JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and MIJATOVIC [2007] WASAT 111
MEMBER	**:**	HON R VIOL (SUPPLEMENTARY DEPUTY PRESIDENT) MR C EDMONDS SC (SENIOR SESSIONAL MEMBER) MS B HOLLAND (SESSIONAL MEMBER)
HEARD	**:**	1-7 AND 30 NOVEMBER 2006, 1 DECEMBER 2006. WRITTEN SUBMISSIONS RECEIVED FROM THE APPLICANT ON 20 DECEMBER 2006 AND FROM THE RESPONDENT ON 31 DECEMBER 2006
DELIVERED	**:**	23 MAY 2007
FILE NO/S	**:**	VR 58 of 2006 VR 59 of 2006 VR 60 of 2006
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND TOMAS MIJATOVIC Respondent

Catchwords:

Legal practitioner - Unprofessional conduct - Costs agreement - Fiduciary duties - Conflict of interests - Family law proceedings - Application of both *Legal Practitioners Act 1893* and *Family Law Rules 1984* as to costs - Unreasonable and unfair terms - Lump sum provision - Practitioner concealing terms and effect of agreement - Client directed where to sign - No explanation as to terms - No advice to obtain independent legal advice - No basis shown for lump sum - *Briginshaw* standard - Gross overcharging - Reliance on decision of Taxing officer - Challenge to decision of Taxing Officer - The *D'Alessandro factors* - Practitioner's justification for each item - No justification for amount charged - Proportionality between charges, and services necessary and provided - Charges during social occasions - Agency of client's son - Communication with court officer during proceedings - No notice or copy to other side

Legislation:

Family Court Act 1997 (WA), s 27, s 237, s 237(3)
Family Court of Western Australia Rules, r 9
Family Law Act 1975 (Cth), s 41, s 123
Family Law Rules 1984 (Cth), O 38, r 4, r 6, r 26, r 27, r 36, r 37, r 38, r 40, r 42
Family Law Rules 2004 (Cth), r 19.4, r 19.5, r 19.6, r 19.12, r 19(14)(4)(a), r 19(14)(4)(b), r 19.32, r 19.33, r 19.34
Interpretation Act 1984 (WA), s 37, Sch 4 Div 3
Legal Practice Act 2003 (WA), s 3, s 164(1)(f), s 180, s 185, s 185(1), s 187, s 250A
Legal Practitioners Act 1893 (WA), s 25(1), s 29A(1), s 29A(2), s 29A(3), s 29A(4), s 34, s 34A, s 59, s 65, s 65(2), s 65(3), s 66, s 66(A)
Professional Conduct Rules 1983 (WA), r 5.1, r 5.2, r 7.1, r 7.7, r 7.8, r 10.3, r 13.10(1), r 16A, r 16(1), r 16.4, r 16.5
State Administrative Tribunal Act 2004 (WA), Pt 3, Pt 4, s 87(2), s 167, s 140(4)

Result:

Legal Practitioner guilty on three counts of unprofessional conduct.

For corrigenda see last page

Category: B

Representation:

Counsel:

Applicant	:	Mr G H Murphy SC and Ms G Roberts
Respondent	:	Self-represented

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	Self-represented

Case(s) referred to in decision(s):

Briginshaw v Briginshaw (1938) 60 CLR 336
Brown v Talbot & Olivier (1993) 9 WAR 70
Cerini v McLeods (A Firm) [2004] WASC 45
D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198
De Pardo v Legal Practitioners Complaints Committee (2000) 97 FCR 575
De Pardo v Legal Practitioners Complaints Committee [2003] WASCA 274
General Medical Council v Spackman [1943] AC 627
Kyle v Legal Practitioners' Complaints Committee (1999) 21 WAR 56
Legal Practice Board v Frichot [2006] WASC 230
Legal Practice Complaints Committee and Cullen [2005] WASAT 211
Legal Practitioners Complaints Committee and Benari [2005] WASAT 213
Legal Practitioners Complaints Committee and Penkin [2006]WASAT 62
Twigg & Co v Rutherford (1996) 20 Fam LR 862
Weiss v Barker Gosling (1993) 16 Fam LR 728

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Practitioners Complaints Committee has brought three charges of unprofessional conduct against the respondent legal practitioner with respect to professional services he provided to his client in the following circumstances.

2 The client separated from her husband in 1999, after a marriage of about 20 years. In April 2002, the client, with assistance from a friend, commenced property settlement proceedings in the Family Court of Western Australia for orders in relation to the distribution of the assets of the marriage. These comprised essentially the matrimonial home, some shares, a boat; and motor vehicles and assets and funds in the possession of the client and husband respectively. The proceedings were the subject of discussions between the practitioner and the client's son, who were good friends. In July 2002 the client learned that her husband had instructed solicitors. She then spoke to the practitioner who practiced in the area of family law. They entered into a written costs agreement providing for payment at hourly rates and rights of itemisation and taxation of costs.

3 The client was very concerned at the legal costs likely to be incurred. She often spoke to the practitioner about these. Her evidence, disputed by the practitioner, was that he said they would not be "that much". Also, in August 2002, the practitioner provided a notice that his costs to that date were $1000 and to trial were estimated at $4000 to $8000. These figures corresponded with the husband's solicitors' estimates showing a total of $9200 to the end of trial. In October 2002 and December 2002 the practitioner produced further costs notifications. The first notification, by some handwritten entries of the practitioner, provided that costs in the event of a settlement would be $22 000 and $50 000 if the matter went to trial. The second notification advised that costs were estimated at $22 000 - $50 000. The client says she was not shown the October notification and signed the December notification without reading it or understanding its terms and effect.

4 The practitioner and client attended conciliation conferences in July 2002 and October 2002. Settlement of the proceedings was not reached. At the end of October 2002 the practitioner wrote to the husband's solicitors proposing there be an even division of the matrimonial property. The offer was essentially that the husband retain the house and boat, that the shares be divided between them, that they

each retain their personal chattels and effects and that the husband pay $150 000. The husband's solicitors offered payment of $130 000 but otherwise accepted these terms. The practitioner on instructions proposed payment of $142 000. The husband's solicitors countered that the difference be split, the husband paying $136 000. In December 2002 the matter settled on that basis. Consent orders were signed.

5 In early February 2003 the practitioner called the client in to sign some documents. She signed where directed, without reading the documents and believing that these related to the settlement. Included in the papers was a second costs agreement prepared by the practitioner. Under this the client agreed to pay $22 000 for costs, disbursements and GST and waived her rights to itemisation, taxation and any claim against the practitioner. In late February 2003 she signed some further documents, including a trust account withdrawal authority giving effect to the second costs agreement. Again she did not read this document nor understand its effect and terms. She was given a cheque for $114 000.

6 The client was distressed and confused at not receiving the full settlement sum. She requested an itemised account. The practitioner failed to provide this. He subsequently sent her letters indicating he was completing the settlement of the consent orders and, on instructions from the client, her partner and her son, working on an "appeal" from the consent orders. The client responded in several letters that she had never given such instructions and that his engagement had concluded at the end of February 2003. The practitioner claims he did not receive this correspondence until some weeks after its posting.

7 Following the client's complaint to the Committee and further requests by it, the practitioner finally provided an itemised account in December 2003. This was for $23 250 including GST. It included substantial amounts for professional services including with respect to his discussions with the client's son, during a function at the client's son's apartment and at Miss Maud Restaurant and from the end of February to April 2003 in respect of effecting settlement and the "appeal". The client had the account assessed by a Registrar of the Family Court. The amount allowed was about $5500. In the course of that hearing the practitioner wrote a letter to the Registrar which was extremely critical of his conduct of the taxation. This was not provided to the client's solicitors until the practitioner was asked to do so by the Registrar. By the orders made, the Registrar referred some aspects of the practitioner's conduct to the Committee.

8 The Committee made three references to the Tribunal for findings that the practitioner was guilty of unprofessional conduct under the provisions of the legislation governing legal practitioners. The first was in essence that the practitioner had acted improperly in relation to the second costs agreement and the withdrawal authority and in failing to provide an itemised account. The second was that he had acted improperly in that he had grossly overcharged the client. The third was that he had improperly communicated with the Registrar.

9 On the first reference we have found that the practitioner did not advise, nor orally agree with, the client that he would charge a lump sum fee of $22 000, (the October 2002 notification of costs being created by the practitioner in early 2003 and the client not reading nor appreciating she was signing the December 2002 notification), that the terms of the second costs agreement were unfair and unreasonable, that he procured the execution of that agreement and the withdrawal authority without the client knowing what each document was, without giving her the opportunity to read the document and without explaining it to her. We have found the practitioner guilty of this complaint, including in relation to failing to provide an itemised account when requested.

10 On the second reference, having considered the Registrar's decision and the relevant factors as to what will constitute a reasonable cost, we have found that the Registrar's assessment of costs provided appropriate evidence as to a reasonable charge for the practitioner's services. This reveals the extent of the overcharge. We reject the practitioner's attack on the Registrar's decision. We have also upheld the Committee's claim that, independently of the Registrar's decision, having regard to the charges during the periods mentioned, the practitioner's bill represented a gross overcharge. In that context we have considered the practitioner's evidence and submissions concerning the reasonableness of all of his charges. We reject the practitioner's claims in that respect. We regard the practitioner's records as unsafe and unreliable. Some were created well after the events they purport to record and were made for the purposes of justifying his account. We have found the practitioner guilty of unprofessional conduct by gross overcharging.

11 On the third reference, we have found that there were no circumstances justifying the practitioner's conduct in writing to the Registrar and in the terms he did and without providing a copy to the other side. We have found the practitioner guilty of this charge.

Outline of these reasons

12 Given the length of these Reasons, it may be helpful to provide an outline by reference to the subject headings we have used:

The complaints and references – the relevant legislation

13 The applicant, the Legal Practitioners Complaints Committee (Committee) has, pursuant to s 180 of the *Legal Practice Act 2003* (WA), determined to refer three matters involving complaints of unprofessional conduct against the respondent (practitioner), to the State Administrative Tribunal. Pursuant to that determination, the Committee has by three applications each dated 31 March 2006, instituted professional disciplinary proceedings against the practitioner for hearing and

determination by this Tribunal within its original jurisdiction pursuant to the provisions of Pt 4 of the *State Administrative Tribunal Act 2004*.

14 The first matter (VR 58 of 2006) alleged that the practitioner was guilty of unprofessional conduct from about July 2002 to December 2003 by failing to ensure that the client's interests were properly protected and advanced in relation to the client's liability for costs payable to the practitioner, and improperly and calculatedly advancing his own interests in respect of costs, in conflict with, and to the detriment of the client's interests (the Conflict Complaint). The Committee has sought a finding that the practitioner was guilty of unprofessional conduct pursuant to s 29A(1) of the *Legal Practitioners Act 1893* (WA), consequential orders pursuant to s 29A(2) and s 29A(3) of that Act, and costs pursuant to s 29A(4) of that Act and s 87(2) of the *State Administrative Tribunal Act 2004* (WA).

15 The second matter (VR 59 of 2006) alleged that the practitioner was guilty of unprofessional conduct in about 2003 by charging a grossly excessive fee for the performance of professional services for a client in property settlement proceedings commenced by the client in the Family Court of Australia [correctly, the Family Court of Western Australia] (the Overcharging Complaint). The Committee again sought a finding that the practitioner was guilty of unprofessional conduct pursuant to s 29A(1) of the *Legal Practitioners Act 1893*, consequential orders pursuant to s 29A(2) and s 29A(3) of that Act, and costs pursuant to s 29A(4) of that Act and s 87(2) of the *State Administrative Tribunal Act 2004*.

16 The third matter (VR 60 of 2006) alleged that the practitioner was guilty of unsatisfactory conduct by unprofessional conduct in May 2004 in communicating with a judicial officer in proceedings in which he was involved, in the period after the commencement of the hearing of the matter and prior to the continuation of the hearing on a subsequent day, on issues relevant to the proceedings and the evidence in and conduct of the proceedings, without the leave or request of the Court, without first notifying the other side that he proposed to make the communication and of its terms, and without forwarding a copy of the communication to the other side prior to, or around the same time that he sent it to the court (the Communication Complaint). The Committee sought a finding that the practitioner had been guilty of unsatisfactory conduct by unprofessional conduct pursuant to s 185(1) of the *Legal Practice Act 2003*, consequential orders pursuant to s 187 of that Act, and costs pursuant to s 87(2) of the *State Administrative Tribunal Act 2004*.

17 The *Legal Practitioners Act 1893* was in force during the period of conduct the subject of the first two references. The *Legal Practice Act 2003* was in force during the period of conduct the subject of the third reference. Under the *Legal Practitioners Act 1893* the Committee had power to refer the complaint to the Disciplinary Tribunal. That Tribunal had power to make a finding that a practitioner had been guilty of unprofessional conduct and to make a report of the matter to the Full Court of the Supreme Court or impose certain penalties and to deal with costs. The *Legal Practitioners Act 1893* was repealed, and the *Legal Practice Act 2003* commenced, on 1 January 2004. From that date the Committee had power under that Act to refer complaints to the Disciplinary Tribunal to make a finding of unsatisfactory conduct by unprofessional conduct and make such a report or impose such penalties and to deal with costs. From 1 January 2005, upon the commencement of the *State Administrative Tribunal Act 2004,* the Committee had power under the *Legal Practice Act 2003* to refer such matters to this Tribunal and this Tribunal had jurisdiction to make findings that a practitioner was guilty of unsatisfactory conduct by unprofessional conduct, and make such report to the Supreme Court or impose such penalties and to deal with costs. (See in particular the amendments to s 185, s 180 and s 164(1)(f) of the *Legal Practice Act 2003.* We note that s 167 of the *State Administrative Tribunal Act 2004* does not appear to govern the position in relation to the operation of the previous legislation as it applies to matters which had initially been referred to, relevantly, the Disciplinary Tribunal. We do not understand that to have been the position here.)

18 The *Legal Practice Act 2003,* which (as noted) from 1 January 2005 provides for the Committee to refer matters to the State Administrative Tribunal, does not in terms deal with the position of a practitioner's conduct arising during the currency of the *Legal Practitioners Act 1893* and whether in those circumstances the matter may be referred to the State Administrative Tribunal. The *Legal Practice Act 2003* does, however, make reference to the operation of the *Interpretation Act 1984* (WA) "as if the 2003 Act repealed that [1893] Act". (Sch 4 Div 3.) By s 37 of the *Interpretation Act 1984* a repeal does not, unless the contrary intention appears, relevantly, affect any duty, obligation or liability which exists prior to the repeal or any penalty or forfeiture incurred or liable to be incurred in respect of an offence against the Act, or any investigation, legal proceedings or remedy in respect of such duty, obligation and liability; and any such investigation legal proceeding or remedy may be instituted continued or enforced and any such penalty may be imposed and enforced as if the repealing law had not been made.

19 The common law principle is that a statute changing the law is not to be understood as applying to facts or events which have already occurred, in such a way as to affect liabilities which the previous law had defined by reference to past events. However, the law regulating the manner in which liabilities are to be enforced is not within this presumption. Changes made to practice and procedure are applied to proceedings to enforce liabilities notwithstanding that before the law was changed the accrual of the liabilities was complete and rested on events that were in the past: ***Legal Practice Board v Frichot*** [2006] WASC 230 at [15] citing the relevant authorities.

20 Applying these principles, the position is with respect to the first two references that the practitioner's conduct is to be determined and any penalty imposed by reference to the provisions of the *Legal Practitioners Act 1893*, and with respect to the third reference, by reference to the *Legal Practice Act 2003*. However, as regards the forum and the procedures in each case, "a contrary intention does appear" and these are now governed by the current legislation namely the *Legal Practice Act 2003* and the *State Administrative Tribunal Act 2004*. That being so, as at 31 March 2006 the Committee had power to refer each of the matters to this Tribunal which has jurisdiction to hear and determine the matters in accordance with its procedures, but to make findings of guilt and make a report or impose penalties under the provisions respectively of the *Legal Practitioner's Act 1893* (the first two references) and the *Legal Practice Act 2003* (the third reference): ***Legal Practice Board v Frichot*** [2006] WASC 230 and ***Legal Practice Complaints Committee and Cullen*** **[2005]** WASAT 211. (We mention that under s 140(4) of the *State Administrative Tribunal Act 2004* Act, the Supplementary Deputy President hearing this matter has the status of a Deputy President for the purposes of s 250A of the *Legal Practice Act 2003*).

21 The central issue for determination is whether the practitioner is guilty of unprofessional conduct (first and second references), and unsatisfactory conduct by unprofessional conduct (third reference), respectively. The *Legal Practice Act 2003* by s 3 defines "unsatisfactory conduct" to include "unprofessional conduct". However, neither that Act nor the *Legal Practitioner's Act 1893*, defines "unprofessional conduct". In this respect the Committee has in each matter relied upon the second limb of the essential notion of what constitutes unprofessional conduct explained in ***Kyle v Legal Practitioners' Complaints Committee*** (1999) 21 WAR 56 at 71-72. That is, that the conduct in question was conduct that, to a substantial degree, fell short of the standard of professional

conduct observed or approved by members of the profession of good repute and competence.

Outline of principal facts and factual disputes

22 The same substratum of facts forms the background for each of the references. The Committee, in the Conflict Complaint and the Overcharging Complaint, relies upon many common facts and documents. The Committee tendered the same witness statements for both those references. As a consequence, the three references were heard together, the evidence of the witnesses being available in each of the matters to the extent they were relevant having regard to the parties' separate Statements of Issues Facts and Contentions.

