruddy Tomlins Baxter to complete her matrimonial affairs.

3.10 On 12 January 2007, Ruddy Tomlins Baxter sent a facsimile to the respondent requesting his client file in relation to Ms Simmons' matrimonial matters.

3.11 On 15 January 2007, the respondent wrote to Ruddy Tomlins Baxter advising that the matter appeared to be finalised but that there was a problem with the Impact Loan and confirming that his total fees were not $30,000.

3.12 On 16 February 2007, Ruddy Tomlins Baxter wrote to the respondent requesting the balance of the loan money held in his trust account.

3.13 On 5 March 2007, the respondent wrote to Ruddy Tomlins Baxter stating that he was only entitled to some $13,860.90 in fees and that he had been overpaid the sum of $19,139.10 which he would repay.

3.14 On 9 March 2007, the respondent paid to Ruddy Tomlins Baxter on behalf of Simmons the sum of $19,139.10.

[123] The Tribunal is satisfied to the requisite standard that charge 4, that on 13 March 2007, the respondent recklessly misled the QLS, in relation to the amount of professional fees and disbursements payable to him by Roma Simmons in relation to matrimonial matters, has been proved. The Tribunal has found that Mr Dempsey acted recklessly in his presentation of the invoices to Mr Hughes without checking that they had in fact been sent.

[124] The Tribunal accepts the following particulars of Charge 4 have been proven:

4.1 Particulars 1.1 to 1.11 to the extent set out above.

4.2 On 13 March 2007 Grenville Hughes, an auditor employed by the Queensland Law Society, conducted an audit of the respondent's trust account pursuant to Section 31 of The Queensland Law Society Act 1952.

4.3 In the course of that audit, the respondent:

(a) Presented to Mr Hughes or caused to be presented to Mr Hughes the following tax invoices:-

i) … #2682 dated 5 October 2006 in the amount of $30,000 for professional fees;

ii) #2461 dated 4 September 2006 in the amount of $3,050.08 for professional fees in the period 7 April to 24 August 2006;

iii) #2495 dated 12 September 2006 in the amount of $762.30 for professional fees in the period 6 to 13 September 2006;

iv) #2529 dated 13 September 2006 in the amount of $155.38 for disbursements.

v) #2629 dated 22 September 2006 in the amount of $646.80 for professional fees in the period 6 to 13 September 2006;

vi) #2648 dated 28 September 2006 in the amount of $517.59 for professional fees and disbursements in the period 6 to 13 September 2006.

(b) By presenting the above invoices, represented to Mr Hughes that those amounts had been billed to Ms Simmons.

4.4 None of the invoices referred to in paragraph 4.3 above were sent to or received by Ms Simmons.

4.5 The respondent told Mr Hughes that he relied upon the trust account authority of 29 August 2006 to draw upon monies held in trust as billed.

4.6 The respondent's representations to Mr Hughes as set out in paragraph 4.3 above were false and misleading because, as the respondent ought to have known:

(a) The invoices he presented to Mr Hughes were not invoices which had been sent to or received by Ms Simmons;

(b) The total amount of the invoices in fact sent to Ms Simmons as at the date of Mr Hughes' audit was only $12,460.86.

[125] The Tribunal is also satisfied to the requisite standard that Charge 5, that on or about 15 October 2004, the respondent charged excessive fees in connection with the practice of law to his client Rafaela Oats, has been proved.

[126] The Tribunal is satisfied that the following particulars are true:

5.1 At all material times the respondent was an Australian legal practitioner.

5.2 In August 2003 Rafaela Oats engaged the respondent to act as her solicitor in a personal injury matter.

5.3 The claim by Mrs Oats was a 'speculative personal injury claim' within the meaning of ss.481A and 481C of the Queensland Law Society Act 1952.

5.4 On 30 September 2004, the claim settled following a compulsory conference.

5.5 On or about 19 November 2004, the practitioner rendered an account for professional fees and outlays.

5.6 At all material times, the respondent was bound by the provisions of s.481C of the Queensland Law Society Act in relation to the fees he could render to Oats.

5.7 In breach of those provisions, the respondent rendered fees to Mrs Oats in excess of the amount permitted by s.481C of the Queensland Law Society Act, particulars of which are as follows:

Settlement received after deduction of refunds by defendant		$41,883.99
Less disbursements (including GST but not photocopying or fax fees)	$13,654.48	
Balance settlement		$28,229.51
Maximum professional fees (including GST permitted by s.481C)		$14,114.75
Fees actually charged including GST	$32,765.04	
Overcharge		**$18,650.29**

[127] The Tribunal is also satisfied to the relevant standard that Charge 6, that on or about 30 September 2004 the respondent, while representing Rafaela Oats in a personal injury matter preferred his own interests to those of his client by purporting to require Mrs Oats to agree to 'waive' the benefit of s.481C of the Queensland Law Society Act in respect of his professional fees in the matter, has been proved.

[128] The Tribunal is satisfied that the following particulars of that charge are true.

6.1 Particulars 5.1 to 5.7 above.

6.2 On 30 September 2004, the respondent represented Mrs Oats to a compulsory conference in Brisbane. Mrs Oats and her husband, Jeffrey Clive Oats, were present at the conference.

6.3 In the course of that conference, the respondent prepared a hand-written document, which stated, inter alia:-

> "Paul Dempsey has explained the '50/50' rule to me, my husband Geoff (sic) and I understand it, and I waive the benefit of the 50/50 rule. I am happy to pay Dempseys (sic) costs."

6.4 At the request of the respondent, Mrs Oats and her husband signed the document.

6.5 Contrary to the purported terms of the document, the respondent:-

(a) Did not in fact explain the '50/50 rule' to Mrs Oats or to her husband; and

(b) Represented to them that the document was an "indemnity against negligence".

6.6 The sole purpose for the respondent purporting to have Mrs Oats 'waive' the benefit of s.481C of the Queensland Law Society Act was so that the respondent could charge Mrs Oats an amount of fees which would likely exceed the amount allowable pursuant to the section.

Conclusion

[129] The Tribunal finds Paul Anthony Dempsey guilty of each of the six charges laid against him. The conduct in charge 1 showed a failure to reach and maintain the reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner and so represented unsatisfactory professional conduct pursuant to s 418(1)(a) of the 2007 Act. In the case of charge 5, that unsatisfactory professional conduct also involved the charging of excessive legal costs contrary to s 420(b) of the 2007 Act. The conduct in charges 2, 3, 4 and 6 involved conduct of an Australian legal practitioner in connection with the practice of law that justifies a finding that he is not a fit and proper person to engage in legal practice, and so represented professional misconduct.

[130] Paul Anthony Dempsey is therefore found to have committed two counts of unsatisfactory professional conduct and four counts of professional misconduct. The Tribunal will hear submissions as to appropriate orders under s 456 of the 2007 Act and costs.