23 The practitioner was born in 1970. He was admitted to the Supreme Court of Western Australia in 1993. Thereafter he worked as an employed solicitor in various law firms commencing sole practice in Perth in October 2000. His practice included family law matters.

24 In July 2002, the complainant (the client) was referred by her son, who was a close friend of the practitioner, to the practitioner. This was with a view to the practitioner acting for her in property settlement proceedings (the Family Court proceedings) instituted in the Family Court of Western Australia (the Family Court) against the client's husband (the husband). The client and the husband had married in 1979 and were then separated. As at July 2002 the Family Court proceedings were under way, the client with assistance from her female friend (the client's friend), having in April 2002 commenced the Family Court proceedings.

25 Although there is a dispute as to when the client's instructions to the practitioner actually commenced (and ended), on 25 July 2002 the practitioner and the client signed a written agreement entitled "Terms and conditions of engagement" (the first costs agreement). The first costs agreement provided for the practitioner's costs to be charged at the rate of $250 per hour and for the client's rights to itemisation and taxation of his costs. No complaint is made as to the circumstances of the execution and the terms of the first costs agreement.

26 For some time before and after 25 July 2002, there were discussions between the client's son and the practitioner in relation to the Family Court proceedings. In this respect the practitioner, at the time he provided his bill of costs in December 2003, claimed that the son was acting on behalf of the client from April 2002 in providing instructions to and receiving advice from, the practitioner. He has charged the client, and

maintains that he was entitled to charge the client, in relation to receiving and acting on those instructions. However, the extent and nature of these discussions and the entitlement to charge in relation to them are in dispute.

27 There is agreement between the practitioner and the client that from the outset she constantly requested details of the costs being incurred by the client. The practitioner says he provided oral and written advice in relation to his costs. The client says that apart from a written advice in August 2002, she was told in effect not to worry and that the costs would not be "that much". The practitioner disputes he said this.

28 In August, and again in October and December 2002, the practitioner prepared a written notification of his costs to that time and estimates of his costs to various stages in the proceedings, including to the conclusion of the trial. There is a dispute as to the circumstances surrounding the client's receipt of the October notification and her signing of the December notification.

29 There is a dispute also as to the reasonableness of fees charged by the practitioner during the period from July 2002 to February 2003 when it is agreed that the practitioner was engaged. For instance, on 31 October 2002, there was a function (the October function) at the son's apartment and at Miss Maud Restaurant attended by the client, the client's male partner (the client's partner), the client's son, the practitioner and his partner, and other friends of the client's son. The practitioner claimed substantial costs for that day for what he claimed and confirmed in evidence, were "evidence gathering conferences". The client and the client's partner maintain that apart from the client giving some money on account of costs to the practitioner, there was no discussion of the Family Court proceedings on these occasions.

30 The practitioner, on behalf of the client, attended conferences at the Family Court on 25 July and 10 October 2002. Settlement negotiations took place on these occasions but were unsuccessful. At the end of October 2002, the practitioner commenced written settlement negotiations with the husband's solicitors. After a brief exchange of correspondence the matter was settled in December 2002. Consent orders reflecting the settlement were made by the Family Court on 9 January 2003. Pursuant to such orders, on about 6 February 2003 the husband paid the sum of $136 000 to the practitioner on behalf of the client. The practitioner paid this sum into his trust account.

31 Shortly prior to this, in early February 2003 the practitioner had prepared and the client had signed, a document entitled "Authority and Agreement" (the second costs agreement). The provisions of the second costs agreement included the client agreeing to:

(1) a deduction of $22 000 from the settlement proceeds in respect of the practitioner's costs, disbursements and GST;

(2) a deferral of any account for the practitioner's costs until July 2003;

(3) waiving any claim she had in respect of the balance of the amount received from the settlement;

(4) treating the balance of $114 000 payable to the client as a final settlement of any claim she might have against the practitioner; and

(5) waiving her rights to the itemisation and taxation of the practitioner's costs.

32 In his oral evidence the practitioner claimed that this document reflected a prior oral agreement agreeing his fees at $22 000 and that the document had been read by and explained to the client. The client disputed that there was any such prior agreement and said in evidence that her execution of the second costs agreement had been procured by the practitioner without her understanding the nature of the document or she having read it or without the practitioner having explained the document.

33 On 24 February 2003, the practitioner prepared and the client executed, again she says without her reading or having it read or explained, an "Account Withdrawal Authority" (the withdrawal authority) providing for the withdrawal from the practitioner's trust account of $22 000 in payment of the practitioner's costs, disbursements and GST. Near the end of this meeting the practitioner provided to the client a cheque drawn on his trust account in the sum of $114 000, that is, after deducting the sum of $22 000 for his costs, disbursements and GST.

34 Immediately following receipt of this sum and thereafter until April 2003, the client asked the practitioner to provide her with an itemised account of the practitioner's costs. The exact nature of these requests is disputed.

35 In March and April 2003, the practitioner says that, pursuant to instructions from the client and her son and her partner, he continued to implement the settlement and commenced working on an "appeal" from

the consent orders to the Full Bench of the Family Court of Australia. The costs for such work were included in the itemised account ultimately provided. The client and her partner say no such instructions were ever given, that at the end of February 2003 the client had acknowledged his services were at an end and the client several times thereafter made clear, orally and in writing, that his engagement was terminated.

36 In March 2003, the client spoke to Legal Aid and subsequently the Law Society about the matter. On 5 May 2003, she made a formal complaint about the practitioner's conduct. The Committee raised these complaints in correspondence with the practitioner commencing on 14 May 2003. It also referred to the client's request for an itemised account and made several requests of the practitioner in this respect.

37 On about 3 July 2003, the practitioner provided a lump sum bill to the client based alternatively on his hourly rate under the first costs agreement, or under the second costs agreement, in the sum of $22 000 including GST. At the same time he transferred that sum from his trust account to his office account. The practitioner says, but the client denies, that he was entitled to do this pursuant to the second costs agreement and the withdrawal authority.

38 On about 22 December 2003, the practitioner sent an itemised account to the client showing costs incurred of $29 550 calculated at $250 per hour, but claiming costs in the sum of $23 250 including GST. In January 2004, the client by her then solicitors disputed the amount of costs claimed by the practitioner and sought an "assessment" of costs in the Family Court. (This appears substantially the same process as what in some State Supreme Courts, including of Western Australia, is described as a "taxation" of costs.)

39 The taxation took place before Registrar Moroni of the Family Court over six days in May 2004. Registrar Moroni assessed the account for the practitioner's services at $5490.10 inclusive of GST. That is, from the practitioner's account of $23 250 he taxed off $17 759. He ordered the practitioner pay the client's costs of the assessment, fixed at $8296.45. The Registrar also made several complaints to the Committee about the practitioner's conduct in relation to the costs charged.

40 The practitioner in accordance with the assessment and orders, paid the client the sum of $16 509.90 being the difference between $22 000 previously transferred to his general account and the assessed costs of $5490.10, together with the client's assessment costs of $8296.45. At the

same time he notified the client that, for "commercial reasons", he did not intend to seek a review of the taxation.

41 After the first day of the taxation hearing before Registrar Moroni, the practitioner, uninvited, faxed a letter dated 12 May 2004 to the Registrar. A copy of this letter was first provided to the solicitors for the client at the hearing nearly three hours later and following a request from the Registrar that this be done. The letter to Registrar Moroni purported to be a record of the events of 10 May 2004. It was very critical of the Registrar's conduct of the taxation and included the suggestion that the Registrar had "prejudged the issues in the matter".

The principal issues

42 As concerns the Conflict Complaint, the Committee has provided particulars in its Statement of Issues Facts and Contentions. In effect it specifies the practitioner's conduct complained of as:

(1) Procuring the client's execution of:

(a) the second costs agreement; and

(b) the withdrawal authority:

(i) the terms of which were contrary to her interests and calculated to advance his own; and

(ii) in circumstances where the practitioner did not:

(A) bring to the client's attention and or concealed from her their terms and effect;

(B) advise her that it was contrary to her interests to sign; and

(C) insist that she should not sign until she had obtained independent legal advice.

(2) Failing to provide an itemised bill of costs in the periods:

(a) 24 February to 2 July 2003;

(b) 3 July to 22 December 2003.

43 The principal factual issue in the Conflict Complaint concerns the circumstances in which the second costs agreement and the withdrawal authority came to be executed. Specifically, whether as the practitioner

claimed (in this respect during the hearing) the client had earlier been informed and agreed to his proposed lump sum fee of $22 000, and had voluntarily agreed and understood this and the terms of the second costs agreement and the withdrawal authority; or whether as the client alleges, there was never any discussion much less agreement as to a lump sum fee, nor as to fees in the order of $22 000, nor as to the other provisions of the second costs agreement and she signed the second costs agreement and subsequently the withdrawal authority without any appreciation of the nature of the documents and their terms. To the extent the Committee's factual claims are proved, the Tribunal will need to determine, having regard to a lawyer's statutory, fiduciary and professional duties, whether this constituted unprofessional conduct.

44 The second issue in relation to the Conflict Complaint is whether from February to December 2003 the client, directly or by the Committee, requested the practitioner to provide an itemised account and whether the practitioner's failure to provide such until December 2003 constituted unprofessional conduct.

45 The main factual issues in the Overcharging Complaint concern the scope, nature and extent of the work undertaken by the practitioner in relation to the Family Court proceedings and the reasonableness of the costs charged for such services. Important issues here are the correctness of Registrar Moroni's decision on taxation and the extent to which the Tribunal may rely upon it. Further, whether independently of this decision, the evidence shows that the amount charged was excessive. The practitioner maintains that notwithstanding Registrar Moroni's decision, the work he undertook in 2002 and early 2003 justified the lump sum fee charged and that the Registrar was wrong in coming to the decision he did. To the extent the costs charged are found to be "grossly excessive" the issue is whether they are so excessive as to constitute unprofessional conduct.

46 There is a much more confined issue in the Communication Complaint. This is whether, as the practitioner maintains, there was compliance with the relevant rules governing such communications or (putting it on behalf of the practitioner) there were particular circumstances justifying the practitioner writing directly to the Court in the terms he did, without invitation to do so and without prior notice to the other.

The witnesses called – some findings on credibility

47 It is apparent from the outline of facts given above that there is a substantial conflict of evidence between the practitioner and the client, and to a more limited extent between the practitioner and the client's partner and friend, on most of the important issues. The specific evidence concerning each of those issues is considered below. It has generally not been possible to reconcile the evidence on the basis of a misunderstanding between the practitioner and the client or a finding of some "middle position" or that one or other witness was mistaken. On the primary issues of the client's knowledge of her son instructing the practitioner on her behalf, the provision of cost estimates to the client, oral discussions and agreement on a lump sum fee of $22 000, the circumstances surrounding and the advice given at the time of the signing of the second costs agreement and the withdrawal authority, termination of the engagement and instructions to prepare an appeal, the acceptance of one witness's evidence necessarily involves the rejection of the other's evidence.

48 The Committee called three witnesses being the client, the male partner of the client (the client's partner) and a female friend of the client (the client's friend).

The client

49 The client was born in 1950 in Spain and came to Australia in 1979, unable to speak any English. She learned English following her arrival. She said in evidence that she can understand and speak English if it is spoken clearly and simply, but she still has difficulty reading documents written in English unless they are expressed simply. She had in the past assisted in an antenna business conducted by the husband, run a take away food business at the Wanneroo markets for several years and worked as a nursing assistant.

50 In her cross-examination by the practitioner, it was put to her that she was fluent in English. Her initial answer was: "Well, whatever is coming in my mouth that's how ... I don't know". When the question was repeated she then said "Yep" and "Well you can hear me talking". A short time later she said she disagreed that she was fluent in English. (T:54, 55, 57, 1.11.06 – given the extensive oral evidence we have included references to the transcript of these proceedings). We mention that in his witness statement in the Overcharging Complaint the practitioner said of the client that "her memory and communication skills were poor". Our finding is that the client was clearly not fluent in speaking and reading

English as was apparent from her evidence and the manner of giving it and as attested by the client's partner and the client's friend. We accept her evidence that she had difficulty in reading documents in English unless they were expressed simply.

51 There was a lengthy cross-examination of the client by the practitioner with the express purpose of demonstrating also that she was an experienced business-woman who would therefore understand the nature of a written costs agreement. In his supplementary oral evidence the practitioner said that he believed from working with her that she was an experienced business-woman who had no difficulty in reading documents in English. (T:11, 7.11.06) It was put to her by the practitioner that she was familiar with commercial documents and financial matters. The client said initially that when she signed a document she "always had someone next to me explaining to me – what it was what". She said in relation to the purchase of the matrimonial home that she had signed the mortgage and transfer documents and some bank loan documents. She had filled in the Family Court documents with assistance from the client's friend. These disclosed that between 1995 and 1998 she had been a "full time working partner" in the antenna business. Further that they had acquired the take away food business in 1995 and she had worked in this until 2000. It was then put to her that running this food business involved financial records and that she was an experienced business-woman. The client rejected this proposition. She said in relation to the take away food business that she sold German sausages in a bun "like hot dogs" from a caravan stall at weekends and that it was conducted on a cash basis. She said that she kept the accounts in the form of a book recording the cash in and out and provided this to a tax agent to prepare the income tax returns. She said that her husband had signed a lease or some document with the stall manager. She said the business ran at a loss and she had arranged an advertisement and sold the business on an oral contract for $3000.

52 In relation to her husband's antenna business, the client said she helped him physically by assisting him install antennas. When he was away in Europe for about a month she managed the business purchasing the antennas and physically installing them with help from her sister. She kept a book for the income and expenses. The business had a bank account with a cheque book, but she had never herself filled out a cheque. If a cheque came in she banked this and she also signed withdrawals with assistance from the "girls" at the bank.

53 She said she "currently" owned land together with her partner. It was not established whether this was acquired before or after 2002. She said she signed the contract of purchase, her partner helping her with the paperwork. She also signed a mortgage. It was put that she had no problem regarding signing contracts and incurring debt under them and she replied "Not if it is explained properly to me, no". She said that her partner and the bank officer had explained the mortgage. Asked if this extended to every single sentence she said; "He did explained a lot to me". (The cross-examination on these subjects is at T:57-78, 1.11.06.)

54 The client said that she had no prior experience in the Family Court and had no previous experience with solicitors. She said that she understood solicitors charged on an hourly rate and that engaging a solicitor in the property dispute would be "expensive". (T:80, 1.11.06) We accept this evidence.

55 In relation to this specific issue, having considered the practitioner's evidence, the client's evidence and that of her partner and friend, we find that the client had limited experience in conducting a business and that such experience as she did have would not qualify her to read and understand legal documents such as a costs agreement and an account withdrawal authority. We find that the client would not have been capable of reading and understanding the first costs agreement and the second costs agreement, and the withdrawal authority, without considerable assistance in the form of explanation of the contents of those documents.

56 Generally as regards the credibility of the client, we find as follows. The client's evidence was contained in a statement of evidence which was signed on 30 August 2006. Although her oral evidence seldom matched the clarity and precision of that document and she sometimes had difficulty expressing herself, there were no departures from the substance of her statement. Further, her evidence was consistent with her written complaint to the Committee dated 5 May 2003 (when the events were fresher in her memory). It was internally consistent and was (as we seek to show) consistent with the probabilities of the matter.

57 The cross-examination of the client by the practitioner was lengthy, laboured and often aggressive. (One consequence of the practitioner acting for himself, notwithstanding earlier suggestions from the Tribunal at directions hearings that he engage independent counsel, was that over some days of the hearing the practitioner cross-examined his former client on matters which had passed between them.) The client exhibited

some distress at this conduct and at having to recount the events the subject of the complaints, some of which she clearly found painful. However, she was not shaken on any aspect of her evidence in chief and repeated and enlarged on much of what she had earlier set out in her witness statement.

58 In several respects the client's evidence was corroborated by the client's partner and by the client's friend. We have considered the nature of those relationships and the likelihood that by reason of them there would be a natural bias towards the partner and friend each supporting the client. Further, it was apparent during his evidence that the client's partner felt strongly about the conduct of the practitioner concerning the deduction of his fees of $22 000 and work said to have been undertaken in relation to the appeal. But even taking those matters into account we have no reason to doubt the substance of their supporting evidence. Certainly nothing emerged in their lengthy cross-examinations to doubt the reliability of their evidence.

59 Having considered all of the evidence, we have come to the firm conclusion that the evidence given by the client was credible and reliable and supported by the two other witnesses in several important respects. For reasons which we detail further below, we accept her evidence on the principal issues. These include her reliance upon and trust in the practitioner, the absence of any intention or conduct that her son act on her behalf in instructing the practitioner, her concerns as to limiting the costs of his work and knowing the quantum of such costs, the receipt of the memorandum of costs dated 9 October 2002 and the signing of the costs disclosure statement of December 2002, the circumstances surrounding her signing of the second costs agreement and the withdrawal authority, her distress when she first learned that the practitioner had charged $22 000 for his work and her lack of any intention or instructions to institute any appeal in relation to the settlement. That is to say, with respect to these issues we find that the version of events put forward by the client is significantly more persuasive than that advanced by the practitioner.

The client's partner

60 The client's partner confirmed the client's evidence as to her limited ability to read long documents and some limitations she had in written and spoken English. He described the client as vulnerable and by nature a very trusting person.

61 The client's partner had very limited involvement in the proceedings concerning the property dispute until early in 2003. He gave important evidence concerning the client's reaction upon being told by the practitioner that he was deducting $22 000 for his costs. He gave evidence as to the client's, and his, immediate requests of the practitioner that he provide an itemised statement of account of his costs. He emphatically rejected the practitioner's claim that at about this time, in late February and March 2003, there were instructions given to the practitioner, including by him, and including at a conference with the practitioner on 31 March 2003, to prepare an appeal from the consent orders. The client's partner also gave evidence as to what occurred at the October function.

62 We take into account that in the course of his cross-examination it was evident that the client's partner felt hostility toward the practitioner in relation to his conduct of the client's matter. Nevertheless we accept the client's partner's evidence on the matters on which he could contribute.

The client's friend

63 The client's friend is a receptionist and long time friend of the client. She had in the past worked with solicitors and assisted the client in initiating the Family Court proceedings. She provided some advice to the client concerning the need for, and costs of, engaging a solicitor.

64 Her evidence was of some importance as concerns the client's claims that the practitioner did not advise her as to the costs being incurred for the work undertaken, despite her repeated requests.

65 She attended the conference at the Family Court on 10 October 2002 and was emphatic that at this time the practitioner did not provide any cost notification documents to the client or to her.

66 The client's friend was an impressive witness and we accept her evidence.

The practitioner

67 The practitioner is 36 years of age. He was born in Yugoslavia and came to Perth when he was a young boy. He graduated from the Law School of Western Australia in 1991 and was admitted to the Supreme Court of Western Australia in 1993. He worked as an employed solicitor, much of this in small sized law firms, before commencing sole practice in October 2000.

68 The practitioner said that prior to the client's matter he had experience in family law matters, referring in his witness statement in the Overcharging Complaint to his "fourteen years of conducting family law court actions" and (inconsistently) in his responsive statement to his "eight years of practice in the Family Court to that time [2002]". He said in evidence he was familiar with the *Family Law Act 1975* (Cth) and Rules. The practitioner in his witness statement in the Overcharging Complaint said he had been involved in "many family law cases and have only lost one case of about 60 that I can remember". He there says also he had conducted in excess of 150 taxations of costs prior to this matter mainly for the successful party, although he conceded in cross-examination none of these were in the Family Court. Elsewhere in his responsive witness statement in the Overcharging Complaint, the practitioner claims to have appeared as counsel in excess of 200 taxations in the State Supreme, District and Magistrate's Courts. We think the practitioner's claims of his experience in the Family Court, and in taxations, to be exaggerated, a matter going to our view of the practitioner's credibility.

69 The practitioner filed witness statements in each of the complaints shortly prior to the commencement of the hearing. On several critical subjects, as identified below, the oral evidence he gave departed significantly from these witness statements. The practitioner also filed Response Statements, Statements of Issues Facts and Contentions and Closing Submissions in the three complaints. The attitude evinced by these documents was that he had achieved a settlement providing a considerable sum of money for the client which she would not have achieved without his assistance. Moreover, his charges for doing so were reasonable and "proportionate" to the value of the matrimonial estate and what the client had received. For that he "ought to have been commended not chastised". Further, his position in relation to the first two complaints was in part that the client had signed the second costs agreement authorising the deduction of $22 000, agreed to a delay in his preparing an account, and otherwise waived her rights to an itemisation and taxation of costs, and therefore had no grounds for complaint.

70 The practitioner, in defending the first two matters, introduced into evidence a large volume of documentary material including voluminous file notes, notes of telephone conversations and timesheets relating to the work undertaken for the client (although not all of these were referred to in evidence and submissions). In the normal course these documents might have been a secure basis for making findings as to what work was undertaken by the practitioner, including in receiving instructions and

giving advice to the client on various matters, and the time taken by him in doing so. After much careful and anxious consideration, acknowledging that we have in addition to considering the practitioner's admissions, relied upon inference and logic and our experience of how lawyers usually operate, and for the reasons explained in detail below, we have found these documents to be of little evidentiary value having regard to their content and the circumstances in which they were generated. With respect to a number of these documents or entries in them, we have found them to have been made a considerable time after they are dated and to purport to record matters which did not happen.

71 Under cross-examination, the practitioner proved to be a most unsatisfactory witness. He repeatedly avoided giving a direct answer to a direct question and the Tribunal was required on numerous occasions to intervene to direct him to do so. Some of the answers he did give were incredible. On some occasions answers he gave initially were contradicted in later evidence. In important respects his evidence was not consistent with his recently filed witness statements. His evidence was also inconsistent with some of the established facts and with what we regard as the probabilities of the matter. The practitioner's claim to have been entitled to charge in respect of discussions with the client's son, at the October function and in respect of the "appeal", are glaring examples. Instances of each of these matters are identified below.

72 In determining the reliability of the practitioner's evidence we are conscious of the difficult position which he was in. He faced charges brought by his professional body which, if made out, would be expected to result in a significant penalty. The Committee had engaged Senior Counsel, Mr Murphy SC, to present its case and had called the client and also her partner and friend to give evidence against the practitioner. There was a taxation decision by Registrar Moroni which was adverse to his position on the Overcharging Complaint. The practitioner had determined to act for himself, which included making submissions, cross examining the Committee's witnesses, giving evidence in chief and then being subjected to lengthy cross-examination. He had elected to call no witnesses in support of his defence of the charges. This was notwithstanding he might have been expected to call the client's son in support of the claim that he took instructions from him and as to services provided at the October function, and his secretarial staff (including his then partner and now his wife) as to his file notes and records and again as to what took place at the October function. He gave evidence of his own conduct in relation to matters which had taken place some four years earlier and in that respect he would be expected to put the most favourable

interpretation on that conduct. He gave his witness statements following, and with the benefit of, the witness statements provided by the Committee. That it might be said that any difficulty arising from acting for himself was of his own making is, in this context, not to the point.

73 Moreover, we have been anxious to ensure that our expressed concerns of the practitioner's conduct of his defence (failure to keep to the times allocated, unresponsive "pleadings" and witness statements, inappropriate cross-examination and so on) have not affected our view of the veracity of his evidence.

74 We have moreover been conscious of the very serious nature of the first two complaints. These involve allegations of dishonest conduct:

(1) in the Conflict Complaint, that the practitioner knowingly concealed the terms and effect of the second costs agreement and the withdrawal authority; and

(2) in the Overcharging Complaint in relation to the October function, that the practitioner knowingly and dishonestly charged for work at which no professional services were provided and kept up the pretence throughout the proceedings.

75 Further, although the Committee has not sought a finding of dishonesty in that respect (other than in respect of the October function), it was put to the practitioner on a number of occasions that the records he produced and relied upon were not made contemporaneously with the events they record but subsequently when the practitioner was called upon to produce an itemised bill of costs. Again, on the client's evidence and that of her partner, upon which the Committee relies, the practitioner effectively invented instructions to proceed with an appeal in order to demonstrate work to justify the costs claimed.

The *Briginshaw* standard

76 These allegations of dishonesty and impropriety and the improbability of a legal practitioner of some years' experience so conducting himself, and the extent to which the Committee relied on circumstantial evidence (particularly in relation to its challenge to the practitioner's records), focus attention on the appropriate standard of proof by which these matters must be established. As to that, the well known judgment of Dixon J in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 sets out the principles. These may relevantly be summarised as follows:

(1) in civil cases, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal;

(2) this reasonable satisfaction may, not must, be based on a preponderance of probability (that is, the strict balance of probabilities may not in some circumstances be sufficient);

(3) when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found; not a mere mechanical comparison of probabilities independently of any belief in its reality;

(4) moreover, the reasonable satisfaction required is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved; the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal; and

(5) in such matters, reasonable satisfaction should not be produced by inexact proof, indefinite testimony, or indirect inferences; weight is to be given to the presumption of innocence and the expected exactness of proof.

77 The nature of the charges brought against the practitioner generally and the consequences for him if made out, as well as the specific allegations of dishonesty and impropriety mentioned, mean that we have sought reasonably clear and congent evidence in order to be reasonably satisfied they have been established. The need carefully to examine and review the extensive documentary evidence, the transcribed oral evidence and the parties' submissions having regard to these considerations, accounts for the length of these Reasons.

78 Where there has been a conflict between the evidence of the client and the practitioner on important matters, we have sought to identify the factors which have led us to accept the evidence of one over the other. This has included consideration of any corroborating evidence from the client's partner and the client's friend and of the existence of objective facts and probabilities. It has also included regard to the demeanour of the witness in respect of evidence given in relation to particular issues, but recognising the limitations in determining credibility on that basis, especially where the witness is of a different cultural background.

79 Generally our view, taking into account all the factors mentioned above and having regard to all of the evidence, is that where the evidence of the practitioner and the client is in conflict, we prefer the evidence of the client.

I The Conflict Complaint

The legal framework

80 The complaint against the practitioner is that he was guilty of unprofessional conduct in July 2002 to December 2003 in that he failed to ensure that the client's interests were properly protected and advanced in relation to the client's liability for costs payable to the practitioner and improperly and calculatedly advanced his own interests in respect of costs in conflict with and to the detriment of the client's interests.

81 In support of that complaint the Committee referred to and made submissions as to the duties and responsibilities of a practitioner as to costs with respect to:

(1) the *Legal Practitioners Act 1893*;

(2) the *Family Law Rules 1984* (Cth);

(3) a lawyer's duties as a fiduciary; and

(4) the *Professional Conduct Rules 1983* (WA).

82 The issue is not whether the practitioner breached these specific duties and responsibilities *per se* but, having regard to these statutory, legal and professional obligations and the extent of any breach of them, the practitioner's conduct is, according to the relevant test, to be regarded as unprofessional conduct. Moreover, to the extent that the practitioner maintains that he acted in accordance with the *Family Law Rules 1984* and or the *Legal Practitioners Act 1893* relating to costs, that may constitute a defence to the claim of professional misconduct.

83 We mention also in this context that, as the Committee has recognised by the terms of the charge, the complaint in relation to the making of the second costs agreement and the giving of the withdrawal authority is not in itself one of the practitioner being in a position of conflict between his interests and those of his client. In a sense the negotiation and implementation of a costs agreement will necessarily involve a degree of conflict between the interests of the practitioner and of the client, for example in relation to a departure from the relevant scale of

costs and the hourly rate struck. That is why the various rules of court seek to manage that situation. The complaint is as to the practitioner by his conduct improperly and calculatedly (knowingly and deliberately) advancing his interests in conflict with the client's interests.

Costs provisions in the *Legal Practitioner's Act 1893*

84 The *Legal Practitioners Act 1893* makes provisions concerning a practitioner's costs. Section 59 provides relevantly that a practitioner may make a written agreement with a client respecting the amount and manner of payment for fees including by a gross sum (lump sum), but provides that no such agreement shall exempt the practitioner for liability for negligence and that the agreement may be reviewed by the Supreme Court. Section 65, which is unaffected by s 59, provides by s 65(2) that where a lump sum bill, that is a bill not containing detailed charges, is served on the party charged, that party may within 30 days require the practitioner to serve a bill containing detailed items. By s 66, a party charged with an itemised bill of costs may within 30 days serve a notice requiring the bill to be taxed in the Supreme Court. By s 66(A), upon such taxation the taxing officer is to give effect to a s 59 agreement. By s 65(3) a bill of costs shall include notice of these rights of itemisation and taxation.

Costs provisions in the *Family Law Rules 1984*

85 The *Family Law Rules 1984* (Cth) made under the *Family Law Act 1975* (Cth) apply in relation to the practice and procedure of the Family Court of Western Australia in the exercise of its federal jurisdiction (by s 123 of the *Family Law Act 1975*). With respect to the exercise of the Court's non-federal jurisdiction, as conferred under that Act or other legislation, the *Family Law Rules 1984* also apply "as nearly as maybe" (by r 9 of the *Family Court of Western Australia Rules*).

86 Order 38 r 26 of the *Family Law Rules 1984* provides that "a lawyer may enter into an agreement with a client of the lawyer relating to the costs to be charged by the lawyer for work done for a proceeding". (There is no separate definition of a costs agreement.) However: (1) such costs agreement must be in writing and be "fair and reasonable"; and (2) at the time of entering into it, the lawyer must provide a pamphlet summarising the main effects of the order and "of the availability of independent legal advice concerning the costs agreement".

87 By O 38 r 27 a party to the agreement may apply to the court to set aside such agreement if these provisions are not complied with. By r 36 a

lawyer must serve a notice of rights on the party liable for the costs, including notice that that person may, if an account payable is not in the form of a bill, request a bill and may dispute the bill. Rule 37 provides that where a lawyer has not served an account, he must do so within 28 days after receiving a request by the person who has paid or is liable to pay the costs. Rule 38 provides that a person who has paid or is liable to pay costs, whether or not under an agreement, may request the lawyer to serve a bill within 28 days of receiving an account. By r 40, the bill must specify each item of work for which costs are payable containing sufficient detail to enable the bill to be taxed. Rule 42 provides for the person liable to dispute the bill. We think this order applies to a substantive second or subsequent cost agreement entered into even, as in the present case, where it is agreed to constitute a variation to the first costs agreement which is otherwise to continue.

88 Order 38 r 4 of the Rules provides that at various stages of defended proceedings, the lawyer for each party must provide to his or her client written memoranda stating actual costs to that stage and estimated future costs to various stages. By r 6 a copy must be provided to the court or Registrar and to the other side.

89 We note that these provisions of the *Family Law Rules 1984* do not, as does the *Legal Practitioners Act 1893*, specifically preclude an agreement for costs which excludes the practitioner's liability in negligence. (Although it is of interest that the later *Family Law Rules 2004* proscribe a provision in a costs agreement preventing the client from taking a civil action against the practitioner, including in respect of negligence. Rule 19.14(4)(a)).

Application of the costs provisions of the *Legal Practitioners Act 1893*

90 Both the Committee and the practitioner proceeded on the basis that the provisions of the *Legal Practitioners Act 1893* as well as the provisions of the *Family Law Rules 1984* applied to the Family Court proceedings and specifically with respect to the second costs agreement. The *Legal Practitioners Act 1893* governs the conduct of practitioners as defined – persons admitted and entitled to practice as a barrister and solicitor of the Supreme Court of Western Australia. There is nothing in the relevant provisions of this Act (nor in the superseding *Legal Practice Act 2003*) which appear to restrict its operation in relation to costs and taxation, to proceedings in the Supreme Court and District Court. Moreover, r 16.1 of the *Professional Conduct Rules 1983* provides that a

practitioner shall comply with the provisions of the *Legal Practitioners Act 1893* in respect of costs.

91 However, it may be questioned whether these provisions of the *Legal Practitioners Act 1893* do have application in relation to costs with respect to proceedings in the Family Court.

92 Section 123 of the *Family Law Act 1975* provides for the making of rules "providing for or in relation to the practice and procedure to be followed in the Family Court and other courts exercising federal jurisdiction under this Act", including "prescribing matters relating to the costs of proceedings ... and the assessment or taxation of those costs". As outlined above the *Family Law Rules 1984* make provision for costs and taxation. By s 41 of the *Family Law Act 1975* and a declaration in that respect, and by s 27 of the *Family Court Act 1997* (WA), the Family Court of Western Australia exercises federal jurisdiction under the *Family Law Act 1975*, as well as State jurisdiction conferred by that Act or other legislation. In this particular case, the proceedings instituted by the client would appear to have attracted federal jurisdiction, the property proceedings constituting a "matrimonial cause" as defined in the *Family Law Act 1975*. That is, being "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them and arising out of the marital relationship".

93 The position would seem to be that the costs provisions of *Family Law Act 1975*, the *Family Law Rules 1984* and the *Family Court Act 1997* and rules made thereunder constitute a code intended to "cover the field" with respect to costs and taxation in matters in the Family Court, so as to exclude State legislation dealing with those matters. This would seem to be so at least where the Family Court is exercising federal jurisdiction, as here, so that a constitutional inconsistency argument may operate. The argument may also apply where the Family Court is exercising State jurisdiction. ***De Pardo v Legal Practitioners Complaints Committee*** (2000) 97 FCR 575 at [18-24], [47] and cases cited; ***Weiss v Barker Gosling*** (1993) 16 Fam LR 728 at 748-9. How far, if at all, this position affects the "ordinary jurisdiction" of the Supreme Court to order a taxation of a practitioner's (its officer's) costs is not presently material. ***Weiss v Barker Gosling*** also held that the family law legislation governing costs, including an agreement to costs which are in dispute (as opposed to an agreement settling a costs dispute or enforcing a costs agreement), did not, except where displaced by State legislation, exclude the "State common law" (as there described) contractual requirements of fairness and

reasonableness and the absence of undue influence applicable to costs agreements.

94 Importantly for present purposes, ***De Pardo v Legal Practitioners Complaints Committee*** decided that the *Family Law Act 1975*, the *Family Court Act 1997* and the *Family Law Rules 1984* do not exclude disciplinary proceedings under the *Legal Practitioners Act 1893* against a practitioner in Western Australia in relation to costs of proceedings in the Family Court. This was so even where the disciplinary proceedings (as here) may provide for a reduction or refund of fees to a client. We note that an application by the practitioner in that case for leave to appeal from the decision of the Full Bench of the Federal Court was refused by the High Court as having "insufficient prospects of success".

95 In fairness to the practitioner, it is important that we give consideration to the question of the application of the relevant costs provisions of the *Legal Practitioners Act 1893*. For present purposes, we do not think it is necessary to finally decide whether the second costs agreement is governed by the relevant costs provisions of the *Legal Practitioners Act 1893* because of the degree of overlap between those provisions and the costs provisions of the *Family Court Rules 1984*. We proceed on the basis (in favour of the practitioner) that it is only the provisions of the *Family Law Rules 1984* and not additionally the provisions of the *Legal Practitioners Act 1893*, which govern the making of a costs agreement and the itemisation and taxation of costs.

96 It will be apparent that the practitioner's conduct in relation to the terms and entry into of the second costs agreement and the practitioner's subsequent conduct in initially refusing requests for an account and itemisation must, in the sense described above (that is, not equating a breach with unprofessional conduct), be tested against: (1) the *Family Law Rules 1984;* (2) the general fiduciary principles governing agreements between a solicitor and client; and (3) the relevant *Professional Conduct Rules*.

Fiduciary obligations

97 As regards the general principles governing the conduct of a practitioner in the negotiation of an agreement on costs, these are well known and the relevant principles were not in dispute. The Committee's submissions set out the principles and the relevant authorities. With some modifications we adopt those submissions as follows:

1. The solicitor is a fiduciary to the client and, as such, owes fiduciary duties to the client, including in relation to entering into an agreement with the client in relation to costs. ***Law Society of New South Wales v Foreman*** **(**1994) 34 NSWLR 408 at 436 - 7 (a misconduct case).

2. The content of such obligations will vary with the circumstances. However, a solicitor's duties frequently involve: (1) ensuring that the client, because of independent advice or otherwise, is not seen to have entered into an agreement with the solicitor in reliance upon the trust arising from the relationship between the solicitor and client; (2) full and frank disclosure to the client of all information known to the solicitor which the client should know; (3) if there are aspects of a contract in respect of which the solicitor may be in a position of advantage *vis-à-vis* the client, those must be brought to the client's attention so that the client can properly decide, in an independent and informed way, whether to enter into the contract. ***Foreman*** at 436 - 7. These duties particularly apply where the costs agreement provides for the payment of fees other than in accordance with a usual or statutory scale. ***Foreman*** at 436 - 7; ***Brown v Talbot & Olivier*** **(**1993) 9 WAR 70 at 77 (a "reasonableness of costs" case).

3. A practitioner who makes an agreement as to costs with a practitioner must take all reasonable steps to explain the agreement and its impact on the client and ensure that the client understands it. It will not be sufficient merely to comply with the statutory obligations concerning the provision of a pamphlet as to costs because this is directed to ensuring fairness not as constituting the test of it. ***Twigg & Co v Rutherford*** **(**1996**)** 20 Fam LR 862 at 881 - 884 (a reasonableness case).

4. There is a common law duty that a costs agreement be fair (relating to the circumstances of entry into the contract) and reasonable (relating to its terms). Fairness here means that the client fully understands and appreciates its terms. It precludes "any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense". It is not necessary in this context to show that the client received independent advice, although it will be an important factor. ***Weiss v Barker Gosling*** (1993) 16 Fam LR 728 at 759 (a reasonableness case).

98 We mention in this context that the fact that a costs agreement is found to be unreasonable or not fairly entered into, is a separate issue

from whether the practitioner concerned has been guilty of unprofessional conduct.

99 These cases may be regarded as supporting the general propositions that: (1) a lawyer must seek to avoid a position of conflict of his or her interests with that of the client; (2) where such a position does exist, as in negotiation on costs, the lawyer must be astute to observe the relevant rules of court, professional conduct rules and the principles governing the obligations of a fiduciary, so as to avoid a situation of an "unacceptable conflict"; and (3) that will generally require the practitioner to provide a full and frank disclosure of his interests, his taking reasonable steps to ensure the client understands the agreement so as to make an informed choice, and the provision of independent advice. That said, what is required in each case will depend on the particular circumstances including, importantly, whether the client is in a vulnerable position as against the practitioner.

100 The practitioner also referred to:

1. ***Cerini v McLeods (A Firm)*** [2004] WASC 45. In this case Pullin J discussed the extent to which the experience of the client in business matters and in dealing with lawyers would be relevant to determining the reasonableness of a costs agreement. He held that a client's business experience may be relevant as to the level of explanation required as to the difference between scale costs and agreed rates, and further as to the extent to which a client might be taken to understand the terms of an agreement which he had read. In that case the client had held a real estate licence for many years, had been a registered builder, was a director of a company, was a partner in a firm which owned a portfolio of properties, had been a local government councillor, had built up assets in excess of $3 million and had regularly dealt with solicitors. The costs agreement had been provided to him and briefly discussed. He had taken it away, read it, photocopied it, signed the copy, returned it the next day, understood it and had no questions to ask in relation to it. It was held that in those circumstances there was no need for the solicitor to explain the document to him.
2. ***Legal Practitioners Complaints Committee and Penkin*** [2006] WASAT 62. The client had brought a complaint of unprofessional conduct against a practitioner, including that the practitioner had not accounted for $900 said to have been given to him by the client. Receipt was denied by the practitioner. In dismissing the

complaint, the Tribunal took into account that the client had failed to make any complaint in this respect to the practitioner, notwithstanding the numerous discussions and negotiations between them.

101 We have dealt below with some further submissions made by the practitioner concerning his defence to the Conflict Complaint.

The *Professional Conduct Rules*

102 In relation to the Law Society of Western Australia *Professional Conduct Rules 1983* (the *Professional Conduct Rules*) amended to December 2003 (and relevantly current in 2002 and 2003), the following are relevant:

1. A practitioner shall treat his client fairly and in good faith having regard to the client's position of dependence upon him, his special training and experience, and the high degree of trust which the client is entitled to place in him. Rule 5.1.
2. A practitioner shall always be completely frank and open with his client. Rule 5.2.
3. A practitioner shall give undivided fidelity to the client's interests, unaffected by any interest of the practitioner. Rule 7.1.
4. A practitioner is under a duty to provide the client with the full benefit of the practitioner's knowledge and to ensure that the client's interests are properly advanced and protected. Rule 7.7.
5. A practitioner must not allow a position to be reached where the practitioner's duty to a client and the practitioner's own interests conflict. Rule 7.8.
6. A practitioner shall as soon as possible inform a client of the basis of calculation of his costs. During the course of the retainer the practitioner shall promptly advise his client of any circumstances likely to have a substantial effect on the amount or basis of calculation of such costs or disbursements. Rule 10.3.
7. A practitioner shall comply with the provisions of the *Legal Practitioners Act 1893* in respect to costs. Rule 16.1.
8. A practitioner shall within a reasonable time after being so requested by his client render a bill of costs covering all work performed for that client to which the request relates. Rule 16.4.
9. Before entering into a retainer with a client, a practitioner must provide his or her client with a brief statement setting out matters

including the basis of calculating professional fees, the client's right to receive a bill of costs, the client's right to a review of costs by taxation and any other matter required by law to be disclosed. Rule 16A (June 2002).

103 As regards the applicability of the *Professional Conduct Rules* relating to a practitioner's costs for a matter in the Family Court, we think that the operation of r 16.1 is qualified to the extent that the *Legal Practitioners Act 1893* applies in respect of the practitioner's costs. Here we have said that we do not think it does. However, it seems to us that r 16.4 and r 16A do apply with respect to costs in the Family Court, in addition to the provisions of the *Family Law Rules 1984*, at least to the extent that the practice rules are not inconsistent therewith. We are fortified in that view by the reference in r 16A to "required by law" rather than to the *Legal Practitioners Act 1893*. Moreover, we think that r 16A applies to a substantive second or subsequent cost agreement entered into even, as in the present case, where it is agreed to constitute a variation to the first costs agreement which is otherwise to continue. In any event we think that requirement is necessary to meet the "spirit" of r 16A. (As to which see the Foreword to the *Professional Conduct Rules*).

The facts relating to the Conflict Complaint

104 For reasons detailed in the following consideration of the Overcharging Complaint, we find the practitioner was first engaged to act in this matter at the time of the first meetings with the practitioner on 25 July 2002.

The first costs agreement

105 The practitioner and client had first met at the conciliation conference at the Family Court on 25 July 2002 and then returned to the practitioner's office. Here the client signed and initialled the first costs agreement. By this document the parties agreed that the practitioner's costs would be charged on a time basis, relevantly $250 per hour. It provided for interim billing. It further provided that if the client was "not happy" or did not fully understand the terms and conditions of engagement, then the client should seek independent legal advice in which event the practitioner would pay for such legal advice up to a limit of $250. A similar provision is included in the accompanying Explanatory Notes. These Notes also referred to the client's rights to request an itemised account and a further right to taxation of the itemised account.

106 We mention that the Scale of Costs attached to the Explanatory Notes provided for an allowance for solicitors undertaking work of the type the practitioner performed at $117 per hour. On the taxation in May 2004 Registrar Moroni referred to the then current scale allowing $160 per hour (although he applied the first costs agreement and allowed the practitioner costs at the rate of $250 per hour). The hourly amount charged under the first costs agreement was therefore a rate substantially higher than the practitioner was entitled to under the scale.

107 The practitioner in his witness statement dated 30 October 2006 refers to the client having initialled the first costs agreement at provisions acknowledging: (1) having read and understood the agreement and receipt of the Court Scale of Costs and explanatory notes; and (2) having been given an explanation in relation to the Scale of Costs and having been advised of her entitlement to seek independent legal advice. In his evidence the practitioner says that he explained the first costs agreement to her and provided her with a copy of it and the related papers either on that day or another date soon thereafter. The Practitioner's copy of the Explanatory Note on Costs in Family Court Matters has a handwritten note on it "Handed to [the client] 25.7.02". However, given the practitioner's practice of backdating documents (as detailed below), we do not place reliance on this endorsement.

108 The client says in her witness statement that at this meeting the practitioner told her not to worry about reading the papers but simply to sign them and that she did so. She says that there was no explanation of the document nor of her right to have the costs taxed. He had said merely that they were all about him representing her and getting paid. Moreover, she says she was not provided with a copy of the Agreement nor the explanatory notes until at the earliest receipt of the practitioner's letter dated 21 October 2002. She says that she did not ask for a copy at the meeting because she was concerned to keep costs down. She knew that lawyers charged on a time basis and that it was important therefore to keep the meetings with the practitioner brief.

109 In cross-examination the client said that she was aware that solicitors charged at an hourly rate and that engaging a solicitor would be expensive but that at no time was she made aware of the charge out rate of $250 per hour. Had she known that the practitioner's work would cost in the order of $20 000 she said she would have done the work herself. From conversations with others she had formed the belief that her costs would be in the order of $3000 - 5000. She regarded $5000 as "expensive enough". (T:92, 11.06)

110 The client said that at the meeting on 25 July 2002 the practitioner put some papers in front of her to sign, saying: "sign here, sign here", including one of which the practitioner had said: "this is for me to get paid". She had said: "well fair, enough, since you are going to work for me you have to get paid for".

111 That was the extent of his explanation of the document. Concerning her initialling the document, she says the practitioner had said: "Do not worry to read the papers" and that she had not. She said under cross-examination by the practitioner: "I did because I trust you. You were working for me and you are supposed – and someone who work for me I suppose he will do the right thing."

112 The client had thought if he didn't want her to read the document that was to save time. She said "there were questions but I thought okay; he's my son's friend and if my son told me he that he's going to look after me, so he will do it". She understood that he was working for her and that he "will get pay at the end".

113 The client "supposed" that she was agreeing to pay an hourly charge but did not know what the rate was. He never mentioned a figure of $250 per hour. She said that he did not give her a copy of the document. She said that she had thought that if the practitioner didn't provide a copy that was again to keep costs down. At some point she had said to him that she wanted him to bill her periodically but came away understanding (it is not clear from what), that he would be paid at the end of the proceedings. She acknowledged that in her complaint to the Committee she had said she had "willingly" signed this document. That meant, she explained, he had not "pointed a gun at me". (T:3-19, 1.11.06)

114 For present purposes it is not necessary to resolve this conflict as to the extent if any the client read the documents or what explanation if any was given by the practitioner concerning them and whether copies were provided at the meeting. Although the Committee refers to the first costs agreement in its Statement of Facts supporting the grounds of the complaint which covers the period July 2002 to December 2003, the Committee made no specific complaint concerning the signing or terms of the first costs agreement or the lack of explanation as to its terms. The Family Court taxation was based upon the terms of the agreement.

115 We have set out the evidence in some detail however, because it forms part of the background as to what follows and because the client's evidence concerning the circumstances surrounding the signing of the first

costs agreement is consistent with her evidence as to the circumstances of other meetings and in particular at those during which she signed the second costs agreement and the withdrawal authority. Her evidence of this meeting is moreover consistent with her evidence generally as to her reliance upon and trust in the practitioner, not only in relation to conducting the proceedings, but also as to their contractual relationship.

116 It seems likely, and we so find, that at least by the time of receipt of the practitioner's letter dated 21 October 2002, the client was in possession of a copy of the first costs agreement. The letter refers to an attached copy of the agreement and although the client cannot remember whether it was enclosed there is no evidence to suggest that it was not. We are prepared to accept her evidence on the point that she did not read the document and therefore did not know from that source of the hourly rate of $250. However, she was aware of the practice of solicitors to charge at hourly rates and she was clearly in a position to know the hourly rate of $250 by reading it on the front page of the document.

117 Equally clearly, from 25 July 2002 onwards, the practitioner was cognisant of the fact that there was an agreement between them that he would charge on a time basis and that such agreement included express provisions concerning her rights and interest in obtaining legal advice in relation to signing a costs agreement. Further, as advised in the Explanatory Notes, that the client had rights to an itemised bill of costs and taxation of those costs.

Memorandum of notification of costs dated 12 August 2002

118 On about 19 July 2002 the husband's solicitors filed a notice of address for service and in accordance with O 38 of the *Family Law Rules 1984* provided a Memorandum of Notification of Costs. This stated that the husband's costs to that date were $1200, that his estimated costs for preparation of trial were, additionally, $5000 and that his estimated costs for trial were additionally $3000, a total to the end of the trial of $9200. A copy of this Notification was provided directly to the client by the solicitors' letter of that date and to the practitioner some time after 25 July 2002. (T:77, 7.11.06) At the relevant times therefore, the client and the practitioner were aware that these were the actual and estimated fees of the husband's solicitors.

119 There was a direction made by the Family Court at the conference on 25 July 2002 that, in accordance with the *Family Law Rules 1984*, the practitioner within 21 days provide a notification of costs.

120 By a Memorandum of Notification of Costs dated 12 August 2002, the practitioner advised the client that her costs up to that date were $1000, that her estimated further costs up to and including the directions hearing [and conference] on 10 October 2002 were $1000 to $2000, that her estimated future costs to a further Conciliation Conference were $1000 [no such conference was programmed], that her estimated costs up to a pre-hearing conference were $1000 - $4000, and that "In all matters", her estimated costs to the conclusion of a defended trial were approximately $4000 to $8000. There is a typed endorsement at the bottom of the page that the memorandum is intended to be an estimate only of the likely costs and that in the event the matter proceeded to trial the actual costs may well differ from those given.

121 The client says that she may have received that document at the meeting with the practitioner on 12 August 2002. She does not remember.

122 When he was cross-examined on this document, the practitioner gave some extraordinary answers. He said in relation to the figure of $1000 that this did not represent his actual costs but was only an estimate. He supported this assertion by reference to the endorsement at the bottom of the page, notwithstanding that this clearly did not relate to the entry for "actual costs". He said he had not worked out the actual costs and the figure of $1000 was based on "guess work". He had not looked at his file and time sheets. He said he had made many "estimates" of costs on this basis. He then said that there were no actual costs but only "work in progress", as it was not yet billed. Then he said that this sum was only for work on 25 July 2002. He also said that the entry for costs of $1000, and also for $4000 to $8000, were not his calculations but figures carried forward from an existing document used as a precedent, to which he had added the other items. He agreed that the figures of $4000 to $8000 were to the end of the trial for all matters, then appeared to resile from this and total all the figures given. (T:89-92, 7.11.06; 42-50, 30.11.06)

123 We reject the practitioner's attempt to disavow what he had written in this Memorandum. It was produced at the time and pursuant to a court direction. It was in line with the estimate provided by the husband's solicitors, of which the practitioner and the client were both aware. There was then no reason why the practitioner could not have given his actual costs (or a close approximation of those) and a reasonably accurate estimate of costs to the completion of the trial. We find that the figures given for actual costs to that time of $1000, and the estimates to the conference on 10 October 2002 of $2000 to $3000 and to a concluded trial

of $4000 to $8000, represented the practitioner's state of mind at the time. The practitioner's attempt at the hearing to distance himself from these figures and their obvious meaning was, we believe, because he understood the extent to which they demonstrated (1) there was no chargeable work undertaken prior to 25 July 2002 and (2) the claim for $22 000 in costs in his notifications in October and December 2002 was unsupportable.

Memorandum of notification of costs dated 9 October 2002

124 There was a second conciliation conference at the Family Court between the parties on 10 October 2002, attended by the practitioner and the client and the client's friend. The practitioner says that at this time he provided to the client a Memorandum of Notification of Costs dated 9 October 2002. (The practitioner's letter dated 27 February 2003 includes a statement to this effect.) This Memorandum is a very untidy document. At the top it has a faxed receipt from another firm of solicitors. The practitioner said that he had used the form when employed by that firm and he had since photocopied it and used it as a pro forma document, altering it as required. The Memorandum is partly typed and partly in handwriting (the client, the figures, the final paragraph and the date). Some of the writing has been scrawled through. The practitioner acknowledged that the writing of the date, or at least the day (9th), at the bottom of the document was not his and thought that he must have found a document with this date on it. (T:74, 30.11.06) The Memorandum advised the client that her "actual costs up to and including the directions hearing scheduled for" [there is a blank] "are $5500". No explanation was given as to why the known date of 10 October 2002 was not included. There is then a reference to "Custody etc" proceedings. Next, that the estimated costs up to "the Conciliation Conference" were approximately $5000 and "In all matters your future estimated costs to the conclusion of a Defended hearing will be approximately [in handwriting] $50 000." The final paragraph in handwriting reads "If we settle for $150 000 you will get $128 000 net proceeds". That is, a difference of $22 000, payable in respect of legal costs and disbursements. (The meaning of "net" in this context was made clear by the practitioner in cross-examination. See T:60, 30.11.06.) The same endorsement as in the August Memorandum appears at the bottom of the page. There was no evidence or submission that, as required by the *Family Law Rules 1984* (O 38 r 6), a copy of this Memorandum was provided by the practitioner to the Court and to the other side.

125 The contents of this document, including in particular the final paragraph with the entries written in hand, cast considerable doubt upon

the date on which it was in fact created and signed by the practitioner, or at least when the penultimate figure and final paragraph were added. Two months earlier the practitioner had estimated total costs (including $1000 of actual costs incurred) up to and including the conference on 10 October 2002 at $2000 to $3000 and to the conclusion of a defended hearing as $4000 to $8000. Those estimates approximated the husband's actual and estimated costs. There was no apparent basis upon which on 9 October 2002 he could justify charging $22 000 or anything like that sum for achieving a negotiated settlement of $150 000. Neither was there any apparent basis upon which he could calculate the sum of $22 000 as being a reasonable fee for work undertaken and to be undertaken in achieving a future settlement. And, as the practitioner had previously advised in August 2002 that fees for a defended hearing were estimated at a maximum of $8000, the suggestion in this Memorandum that they might reach $50 000 was not believable. There had been no work of any consequence between the dates of the August and October cost notifications. The practitioner sought to explain the increase by his greater understanding of the matter and the way in which the defence of the client's property claim was being conducted. (T:21, 7.11.06) But there was no evidence which supported this assertion and we do not accept it as an explanation for the increase in the cost estimate. Moreover, it is not consistent with the final paragraph of the Memorandum which contemplates a settlement of the matter.

126 The client says that she did not see this document on 10 October 2002 and first saw it on about 27 February 2003 on receipt of the practitioner's letter of that date. We accept the evidence of the client as to her first receiving the document at the end of February 2003 for a number of reasons. First, as the practitioner confirmed, the client was very conscious of the costs being incurred and was anxious to know what these were. She had not engaged a solicitor at the outset because she was concerned about lawyers' costs. She gave evidence that she believed from her general enquiries that her likely costs would be in the order of $3000 - $5000. (T:80, 91, 1.11.06) She knew what her husband's solicitors had estimated as to their fees. Had she been told in October of the existing and estimated costs we have little doubt that she would have been alarmed and raised the matter with the practitioner, or at least with her friend. We think her reaction to reading the Memorandum, and in particular the last paragraph, would likely have been the same as at the end of February 2003 when made aware of claimed costs of $22 000; namely one of shock and distress. Second, assuming she did receive the Memorandum of 12 August 2002, it seems very likely that she would

have queried the very considerable discrepancies between the two estimates or, again, taken these up with her friend. Third, the evidence of the client's friend corroborated the client's evidence that the practitioner did not give the client any documents on 10 October. Had he provided this document to the client, it seems inevitable that she would have referred it to her friend. The client's friend does not remember any discussion of fees on this day. (T:144, 6.11.06) Moreover, the friend had been "harassing" the client to find out the practitioner's costs and on that day (10 October 2002) the friend had rung the practitioner's office with a view to discussing his charges and costs and asking that he send a memorandum of costs. He did not return the call. (T:122, 141, 6.11.06) All of this is entirely inconsistent with the client and the friend receiving the Memorandum on 10 October 2002. We mention that on the practitioner's case he did speak to the client's friend about elements of the case at this time, including in relation to offers of settlement made as evidenced in his telephone note. During her cross-examination, he put this to her. She emphatically rejected the suggestion. Notwithstanding the existence of the note, we accept the client's friend's evidence that there was no such conversation. Finally, to the extent the practitioner suggested the client had a poor recollection of these events, we note that when she completed the Complaint Form on 5 May 2003 she says (par 18) she did not receive the Memorandum in October 2002.

127 The practitioner was cross-examined at length on the discrepancies in the Memorandum and his answers were wholly unsatisfactory. At one point he suggested that his estimate of fees up to the hearing on 10 October 2002 was $10 500, that is the combined amounts of $5500 in par 1 and $5000 in par 3. (T:51, 30.11.06) By reference to the practitioner's itemised bill dated 22 December 2003, it appears that the amount charged for the period 13 August to 10 October 2002 (the quantum of which Registrar Moroni rejected) was $3400. With "actual costs" of $1000, that gives a total of $4400. It was put to him by a member of the Tribunal that on the basis of this Memorandum, his costs to the conference on 10 October 2002 were estimated at $5500, but in the event there was a settlement later on that day he would be claiming $22 000 in costs. There was no satisfactory answer. (T:66-67, 30.11.06) None was available.

128 The fact that a negotiated settlement was subsequently achieved and that the practitioner included the sum of $22 000 for his fees in the second costs agreement in February 2003, suggests that the document dated 9 October 2002 was created at about the time of the practitioner's letter dated 27 February 2003 and for the purposes of inclusion in it. That

would explain how the last paragraph of the Memorandum throws up the precise amount of $22 000 for costs. Although such conduct by a legal practitioner seems improbable, it is relevant to note that the practitioner on other occasions created documents much later than the date they bear and including reference to events which (as we find) did not take place (as detailed below). It is also material to observe that some week or so after this alleged costs notification the practitioner wrote to the client seeking an amount of $1500 for "legal costs". That is again inconsistent with a claim of actual costs to that point of $5500 and estimated total costs to a hearing of $50 000.

129 We find that the Memorandum dated 9 October 2002 was not created nor signed by the practitioner on about 9 October 2002 and was not created until about February 2003 and was not provided to the client until receipt of the practitioner's letter dated 27 February 2003. The several references in that letter to the effect that the Memorandum was handed to the client on 10 October 2002 are self serving and false.

130 The practitioner, by letter dated 21 October 2002 to the client, requested $1500 for legal costs pursuant to the Terms of Engagement. The practitioner says he only received $1250 paid to him in cash at Miss Maud Restaurant on 31 October 2002. This latter sum was paid into his trust account and a receipt dated 1 November 2002 prepared. The practitioner said that shortly before, the client had spoken to him and said she could not pay $1500 and would bring $1250 on another day. She had "money issues". (T:77–78, 30 .11.06) The client says she paid the full amount in tranches of $250 in cash at their meeting on 30 October and $1250 in cash on 31 October 2002 at Miss Maud Restaurant. We are inclined to accept the client's version of events on the basis that there was a discussion about payment of $1250 and her detailed description of the circumstances of the first payment on 30 October 2002 and the fact she was the payer, suggests she has a better memory of the occasion. We do not regard this matter as going to the practitioner's honesty, but only as to his memory and record keeping.

The settlement of the property dispute

131 On about 30 October 2002 the practitioner wrote to the husband's solicitors with an offer of settlement. This proposed an equal division of the matrimonial property so that the parties retain the assets including the boat and motor vehicles in their possession, the AMP shares be divided equally, the husband acquire full ownership of the matrimonial house and assume liability of the mortgage, and pay $150 000 to the client.

132 By letter dated 28 November 2002 the husband's solicitors responded. Although disputing the value of some of the chattels and the husband's sole liability for the mortgage, they agreed with the proposal, save that the husband offered to pay $130 000.

133 The client recalls discussing this offer. She wanted $140 000 and the practitioner suggested she counter with $142 000. On about 11 December 2002 the practitioner wrote to the husband's solicitors offering settlement based on a payment by the husband of $142 000.

134 On about 18 December 2002 the husband's solicitors wrote a short letter offering to "split the difference" by making a payment of $136 000. This was on the basis that if agreed they would prepare consent orders to be filed prior to the New Year break.

135 The client in her witness statement says this offer was also discussed with the practitioner, on 19 December 2002. He proposed she pursue a claim for $142 000. The client was concerned that if she did this, the matter would drag on. The client agreed to settle on the basis offered. This meant that she would receive $4 000 less than her aim of $140 000. On the next day, 20 December 2002, she rang the practitioner to ask the outcome of the AMP shares and recovery of her expenses of renovating the house. She says "[The practitioner] told me to forget about the expenses and seemed annoyed that I had raised them. He said I would get half the AMP shares". (The practitioner in his evidence recalled a quite different conversation on this date – see below.)

136 On about 20 December 2002 the husband's solicitors forwarded draft consent orders. On 30 December 2002 the client attended at the practitioner's office at his request to sign some papers.

137 The client says that she is not sure what papers she signed because the practitioner put several documents in front of her and flipped over the pages to where he wanted her to sign and she did so. She did not have the opportunity to read the documents. She said she was excited about the matter being finalised and that the practitioner appeared to be in a hurry. She did not tell him she was unhappy with the settlement. The documents were not explained to her. Neither was a copy of the documents then provided to her. It appears that amongst the papers she signed were the consent orders.

The Costs Disclosure Statement dated 30 December 2002

138 The papers put before the client on 30 December 2002 also appear to have included a document described as "Costs Disclosure Statement". This was dated 30 December 2002 and apparently based upon the practitioner's precedents and intended to be provided at the time of his initial engagement. It refers at the top to PCR 16A, being a reference to r 16A of the *Professional Conduct Rules*. It recorded the basis of calculating fees as being the hourly basis "as specified in the Terms & Conditions of Engagement provided herewith". (It is not suggested a copy of such document was then provided.) It paraphrases the main provisions of s 59 of *The Legal Practitioners Act 1893* and states that, as specified in s 65 and s 66 of the Act, you may within 30 days of receiving a bill require us to provide you with an itemised bill of costs and within 30 days of receiving that have it taxed "in the Supreme Court of WA". There is a typed subheading in bold: "The total costs if known, or an estimate of costs or a range of estimates if it is not reasonably practicable to provide an estimate". Alongside this and seemingly typed in a different font is - "$1500 - $15 000". By hand this has been ruled through and an addition made "$22 000 - $50 000". It is reasonably clear from the heading of that paragraph that it is intended to cover the "total costs" which in the case of litigation, as here, meant to the end of the trial. The practitioner having first agreed with this proposition, subsequently appeared to dispute it. (T:218-9, 1.12.06)

139 The practitioner did not explain why at this particular time he prepared a Costs Disclosure Statement clearly intended to be provided to the client at the time of the initial engagement. Neither did he explain why this form of document, rather than that which he had previously provided as required by the *Family Law Rules 1984,* was produced.

140 Some of the same questions arise in relation to the Costs Disclosure Statement as to the Memorandum dated 9 October 2002. It is again impossible to reconcile the estimate of the total costs with those in the Memorandum dated 12 August 2002. To the extent the practitioner again sought to do so based upon his greater knowledge of the matter and the alleged "intensity" of the dispute ("one of the most hotly contested matters I had ever conducted", T:166, 6.11.06) we again reject that assertion. The evidence does not support it. The correspondence between the solicitors reflects only some quibbling as to the values of the assets and limited "haggling" over exactly how much the husband was to pay.

141 Moreover, the practitioner did not explain why he provided an estimate of $22 000 - $50 000 at a time when he was in a position to give an accurate record of his costs to that time, on a matter which except for attending the settlement had settled. The practitioner said this was because the client was already seeking to repudiate the agreed settlement figure and he was advising her of the costs if she went to trial. (T:171, 6.11.06) The client denied that she had ever sought to retract her agreement on the settlement terms. The suggestion that the client was seeking to resile from her agreement is most unlikely given that on both the practitioner's and her evidence (1) it was she who had determined to settle at $136 000 even when the practitioner was advising her to hold out for more, (2) she had been "excited" to have finally reached agreement and ended the dispute and (3) she was always concerned about the costs of conducting the proceedings and would have known that continuing them would have continued and increased the costs. There is nothing in the practitioner's letter of 17 January 2003, some two weeks after the conference, which suggests this was the client's position. Indeed in the penultimate paragraph, the practitioner adverts to a delay in settlement entitling **the client** to enforce the judgment sum against the husband. The first reference in correspondence to the client seeking to re-negotiate the settlement sum is in the practitioner's letter dated 27 February 2003. This letter was written after the client and her partner raised with the practitioner his deducting $22 000 from the settlement proceeds.

142 As mentioned, the client's evidence by her witness statement was that the practitioner asked her to come in on 30 December 2002 and sign some papers. She did not read the documents and did not know exactly what she signed. The practitioner showed her where to sign by flipping over the bottom of each page to the spot where he wanted her to sign. He did not invite her to read the papers. She was excited that the settlement was finally going ahead. She did not say at this meeting she was unhappy with the settlement.

143 The practitioner in his witness statement does not deal with this meeting other than to record the client signed the Statement. The practitioner's file note for that conference does not mention the Costs Disclosure Statement.

144 In his cross-examination of the client, the practitioner put to her that on 30 December 2002 they had discussed costs and he had provided to her the Costs Disclosure Statement of that date which he "let her read". Her answer was: "Absolutely not. That's not true." She was clear that she was not made aware of the costs on that day. (T:32, 34, 3.11.06) The

practitioner put to her the meeting lasted half an hour. She did not recall. At first she said it could have been. But she subsequently said that the meeting on 30 December 2002 was "very brief", it was "just five minutes" and that the practitioner gave no explanation and provided no copy of the Costs Disclosure Statement. (T:35, 36, 40, 50, 54, 55, 3.11.06)

145 We accept the client's evidence and find that she did not read this document on 30 December 2002 and neither was it read nor explained to her by the practitioner. Had this happened, it seems inevitable in the light of her earlier concerns to know the costs and her belief that such might be in the order of $3000 – $5000 and her subsequent conduct (examined below), that she would have questioned the practitioner as to costs in the amounts he was now indicating and discussed them with her friend.

The alleged oral agreement on costs

146 There is a related aspect of the 30 December Costs Disclosure Statement which is of importance to the determination of this complaint. It concerns the practitioner's claim (first made during the hearing) that prior to the second costs agreement there was an oral agreement with the client that his costs on a settlement would be a lump sum figure of $22 000. If would follow from this that the provision for costs in this amount in the second costs agreement was a documenting of an earlier agreement. The practitioner expressly adopted this position, saying that the second costs agreement was not prejudicial because it reflected the earlier agreement. (T:198, 199, 1.12.06)

147 In the practitioner's witness statement there is no reference to any oral agreement as to a lump sum fee of $22 000. At page 4 he says he was promised by the client he would be paid a lump sum fee at the conclusion of his services. This is inconsistent with the terms of the first costs agreement and he did not cross-examine the client to this effect. Also starting at page 4 he provides particulars of communications concerning the client's knowledge of "costs involved" and includes reference to the 9 October Memorandum (there being no reference here to the sum $22 000) and the 30 December Costs Disclosure Statement. At page 7 there is a reference to verbal notifications of costs and there is no reference to any communication on about 30 December 2002 or shortly thereafter (the next reference being 24 February 2003). There is a reference to unspecified verbal advice on 20 December 2002 in an unidentified document of that date. In dealing with events on 3 February 2003 the statement records "I told her we can fix the agreed costs and she said she would want that so she knew how much she could

'get in her hand'. I told her that the authority was what we had discussed before and I needed to put things in writing". At page 13 he says that on 24 February 2003 "we had agreed on the fixed price for the legal fees and disbursements" (seemingly a reference to the second costs agreement). All of this is far short of an alleged oral agreement concerning lump sum costs and the reference to "we can fix costs" is inconsistent with it. We mention also that there is no reference to this oral agreement in the practitioner's detailed account of events in his witness statement in the Overcharging Complaint.

148 This failure to deal with this important matter in his witness statement in the Conflict Complaint was put to the practitioner at some length (T:212 - 219, 1.12.06). His quite inadequate answer was simply that he thought he had dealt with it and that he had not earlier been asked about it. His further answer that the client had not dealt with it in her witness statement (T:213, 1.12.06), is to be explained by the fact that prior to the practitioner's oral submissions and evidence, there was no issue about an oral agreement to pay the practitioner $22 000.

149 In his oral submissions the practitioner said that on 30 December 2002 he had calculated his costs at $22 000 based on a rate of $250 per hour to that point, and provided the client with the Costs Disclosure Statement of that date. (T:165, 6.12.06)

150 In his supplementary oral evidence the practitioner said that on 30 December 2002 he had discussed this figure of $22 000 as his estimate of his costs to date and $50 000 as the estimate to go to trial. He said that this discussion arose because she did not want to sign the consent orders but to renegotiate the terms. She wanted to know what she would "get in her hand". (T:15, 7.11.06) When the practitioner was asked about documents recording this discussion, he referred at first to his file note of 30 December 2002, but then conceded this did not refer to that sum. He then said that in a telephone conversation on 20 December (10 days before) the client indicated she wanted $142 000, but allowing within this sum for his costs of $22 000.

151 The practitioner did not put to the client that there had been an oral agreement as to costs nor such a discussion on 20 December 2002 (although he had put a discussion on costs on 30 December). This was so notwithstanding that in her witness statement she had referred to telephone conversations on 19 and 20 December 2002 on the subject of agreeing the settlement offer. Neither was there any question asked of her concerning her alleged desire at this time to go back on the agreed

settlement. As the chronology was that on 19 December 2002 she had, contrary to his advice, determined to accept the offer of $136 000 it seems unlikely (although of course possible) that on the next day she would have recanted. Her evidence was that she had rung on the following day concerning the AMP shares and expenses of renovating the house but that he had dismissed her enquiries. That was the end of it. On 30 December 2002 she signed the consent orders, "excited" to achieve a settlement.

152 In the course of his cross-examination the practitioner admitted that when he had asked the client to come in to sign the consent orders on 30 December 2002, he had not told her about the Costs Disclosure Statement. He claimed that at that conference he had said to her "we could agree - had agreed a figure on the phone" of $22 000. He said in effect there was a lengthy discussion about the consent orders, the costs if she went to trial, what she would receive after the $22 000 cost deduction and her desire to withdraw from the settlement. He agreed that the file note of 30 December 2002 made no mention of this. (T:176, 1.12.06) He denied that as at 30 December 2002 he would have known what the actual costs were, although he said he looked at the file and at the file notes to arrive at the estimate. He then gave a lengthy explanation of how earlier in October 2002 he had arrived at a figure of $22 000. He was then taken to the husband's solicitors' letter of 18 December 2002 which includes annotations by the practitioner in relation to a telephone conversation with the client. It includes "Don't ask for $142 000. Her payout less than $120 000, then ok". The practitioner's explanation was that she had wanted a net sum of $120 000 and that had she achieved $142 000 she would have achieved this, that is, knowing the costs were $22 000. Senior Counsel for the Committee then put to the practitioner that this annotation was not made contemporaneously. The practitioner said that it was. (T:187, 1.12.06) His telephone note of 20 December 2002 records that he talked to the client's partner and the client's friend. It includes "wants $142 000 to cover costs of $22 000 and get $120 000". The practitioner was asked by a member of the Tribunal when he says the oral agreement relating to his costs in the sum of $22 000 was first made. He first said that it was made between 30 October 2002 and 24 February 2003. (T:68, 69, 30.11.06) Notwithstanding this initial uncertainty, he subsequently settled on 18 December 2002 as the date on which he claimed they had reached the oral agreement. This was "definitely" the date. (T:72, 30.11.06) Yet his itemised bill of costs dated 22 December 2003 claims only for a 6 minute (or less) call on 18 December 2002 (although he was not cross-examined on this). There was no correspondence referring to

this alleged agreement until the practitioner's letter dated 27 February 2003.

153 Having regard to all of the evidence and in particular the matters identified above, we have reached the conclusion and find that:

(1) the client signed the Costs Disclosure Statement on 30 December 2002 without understanding the nature of this document, or reading it, or it being read or explained to her;

(2) no copy of that agreement was provided to her until the practitioner's letter of 27 February 2003;

(3) there was no oral agreement to costs of $22 000 on 18, 20 or 30 December 2002 or at all;

(4) the practitioner's telephone note dated 20 December 2002 was not created at that time and was not a true record of any conversation on about that date; and

(5) the annotation on the letter dated 18 December 2002 was not made at that time and was not a true record of any conversation on about that date.

The consent orders

154 The consent orders were made on 9 January 2003. On 17 January 2003 the practitioner wrote to the client attaching a copy of the orders and advising that the husband was to pay $136 000 by bank cheque within 28 days. It advised also in relation to the other aspects of the settlement; the discharge of mortgage to remove the client as mortgagor, the transfer of a motor vehicle into the husband's name, the transfer of some AMP shares so that they held equal numbers of shares and the transfer of a business name to the husband. The necessary documents were to be prepared by the husband's solicitors. The letter proposed a settlement on 6 February 2003.

The second costs agreement

155 Shortly prior to settlement, the practitioner again requested the client attend to sign some papers. The client says that she remembered him referring to the AMP share transfers. She met at his office on 3 February 2003.

156 In the Tribunal's view the circumstances surrounding the signing of the second costs agreement require close consideration. The Committee's complaint based on the signing and content of this document raises an

extremely grave charge of unprofessional conduct. The terms of this document are so prejudicial to a client that the mere preparation of it for execution by the client would raise issues of the reasonableness of the terms and of unprofessional conduct in that respect. But here the charge is that the practitioner not only prepared the document for such purpose but procured its execution "without bringing to her attention and or concealing from her, its terms and effect". (As well as not advising her that it was contrary to her interests and that she ought not to sign it until she had obtained independent legal advice.) That is, the charge goes to the practitioner's honesty in relation to the entry into of the agreement, as well as its terms. Senior Counsel for the Committee put to the practitioner that he understood the seriousness of these charges in this respect (T:193, 194, 1.11.06). The practitioner repeatedly denied that these were serious charges, an answer which the Tribunal considers means either that he was not being honest in his answers, or that he continued to fail to understand how seriously the law regards the obligations of a solicitor concerning her or his contractual relations with a client.

157 There is another aspect. This agreement provided the justification for the practitioner preparing the withdrawal authority and making the deduction of costs pursuant to it. If no complaint can be made out concerning the second costs agreement, much of the complaint concerning the withdrawal authority necessarily falls away.

158 Relevant parts of the second costs agreement read as follows:

> "I, [the client] direct and authorise [the practitioner] to settle and resolve my above claim and action in respect of my property settlement & family law claims against ... my ex-husband.
>
> ...
>
> I acknowledge that you have advised me that the sum I actually receive net will be $114 000.00 and being substantially less than the sum of $136 000.00 due to taxes due to the Commonwealth, my legal costs or fees, GST and disbursements as tax and fees will be deducted from the settlement proceeds received from [the husband].
>
> I confirm our agreement that I will receive a clear sum of $114 000.00 and the balance of the legal fees, GST and disbursements for TRM Legal Services will be deposited into and will remain in the trust account and will not be billed until after 2 July 2003 (the account) the balance of which will be

waived against me on the basis that I make no further claims, actions or demands and will waive my rights to itemisation or taxation of the account and will take no claim or legal action against you in consideration for your waiver of the balance of the account against me.

I authorise the settlement proceeds retained in your trust account (after payment to me by cheque of $114 000.00) be transferred to your office account to pay the account (once issued after 2 July 2003) in full and final settlement of the account and all claims by me against you or any claim by you against me and that sum covers all my legal costs as a fixed price as agreed by me and TRM Legal Services and GST. This sum is agreed by me to be the fixed as a maximum for all the costs and disbursements specified above and the terms of the cost agreement dated 25 July 2002 which still remains in full force including the hourly rates and disbursements specified therein subject to this fixed price sum as agreed to be paid between us for these fees.

I agree that I have no further claims, actions, demands or requests against you as a part of the consideration of signing this authority and receiving the sum referred to herein and we have amicably settled all claims and actions between us as a result in full and final settlement for your claim for legal costs and any claim I may have had for itemisation, taxation or refund of costs paid to you or funds due to me from the settlement proceeds paid to your trust account.

I confirm that I am very pleased with the terms of this agreement and authority considering the length the claim has proceeded and that I have received no offer of settlement for over two and half years and that Tom Mijatovic and/or TRM Legal Services have settled the claim after substantial work and effort including substantial number of conferences, drafting court documents, telephone calls research and investigations with no prospect of settlement or payment and considering that you as my solicitors were not paid for your services for about 12 months.

I have been provided with the opportunity of obtaining independent legal advice as to this authority and the terms of the settlement and this agreement and have chosen not to take such advice as I have received a net settlement figure after legal costs and expenses greater than I ever personally conceived possible.

I acknowledge that I had no prospect of settling or obtaining such funds or settlement without you as my solicitors and this is the basis of why I am willing and generous with respect to the terms of this agreement.

I acknowledge that I have read the entire contents of this agreement and authority which I understand very well so that I am completely aware and understand the terms herein and understand the terms thereof which I have read and which I have signed of my own free will."

159 As to the content of the agreement, it is difficult to conceive of circumstances which would justify a practitioner preparing such an agreement for her or his client. Moreover, here the client was clearly inexperienced in dealing with legal matters, read documents in English with some difficulty and as the practitioner must have known, trusted and was reliant upon him. She was moving from the first costs agreement which provided for hourly rates and express rights of itemisation and taxation, to an agreement which fixed a lump sum and by several methods (waiver, mutual release, final settlement) sought to deny all such rights and any right to claim against the practitioner. There was no clear statement that the practitioner's costs were $22 000. The reference to payment of Commonwealth taxes (as well as GST) was misleading, as were the references to the practitioner having worked on the matter for 12 months, changes to the first costs agreement being confined to agreement on a lump sum (because it included the delay in providing an account, the waivers and so on), the practitioner preparing Court documents, and the existence of a dispute between them which the agreement records as having been settled. There was no attempt to explain how costs of $22 000 had been calculated by reference to the work undertaken or otherwise. On both witnesses' oral evidence, and as we find, the agreement had been prepared by the practitioner without prior discussion with the client as to its terms, and yet she was purportedly acknowledging the opportunity to obtain legal advice and the decision to reject that opportunity. The reason the practitioner provides (in advance) for the client refusing such advice is also telling, for reasons explained below.

160 As to the execution of the document the evidence is as follows.

161 The practitioner in his witness statement, this being the first occasion when he sets out his version of the events, said that he gave the client the document and he had said "it says what the settlement and costs are in there" and that the client "looked through it and read through it". He says she asked many questions including "will I get $120 000 in my hand" to which he responded "No, $114 000, you would have got $120 000 if we had sold the house for $142 000". He said that "I told her that we can fix the agreed costs and she said she would want that so she knew how much she could get in her hand". As regards her obtaining independent legal advice on the document, he said that he had specified the right [in the agreement] and "I never denied her any such right." He said that "the authority was what we had discussed before and I needed to put things in writing". (There is no other reference in the witness statement to such "discussion" of the terms of the authority and no oral evidence concerning such.) He says she read through it and said "OK, where do I sign". He had pointed this out and witnessed her signature. He says that he had told her he would bill the account after 2 July 2003 and send her the account and she had said "OK".

162 We observe that the questions the client is said to have asked are not consistent with what one would expect nor her subsequent conduct when she did receive and read and understand the document. Had she read and understood the document before signing it, she would have been expected to raise questions as to why a new agreement on costs was being prepared, how much his costs were, how was this amount calculated, why was she giving up her "rights" (a subject which she felt strongly about as appears below) to itemisation and taxation and so on. Had she been advised about and understood the invitation to obtain independent legal advice it seems most unlikely that she would not at least have discussed this new agreement with her friend, who had been advising her from the outset and had continually advised on the need to obtain advice on costs, and possibly also her partner.

163 In his cross-examination of the client, the practitioner put to her that he had explained the document to her. (He had not said this in his witness statement.) He had told her that his costs would be $22 000 and that if it proceeded to trial it would cost $50 000. That she would get $114 000 in her hand. He put to her that she had read the document or parts of it or had the chance to do so. All this the client denied. (T:42, 6.11.06)

164 In his opening submissions the practitioner said that he did refer to the contents of the second costs agreement during the time she was "looking through the document". He said he did not hide any portion or

hold his hand over any portion and that he had stickers identifying where she was to sign. (T:155, 6.11.06)

165 In his supplementary oral evidence the practitioner says that he explained the authority and they talked about the net amount she would receive. (T:23, 7.11.06)

166 When the practitioner was cross-examined, he said that the second costs agreement reflected an earlier oral agreement, but denied that his purpose in preparing a written agreement was so that it was enforceable under the *Legal Practitioners Act 1893*. He disputed that it was prejudicial to the client's interests (T:198, 1.11.06). This was so notwithstanding that the practitioner had provided in the agreement, that the client had been "willing and generous" in agreeing to it. Given that it was entirely prejudicial to the client, this is an aspect of his evidence which again reflects poorly on the practitioner's honesty and credibility. He did acknowledge that the client's rights to itemisation and taxation were very important rights, but then in an incomprehensible answer purported to say that her waiver of them was not intended to preclude her enforcing them. He was referred to the final settlement clause, but disputed that this meant or was intended to mean or would be understood to mean, including by a lay person, that the client had no further claim for itemisation, taxation or refund of costs. When he was asked whether he regarded the agreement as binding and creating an estoppel, he denied this until confronted with his own letter dated 24 September 2003 to the Committee, precisely to that effect. He was referred to the provision concerning the client declining the opportunity to obtain legal advice. The practitioner then said "I read portions of this to her. She said [in her oral evidence] I was babbling things but I say I read out in particular that she had the opportunity to obtain independent legal advice." And later "I basically went through and explained every paragraph as I did with the other documents she signed that day". When he was referred by a Tribunal member to the fact that in his witness statement he had not said he had given such explanation nor had he referred to the alleged earlier oral agreement to pay him $22 000, the practitioner could not give a satisfactory answer.

167 In her witness statement, the client said that at the meeting the practitioner had put some papers in front of her to sign and told her these included a transfer of land document, documents to transfer the electricity and telephone, Alinta accounts and AMP share documents. She recalls explaining to him that the house did not have a gas connection and that some of the other accounts were not in her name. The top document on

the bundle was an AMP document. She said the practitioner held the documents and turned the bottom of the pages over to show her where she was to sign, in such a way that she could not read the page. She said this was the same method he always used when he wanted her to sign documents. She signed the documents where he indicated.

168 She said the practitioner talked the whole time she was signing the documents. However, he did not tell her that the documents had anything to do with his costs, or waiving her rights, or that she should seek independent advice, or that it was against her interests to sign. There was no discussion about the terms of settlement, although he did tell her that her husband was going to pay the settlement amount ($136 000) in two cheques. The practitioner indicated that he was sending the documents to the husband's solicitors and the bank. It was a very short meeting and as soon as she finished signing, the meeting finished. He did not provide her with any copies.

169 She does not remember seeing the second cost agreement at the meeting, but she says it is possible she signed this but without knowing what it was. The practitioner gave no advice about such a document.

170 During the client's cross-examination, it was put to her that the meeting took 42 minutes. She denied this and affirmed her evidence that it was only very short. Asked by a member of the Tribunal how long this meant, she said in effect it took only as long as was necessary for her to sign the papers and as soon as that was complete the practitioner showed her to the door. As to the signing process, he "never stopped talking when I was sign" and he "always stood up, lift the papers a little bit for me to sign, lift the other one, sign, the other and he already had stickers pointing where to sign". (T:38, 6.11.06)

171 The practitioner then put to her that by his "talking" he was explaining the documents she was signing. She denied this. She said he never mentioned the second costs agreement. She was then asked by a member of the Tribunal that if the practitioner was talking to her but she did not know about what, how could she be sure that it was not concerning the terms of the second costs agreement. The client, clearly emotional, said:

> "I'm coming from a country where rights of people been taken away and I would never never sign that - - I fight with my life if I have to for my rights and I would never give it to him, my rights"

172 And then when asked again:

> "Well maybe he did mention it[?] too[?], the agreement. I don't know. I never heard. But if he - - a person give me this paper and like he's state then I - - I could - - he gave it to me to read, I would never in my lifetime sign this paper."

173 Asked by the Tribunal why she was certain that had she known of the contents of the document, she would never have signed it she said:

> "Because it take my rights away and I would never give my rights to anyone. That's something ... only political country would do that".

174 The practitioner then asked her what rights were being taken away and she answered:

> "By me giving you the authorisation of taking my money away, no - - and signed of papers will allowed you to do whatever you wanted to do."
>
> (T:39 – 41, 6.11.06)

175 The client then gave evidence that neither the practitioner nor she read the document at the conference. The practitioner then put to her again that what he was saying during the meeting was an explanation of the terms of the first costs agreement. She answered that that was not true "otherwise my ears would go alert". It was put to her that he had mentioned the costs would be $22 000 and $50 000 to go to trial. She said "no you never mentioned that". It was put that he said she would get $114 000 in her hand. She said she would "argue that one" and explained:

> "Well if I was paid 136 [meaning $136 000] and someone gave me 114 [meaning $114 000] and he wouldn't told me beforehand, I would argue. I would complain bitterly about that."

176 The cross-examination as to the events of 3 February 2003 continued for some time but without any change to the substance of her evidence. She did not recall asking any questions about the documents she was signing. (T:53, 6.11.06)

177 The client's evidence on these issues was compelling. We are satisfied that for the client even recounting these events and refuting the

suggestion put to her that she was aware of the terms of the agreement and voluntarily acceded to them, was genuinely distressing to her. She accepted that the practitioner was talking to her during her signing of the documents on 3 February 2003 but she was very clear that this did not involve an explanation of the terms of the agreement and nor was there any discussion of costs of $22 000. She was equally clear that the practitioner did not read to her the agreement and neither did she read it.

178 Although at one point in his witness statement the practitioner claimed that he had said to the client on 3 February 2003 that the authority was that which they had discussed before, in his supplementary oral evidence he did not suggest this. He admitted under cross-examination that when he had called the client in to sign the settlement documents he did not mention the second costs agreement which he had prepared "on 3 February or a few days before". (T:198, 1.12.06) Although he did not agree that he had asked the client to come in "urgently", the evidence shows the husband's solicitor's had faxed a letter dated 3 February 2003 advising that the bank required the executed mortgage discharge by that day for a settlement planned for 6 February 2003. That meant that obtaining the client's signature to the transfer documents was required on 3 February 2003. The client said that there had been no discussion prior to 3 February 2003 of any new costs agreement. We find that there was no discussion of the relevant terms and effect of the costs agreement prior to 3 February 2003 (we subsequently deal with any discussion on that date).

179 In considering the circumstances surrounding the preparation and signing of this agreement, it is to be remembered that at this stage of the proceedings, 3 February 2003, agreement to settle the property dispute had been reached and the orders made. All that remained for the practitioner to do to complete his engagement was to effect settlement. What would be expected is that following the settlement, the practitioner would prepare and send her an itemised bill of costs. In accordance with the terms of the first costs agreement, he would be entitled to deduct from the settlement sum the amount of his bill, but subject to the client's rights of taxation. There was no reason why the practitioner should, at this stage, change their contractual relationship. None of any substance was proffered by the practitioner. Neither was there any sensible explanation given as to why, if, as the practitioner maintained in evidence, he had in October 2002 estimated the figure of $22 000 for work then undertaken, there were no charges for work from then to February 2003. Further, on the practitioner's own evidence, at the time he had entered into the first costs agreement he had explained the terms and provided the required

explanatory material including as to the opportunity for the client, at his cost, to obtain independent legal advice. There was a much greater need for such explanation and opportunity to obtain independent advice given the prejudicial terms of the second costs agreement.

180 In answer to this complaint, much of the practitioner's submissions and evidence were directed to showing how he had achieved a settlement figure greater than that which he believed the client would have achieved without his assistance and moreover without his rendering an interim account. In his witness statement he says "A hard working lawyer who wins his clients cases for a substantial payment to his client without being paid interim ought to be commended not chastised". He expresses surprise that notwithstanding that the Committee knew of these benefits to the client, it had still referred the matter to the Tribunal. In his witness statement in the Overcharging Complaint he says (par 47) "I wanted to ... be paid fairly for the substantial work I did to make her another $150 000". The reason the practitioner provided in the second cost agreement for the client refusing independent legal advice was the extent to which (he claims) the settlement exceeded her expectations. She could therefore afford to be "willing and generous". His correspondence to the client in March and April 2003 is again focused on the extent of her recovery as a result of his efforts. The whole of the evidence suggests, and after careful consideration we find, that shortly before the time that a substantial sum was due from the husband, the practitioner decided he would fix a lump sum fee of $22 000 and deduct this from the settlement proceeds. This was an amount which in his mind was a relatively modest proportion of the value the client had obtained from the settlement, although (as we find) it bore no relation to the work actually performed at an hourly rate of $250. He decided also he would not tell the client of these costs until after the deduction had been effected and attempt to ensure that she had no legal recourse against him in relation to deducting this amount for his costs. To achieve these ends he prepared the second costs agreement and subsequently the withdrawal authority and procured her signature to each document without making known to her the purpose and effect of these documents.

181 Upon the whole of the evidence on this subject we find that:

(1) the practitioner asked the client to come in to sign some documents, mentioning the AMP transfers, and without referring to the second costs agreement;

(2) at the meeting the practitioner held a bundle of documents including the second costs agreement and turned the pages over to

those where the client was to sign, such pages having "sign here" stickers;

(3) the practitioner indicated that the documents related to the settlement and to the extent he may have mentioned the existence of a document called an "Authority and Agreement" he did not disclose that this was an agreement between them concerning his costs and the limitation of her rights against him;

(4) the practitioner did not read the second costs agreement to her nor explain its material terms nor otherwise advise her of its terms including in relation to obtaining independent legal advice;

(5) the practitioner did not otherwise advise her of the provisions by which he would deduct from the settlement proceeds the sum of $22 000 representing his costs nor did he say that his costs were in this sum;

(6) the client did not read the second costs agreement nor any part of it except as necessary to show her where to sign;

(7) the client at all material times believed the documents she signed were related to the settlement;

(8) however long the conference took (the practitioner claimed it was 42 minutes and the client that it was very short) and whatever limited discussion there may have been in relation to the settlement terms, the actual signing process was very short and allowed no time for the client to read the documents; and

(9) as at 3 February 2003 the practitioner had made no or no proper attempt to arrive at a reasonable figure for the work performed based on a rate of $250 per hour or otherwise and the figure of $22 000 was not based on any reasonable assessment of the work performed.

182 We have carefully considered the allegation in the Committee's Statement of Issues Facts and Contentions that the practitioner deliberately concealed from the client relevant provisions of the second costs agreement. It is an allegation which by its nature requires sufficiently clear evidence for the Tribunal to be persuaded as to its occurrence. We think that that the practitioner's conduct at the meeting in including the second costs agreement amongst the bundle of settlement documents and directing her where to sign, was directed at obtaining her signature to the second costs agreement without her knowledge as to the fact that she was signing an agreement with the practitioner concerning his costs, waiving and barring her rights and otherwise in the terms of that

document. Consistently, there was no material disclosure or discussion concerning its terms. For her part, the client, (1) pleased at the prospect of concluding a settlement and receiving a settlement sum, (2) anxious to limit the practitioner's costs by not taking his time during the meeting, (3) relying upon and trusting in his integrity and professionalism, was prepared to sign the documents he put in front of her believing they concerned the settlement. Based upon the findings we have made as to what took place at the meeting on 3 February 2002, we find the charge of the practitioner dishonestly concealing the terms of the second costs agreement has been made out.

Meeting on 24 February 2003

183 At the settlement on 6 February 2003 the practitioner received two bank cheques totalling $136 000 from the husband, which he deposited into his trust account.

184 Shortly before 24 February 2003 the practitioner again called the client in to sign some more papers. These included two "Account Withdrawal Authority" documents providing for withdrawals from his trust account, (1) for $22 000 for "legal fees and disbursements for account pursuant to authority dated 3.2.03" and (2) for $114 000 for "Family Court settlement proceeds to client".

185 What happened at the meeting on 24 February 2003 is central to the Conflict Complaint concerning the withdrawal authority. It is also relevant to determining whether, as the practitioner maintains and the client disputes, the client was aware prior to this date of costs in the same of $22 000 and had orally and in writing agreed to such.

186 The practitioner in his witness statement says that on 24 February 2003 he explained the contents of the documents and gave them to the client to read, which she did. She asked some questions about the settlement and asked where she should sign. He pointed this out – at the "sign here" stickers. She saw the trust authorities and read these intently and said she thought she would get $120 000 in her hand. He said she would have done so if they had sold the house for $142 000. (We comment on this alleged exchange below.) She said "the authorities looked right for the settlement". He handed her the cheque and the only query was (again) that she thought she would get $120 000. She said "she was very happy to have finally received a large payout after such a fight." He advised her costs were $22 000 and he recalls their discussing GST. His oral supplementary evidence was to the effect that he had explained the withdrawal authority.

187 Under cross-examination, it was put to the practitioner that he had not explained the withdrawal authority. His answer included:

> "I explained to her that these were authorities to draw the funds from the trust account, that I had a cheque. I showed her the cheque, 114 000. Her only comment at that meeting was something to the words, to the effect of anything remotely querying it, was, "I thought I'd get 120 000," and my answer was, "You would have if we'd settled for 142." So she knew at least that she was looking at costs of 16 [$16 000] at least 16 [$16 000], as we agreed 22 [$22 000]."

188 The Deputy President asked where the figure of $16 000 had come from. The practitioner answered:

> "Because when she said to me, 'I thought I'd get 120 in the cheque,' that implied to my mind that she, in her mind, had agreed to 136 minus 120 which is 16."

189 That was a curious answer in the light of his earlier evidence. According to this, the client knew by this meeting that the settlement was for $136 000 and that his costs were $22 000. There was therefore no basis for her to believe that she would get $120 000, nor that the costs were $16 000. She had to know she would only get $114 000.

190 The Deputy President then asked why the practitioner had not immediately responded that they had agreed the sum of $22 000. His answer, contradictory and unbelievable, was that this was an experienced business-woman who understood accounts.

191 In her witness statement the client said that she was called in to sign some further papers. The practitioner had held the documents and turned the pages to show her where to sign at the "sign here" stickers. His hand concealed the main part of the pages except the top page. She did recall seeing two documents, photocopied onto a single page, with the figures of $114 000 and $22 000 on them respectively. She did not know what the documents were about but mentally added these sums together and thought they added up to the settlement sum. While signing the practitioner told her he had a cheque for her and when she finished signing he took this out of the bundle and gave it to her. This was for $114 000. She asked if there was another cheque to come. The practitioner had said "No, that's the whole amount." The practitioner said something which she did not understand and then there was a discussion about GST. She asked if she had to pay him as well. He said the trust had

paid him. (It appears that she realised at this point that she was not going to receive the remaining $22 000.) She grabbed the bundle of documents to see where her money had gone but he took these from her saying he needed to send these to AMP. She was stunned. She wanted to know what had happened to her money but "did not know how to express herself". When she left, the practitioner did not give her any copy documents.

192 In cross-examination of the client, the practitioner put to her that there was a discussion of his fees and that he had said she would have got $120 000 if they had settled for $142 000. She denied this. (She was never asked as to whether the $120 000 was of some significance to her decision to settle or as to her affairs in some way.) She said she had noticed that in the papers there were two sums being $114 000 and $22 000. The practitioner put to her that she knew the second amount was for his legal costs. She denied this. She understood at the time the second sum represented the second cheque to come from the husband. (We think this a plausible belief because she knew the husband was to pay by two cheques.) The practitioner put that he was explaining the papers as she was signing them. She denied this. She said he held the bundle of papers and turned to the pages where she was to sign, his hand covering the balance of the page. There were "sign here" stickers at the relevant places. It was put that he explained the cost, disbursements and GST. The client then said that the practitioner was talking - "babbling" - but she does recall that he explained that GST would be payable on his fees. At the time she received the cheque she had asked the practitioner whether she had to pay him from this. He said no because he had already been paid "by the trust". She said that had he mentioned his costs of $22 000 she would have asked him to justify them. There was then a lengthy cross-examination to the effect that she did not thereafter complain to him nor make a formal complaint until 5 May 2003. (T:54 - 85, 6.12.06)

193 Notwithstanding this lengthy cross-examination, the client's evidence remained consistent with her witness statement in all matters of substance.

194 Having considered all the evidence we have come to the conclusion that the client's account of the meeting is to be preferred. This is in large part because:

(1) her evidence on this meeting is consistent with:

(a) her general evidence as to her lack of knowledge concerning legal costs of $22 000;

(b) her evidence as to the events immediately following (discussed below);

(c) the evidence of the client's partner and the client's friend as to what took place immediately thereafter (below);

(d) her evidence as to the circumstances of the signing of documents at the earlier meetings with the practitioner in particular on 25 July 2002, 30 December 2002 and 3 February 2003;

(e) the details of her complaint dated 5 May 2003, and

(2) that evidence is consistent with the practitioner's intention, as we find from his conduct and the whole of the evidence, of deducting $22 000 for his costs without her appreciating he was doing so until after he had procured her signatures to the second cost agreement and the withdrawal authority.

195 We find in relation to the meeting that:

(1) the practitioner proffered the documents for signing by the client and directed her where to sign in a way which meant she had little opportunity to read them;

(2) the client did read the withdrawal authority sufficiently to identify the sum of $22 000 and ask a question about it, but she did not understand this sum related to the practitioner's costs;

(3) the practitioner did not read nor explain the purpose and effect of the withdrawal authority insofar as it related to a deduction for his costs;

(4) there was no discussion between the practitioner and the client to the effect that the withdrawal authority for $22 000 was in respect of the practitioner's costs or as had previously been agreed between them;

(5) the practitioner did not give the client any copies of the documents she had signed; and

(6) the client came away in the knowledge that $22 000 had been deducted from the settlement proceeds and understanding that in part it represented legal costs, but unsure as to exactly how this sum was accounted for.

196 Because the client read the withdrawal authority to the extent of knowing it referred to the sum of $22 000 and asked some questions about

it, we do not think it can be said that the practitioner concealed the terms and effect of the authority. He did not, however, explain its meaning and effect to her.

Events following the meeting on 24 February 2003

197 There is little dispute as to the substance of what happened immediately after the meeting on 24 February 2003.

198 The client said in her witness statement that when she left the meeting on 24 February 2003 she drove home and parked outside her house. From her car she rang the practitioner and asked if he was going to send a receipt to show "where her money had gone". He said she would get one in time. She went inside and showed her partner the cheque and cried. She rang the practitioner again and passed the telephone to her partner. She heard him ask the practitioner for an itemised account. Her partner said to her he did not understand much of what the practitioner had said. She said she then rang her son about the amount taken for costs. She believes her son then spoke to the practitioner because her son reported to her that the practitioner had said to him something to the effect "don't get involved – it's a matter between your mother and me". The practitioner did not cross-examine her on this conversation which is, we think, consistent with the client's version of being referred to the practitioner by her son but not otherwise involving him in the Family Court proceedings. Shortly thereafter she asked her partner to ring the practitioner again which he did. At the end of this call her partner told her that the practitioner had said he would send her some documents. She did not cash the cheque. She was not happy. She then received the practitioner's letter dated 27 February 2003, enclosing documents (but not an account) which she had not seen before, except the first costs agreement.

199 There was little cross-examination as to these matters. The client agreed that in her call from the car she did not "criticise" the practitioner and she explained this was because she needed to understand the facts. (T:55, 57, 6.11.06)

200 The practitioner in his witness statement does not deal with these events. (Although there is some elaboration in his witness statement in the Overcharging Complaint.) In his evidence the practitioner agreed that the client had called him on the afternoon of 24 February 2003 following their meeting and asked him where her money went. He asked her if she would like "a statement of account". She said "yes". He said he would send a "trust statement". He disputed when and from where on that day

the call was made, but those details are of little consequence. He also said that the client's partner had asked about a "statement of account" and that he had said "all right – costs account statement, is that good enough". His file note of the conversation however includes: "No account issued. Won't be for a while. No itemisation"

201 The client's partner in his witness statement said that on 24 February 2003 the client had come home, shown him the cheque for $114 000 and was distressed, saying repeatedly "I trusted him [the practitioner]". He then spoke to the practitioner on the telephone and asked for an itemised account. The practitioner had said there was too much paperwork for this. He told the practitioner that the client was upset and the practitioner had said that she was happy when she had left. On 26 February 2003 he again asked the practitioner for an itemised account. He said the practitioner had referred to some agreement.

202 The client's partner was cross-examined as to these events but only in relation to largely immaterial details. In the course of his cross-examination the client's partner was asked by the Tribunal how he knew of the practice of lawyers providing itemised accounts. He said that he was familiar with the term amongst the trades generally. We accept that evidence.

203 The client's friend, in the course of her cross-examination, gave evidence that when the client learned that the practitioner had deducted $22 000 for his fees, the client rang her "crying her eyes out". Although the witness was uncertain as when exactly that occurred, it was clearly in late February 2003. We accept her evidence that at this time the client rang her friend and expressed dismay at the deduction of $22 000.

204 We find that following the meeting with the practitioner on 24 February 2003:

(1) the client was shocked and distressed that she had received $22 000 less than the settlement sum;

(2) the client directly and by her partner spoke to the practitioner on several occasions seeking an itemised account from him in order to determine what had happened to the balance of the settlement money being $22 000;

(3) the practitioner understood they were seeking an itemised account and said that he would not provide an itemised account but would send copies of the relevant papers; and

(4) the client did not directly complain or criticise the practitioner for deducting $22 000 for his fees because:

(a) she generally deferred to him; and

(b) although she thought that this represented at least in part her legal costs, she was unsure as to how the $22 000 was accounted for.

205 On about 27 February 2003 the practitioner wrote a long letter to the client referring to the "seven telephone conversations with you and your family members over the last few days". He copied a number of documents including the second costs agreement and the withdrawal authority. The letter purported to summarise the client's instructions concerning settlement, including reference to her knowledge at 10 October 2002 of current costs of $22 000 (that is, if she achieved a settlement of $150 000 she would "receive a clear sum of $128 000 as notified to you on 10 October 2002" and "as previously agreed") and an estimate of $50 000 costs to trial. At page 4 the letter states that as a result of the settlement the client would end up with "no other legal liability for legal costs, GST, disbursements or stamp duty payable by you other than those paid by [her husband] [*sic*] from the settlement proceeds ($22 000)". On the last page it recorded that "We have no further instructions from you ... We will bill our file and trust [*sic*] the transfer the balance of funds in due course and thereafter close your file ... We confirm that all work required to meet any of your instructions has been completed".

206 What is remarkable about this letter, if the practitioner's version of events is to be accepted, is that it does not say something to the effect – "The reason you have received only $114 000 from the settlement proceeds of $136 000 is that, as you are well aware, I have deducted from the settlement proceeds the sum of $22 000 representing my costs. That sum was first discussed with you in October 2002 and an oral agreement reached with you as to payment of that amount in the event of a settlement on 18 December 2002. This was documented in the second costs agreement signed by you on 3 February 2003, the contents of which I explained to you on that day and in the account withdrawal authority discussed with you and signed on 24 February". Not only was that sort of statement not then made by the practitioner, it was not made by him in the course of the Committee's investigation, nor in the practitioner's Response Statement dated 16 May 2006, his further Statement of Issues, Facts and Contentions dated 12 September 2006, his witness statement dated 30 October 2006, his oral submissions, his supplementary oral evidence

(both on 6 November 2006), nor was the substance of this put to the client during the course of her cross-examination. It was not expressed in the practitioner's comprehensive Closing Submissions. This version first evolved, uncertain and piecemeal, during the course of his cross-examination.

207 We are of the view on the whole of the evidence and find that as at 24 February 2003 there had been no earlier notification by the practitioner of costs of $22 000, much less discussion and agreement as to payment of that sum. That explains why the practitioner prepared the second costs agreement containing its extraordinary terms; and why the client was shocked and distressed on and after 24 February 2003 to learn that $22 000 had been deducted in respect of the practitioner's costs. Her position in that respect was made explicit shortly thereafter in her letter to the practitioner dated 11 April 2003.

208 In early March 2003 the client visited a legal aid centre to discuss her position. She was referred to the Law Society and then to the Committee who sent her a complaint form. This she completed and lodged on about 5 May 2003.

Requests for an account – 24 February 2003 to December 2003

209 This issue can be dealt with largely by reference to the documents. The course of events is important however, because it does contribute to our adverse findings concerning the practitioner's appreciation of his professional responsibilities and his credibility as a witness. (The evidence concerning instructions for the "appeal" is included here for convenience and the relevant findings made when dealing with this period in the Overcharging Complaint.)

210 As mentioned above, on 24 and 26 February 2003 the client requested that the practitioner provide an itemised account of his costs. He refused that request. Upon receipt of the practitioner's letter dated 27 February 2003, the client's partner took this to his solicitor and received advice to recover the file from the practitioner. He relayed this to the client.

211 The client by her new solicitors by letter dated 11 March 2003, requested a fully detailed and itemised bill of costs in accordance with the terms of the first costs agreement. (At this time also she was advised by those solicitors to bank her cheque for $114 000, which she did.) The practitioner in cross-examination, including by reference to his file records, denied receiving this letter at about the time it was sent. (T:48,

49, 2.11.06 and 97, 6.11.06). We think it most unlikely that the client's new solicitors would have failed to send the letter. There is no reason to believe that the letter would not have been delivered in the ordinary course of the mail. We note also that shortly thereafter the practitioner sent a Trust Statement to the client, without any further request in that respect. Having regard to all of the evidence on the subject of the practitioner's receipt of correspondence (discussed below), we find that the new solicitor's letter was sent on about 11 March 2003 and received by the practitioner a day or so later.

212 On about 19 March 2003 the practitioner wrote a letter stating that he confirmed the client's instructions "relayed as usual through your defacto husband Barry (*sic*) and your son that you are considering an appeal to the Full Bench of the Family Court" and that as instructed by them he had "researched the appeal issues and papers and have prepared the appeal documents."

213 With that letter the practitioner forwarded a Trust Statement showing a balance in his trust account of $23 250 (that is, $22 000 plus the $1250 paid in cash earlier). It described this as "Funds in trust held pursuant to contract dated 26.2.02" (*scil 2003*).

214 The client says in her witness statement that she was incredulous as to the statements in the practitioner's letter, given that she had never spoken to the practitioner nor anyone else about an appeal. The client responded by letter dated 26 March 2003 referring to the practitioner's letter of 27 February 2003 to the effect that her matter was at an end and in her letter stating in the plainest terms that the practitioner was not instructed to do anything. This was one of several letters the practitioner denied receiving from the client in the mail until faxed on 14 April 2003 and received by the practitioner (personally) on 28 April 2003.

215 On the client's evidence, on 31 March 2003 the client and her partner went to the practitioner's office for the purpose of collecting her file. The practitioner came into the reception area and asked the client to sign some more papers. She refused saying she just wanted to collect her files. The practitioner became aggressive and said the client would have to write requesting the file and that she would not get it until he was paid. She then told him that he was not working for her any longer and the practitioner replied that he wanted that in writing also. She was cross-examined on this and repeated the events. The client's partner corroborated this account of the meeting in his witness statement and under cross-examination. (T:104, 2.11.06) The client's partner was

emphatic that on 31 March 2003 the client made clear that the practitioner's engagement was at an end.

216 The practitioner did not address this meeting in his witness statement. In cross-examination he said that his telephone note revealed that the client had rung to arrange to collect her file and that at the meeting he had said he refused this until they paid him. He denied that she had said "you're no longer working for me" and denied, then could not remember, that he asked for that in writing. He said by reference to his "conference note" (page 314 of B1) that they had wanted the file and he had refused. They had then instructed him that they "want to go ahead" with the appeal. He was challenged as to the startling inconsistency in this evidence, but asserted that this is what happened. (T:231 - 232, 1.12.06) This note also records "Cost notification received". None of the witnesses suggested that this was discussed. (The practitioner was not cross-examined on this note.)

217 The client, by a note headed "Termination Notice" and dated 3 April 2003 again wrote expressly terminating the practitioner's engagement and requesting her "account (itemised)" and her files. The client gave evidence this was sent by registered post. Her records show a receipt from the Post Office stamped 3 April 2003. The practitioner said during his cross-examination of the client's partner that he never received the original of the letter but only a copy some time later. (T:112-3, 2.11.06) He was then shown an envelope from his file with the practitioner's writing showing "2 May 2003". When confronted with this he said from the bar table that he "accepted that some of my submissions were inaccurate". (T:65, 7.11.06) In his cross-examination he denied he had put the date 2 May on the envelope sometime later. But shortly after this he said that in April 2003 he had left some mail in his letterbox because of his absence on a visit to Queensland "or in preparation for it". (T:70, 7.11.06. We observe also that in his witness statement in the Overcharging Complaint the practitioner stated that his instructions were not terminated until he "returned from interstate in April-May 2003 when I received a certified letter at our firm's PO Box".) Having regard to all of the evidence on the subject of the practitioner's receipt of correspondence, we find that the letter of 3 April 2003 was sent by registered post to the practitioner and arrived in the ordinary course of the post at the practitioner's office. There may have been a short delay in the practitioner reading the letter due to his absence in Queensland (dealt with below). We think it most unlikely that the practitioner first received the letter on 2 May 2003 as he recorded on the envelope. This is well after his return from Queensland (on his version) and is inconsistent with his asking the

client in his letter of that date to provide evidence of posting. There is no dispute that the practitioner's office received a faxed copy on 14 April and he read this at least by 28 April 2003.

218 The practitioner by letter dated 8 April 2003 referred to the "conference"' on 31 March 2003 and confirmed "that you instructed us that ... you are going ahead with the matter – the settlement and the appeal."' It referred to the grounds of appeal. It invited the client to attend to swear the appeal affidavit and affidavit of discovery.

219 By a notice headed "Second Termination Notice and Letter of Reality" dated 11 April 2003 the client wrote requesting a "re-costed itemised account" and "before this is taken any further". (And vigorously denying receipt of the 9 October Memorandum prior to receipt of the practitioner's letter dated 27 February 2003 and maintaining her signing of the second costs agreement was procured by the practitioner's "deceit". The letter is more fully recited in our consideration of the Overcharging Complaint.) The client's partner said he faxed this to the practitioner on 14 April 2003 (Monday morning). He was clear on the matter because he had purchased a fax machine for the very purpose. (T:112, 2.11.06) His fax records show and his evidence confirmed that on 14 April four pages were faxed being copies of the letters dated 26 March (1 page), 3 April (1 page) and 11 April (2 pages). (T:11, 2.11.06)

220 The practitioner wrote a letter dated 14 April 2003 without reference to the client's letters and dealing further with the client's alleged instructions concerning an appeal. In his evidence the practitioner said by reference to his records that this letter was prepared on 11 April 2003, he dating it on 14 April (the Monday) "in anticipation" of it being received on that date, that sometimes being his practice. Or it could have been his typist's mistake. (T:1-73, 7.11.06) He was not sure whether he signed it on 11 or 14 April 2003.

221 In his letter dated 2 May 2003 the practitioner refers to the client's letters dated 3 April and 11 April 2003 "apparently faxed on 14 April". As to the letter dated 3 April it is said that it was not received by post. The practitioner says in his letter in effect that he had been away in Queensland from 3 April returning to his office on 28 April 2003. In dealing with the letter dated 2 May 2003, Senior Counsel for the Committee asked the practitioner how he could explain that during this alleged period of absence he had written his letters dated 8 April and 14 April 2003, the latter inviting the client to attend his office to swear various papers, and, implicitly, to do so as a matter of urgency. (T:234,

1.12.06) The practitioner admitted that his letters had been prepared from his Perth office. He said that he must have been mistaken in his letter dated 2 May 2003 as to the period of his absence. It is not possible however to attribute the period of absence as being a "mistake" given the practitioner was writing a few days after, he says, he returned. We think rather that the practitioner used his short absence as an excuse for claiming he had not earlier received the client's correspondence. He was not honest about that at the time with his client, nor before us.

222 Following the lodging of the client's complaint, the Law Complaints Officer first wrote to the practitioner on 14 May 2003 referring in particular to the practitioner's failure to lodge an itemised bill of costs. The Law Complaints Officer wrote further on this subject on 10 June 2003.

223 The practitioner sent a lump sum bill dated 3 July 2003 to the client, in general terms describing the work undertaken but not the times involved, "limited" to the sum of $20 000, plus GST, making a total of $22 000. He included a trust statement which showed that he had transferred $22 000 remaining in trust to his office account.

224 By letter dated 22 July 2003 the Law Complaints Officer referred to the client's previous requests for itemisation and asked whether the practitioner would now itemise his account dated 3 July 2003. The question was asked again by its letter dated 4 August 2003.

225 By letter dated 18 September 2003 the Law Complaints Officer noted that the practitioner's account dated 3 July 2003 did not comply with the provisions of the *Family Law Rules 1984* requiring sufficient detail to allow a taxation.

226 The practitioner, in his letter of 24 September 2003, being one of several letters disputing his obligation to provide an itemisation, claimed that the client had waived her right to itemisation and by the second costs agreement also had waived and was estopped from seeking itemisation.

227 By letter dated 29 October 2003 the Law Complaints Officer advised that the Committee had resolved that the practitioner should provide an itemisation.

228 On 27 November 2003 the practitioner advised that he was briefing a barrister to advise him in relation to itemisation and that he expected such advice within 21 days.

229 By letter dated 12 December 2003 the Law Complaints Officer advised that the Committee had resolved that unless within 10 days a properly itemised account was issued to the client, a reference alleging unprofessional conduct would be made.

230 The practitioner sent an itemised bill of costs to the client on about 22 December 2003, by which the practitioner claimed costs of $23 250, inclusive of GST.

The practitioner's submissions on the conflict complaint

231 The practitioner filed Closing Submissions, some 10 pages of which respond to this complaint. We take into account that in preparing these submissions the practitioner did not (we trust) have the benefit of any independent legal advice. Even so, those submissions reveal an alarming failure on the practitioner's part to understand the nature of the complaints made and his responsibilities as a practitioner. We mention this because it appears to us of some relevance in determining the probabilities of the matter.

232 We deal seriatim with the defences relied upon. We set out the opening paragraph of each defence which outlines the argument.

> "**Defence of Failure to Complain or Criticise Authorities –** If a client fails to complain to the practitioner about any failure despite numerous discussions and meetings in relation to the same over an extended period, the requisite standard that the conduct was improper cannot be made out (***LPCC and Penkin*** [2006] WASAT 62.)"

233 We have largely dealt with this defence in reciting the evidence. It is not sustainable on the facts. In late February 2003 the client did ask the practitioner in effect "where her money had gone" and for an itemised account. That there was not immediately a more strongly worded complaint reflects the client's uncertainty of how the $22 000 was accounted for and her deferral to the practitioner. By 11 March 2003 the client had engaged new solicitors who sought a detailed and itemised bill of costs. She had also sought advice from Legal Aid and the Law Society. By 11 April 2003 the client was satisfied that the practitioner had deducted $22 000 for his costs purportedly in accordance with the second costs agreement and the client then sent a strongly worded complaint.

234 The decision in ***Penkin*** was not purporting to lay down any legal principle but to take a common sense approach to the client's failure to

complain about the alleged failure to account on the different facts of that case.

> **"Defence of Compliance with Client's Lawful Written Directions:** The 2 trust withdrawal authorities of 24 February 2003 authorised the withdrawal of trust funds as directed by the client in writing and admitted to be signed by her. ...
>
> The client had good reading and English speaking skills. The client is an experienced businesswoman who conducted at least two businesses, managed bank accounts, tax records and signed legal documents such as leases and long affidavits.
>
> **"Defence that Application is Ultra Vires Existing Law:** A practitioner complying with his client's written directions cannot be considered to have acted contrary to those instructions or to have prejudiced the client. The applicant seeks to impose an unprecedented level of duty on practitioners not to prejudice their client - they must reject their own client's instructions and act contrary to those instructions if they objectively consider those are prejudicial to his client - even if she authorized and agreed to them in writing and involves payments to herself. This proposition is untenable and contrary to the express provisions of s 34 and s 34A of *The Legal Practitioners Act*."

235 These propositions overlook that the client maintained, as we find, that she signed the withdrawal authority without understanding its contents and that there was no explanation by the practitioner as to the effect of the withdrawal. The practitioner's allegation in this context that the client had good reading skills and was an experienced businesswoman is rejected on the facts. The evidence was her husband signed the lease. She obtained assistance in preparing the affidavits in the Family Court. The business experience of the client in ***Cerini v McLeods (A Firm)*** [2004] WASC 45 was altogether different, as recited above in our summary of the case.

236 In support of the "*ultra vires*" claim the practitioner also submitted under this heading:

> "If the applicant's position is granted, it would discourage fixing or agreeing legal costs with a client without independent advice".

237 It is possible to infer from this submission that the practitioner has a continuing belief that there was no need for the client to obtain independent legal advice in relation to the second costs agreement. It is some evidence in support of the client's evidence, which we accept, that the practitioner did not on 3 February 2003 advise her to obtain independent legal advice or advise her that by signing the agreement she was declining to obtain such advice.

> "**Defence of No Conflict to Her Interests:- 24 February 2003 Authorities**: Nothing in the 24 February 2003 authorities were prejudicial to the client's interest - they were in accordance with her interests of receiving money for herself and paying agreed costs which she authorized and had previously authorized - the authorities and were carried out as directed and as required by law under s 34, s 34A of the *Legal Practitioners Act*.
>
> **3 February 2003 Authority:** The 3 February 2003 authority referred to payment of $114 000.00 to the client, payment of legal costs, agreeing to settle for a $136 000.00 cash payment, a waiver of the right to tax/itemize and agree a fixed fee for costs. None of the components of that authority as to agreeing to settlement, paying costs or paying herself $114 000.00 were improper or prejudicial to her own interests but were consistent with her instructions and resolving her legal action and dealing with trust funds as she wanted.
>
> **No Denial of Rights**: There was no reference in that authority to contracting out of the right to tax or itemize nor any reference to the Legal Practitioners Act statutory rights to tax or itemize being revoked or discharged. There was no denial of the right to tax or itemize which rights were exercised and respected - the itemization was issued 21 December 2003 and the taxation was conducted in 2004."

238 We have found the second costs agreement was entirely prejudicial to the client's rights and so in consequence was the withdrawal authority. We think the fact that the practitioner continues to maintain the contrary position reflects adversely on his credibility. The submission that the second costs agreement contained no provision by which the client agreed to contract out of her right to itemisation and taxation and that this was the practitioner's intention, is incomprehensible given the terms of the agreement and the practitioner's conduct during 2003 in refusing her a right of itemisation by reason of that agreement. That the legislation

provided a right to itemisation and taxation is a different question. The claim that the right to itemisation was exercised and respected overlooks the terms of the complaint which was of his failure to do so in the period 24 February to 21 December 2003.

> **"Independent Advice Fatal:-** [The client's new solicitors] in their letter of 11 March 2003 (Exhibit AI, page 107) states that the practitioner's letter of 27 February 2003 (enclosing the said authorities of 3 and 24 February 2003) were handed to [them] by the client and [they are] 'requesting that you furnish our office on behalf of our client with a fully detailed and itemised bill of costs in accordance with the terms and conditions of engagement.'
>
> The client's own independent solicitor, … advised the client there was a right to itemize (Exhibit AI, page 107). That independent legal advice … to request itemization and thereby that the said authority DID NOT prevent itemisation is fatal to this application."

239 This submission appears to confuse several aspects of the complaint. The new solicitors' request in March 2003 for itemisation of the practitioner's account pursuant to the terms of the first costs agreement, has nothing to do with the practitioner's conflict of interest in procuring execution of the second costs agreement in the absence of a full explanation and independent advice. It suggests that the practitioner has no understanding of the requirement that the client be advised as to the need for and have the opportunity to obtain independent advice before signing the second costs agreement. Further, to the extent the new solicitors' letter reflects any advice to the client concerning itemisation, that does not affect the propriety of the conduct of the practitioner in including provision for a waiver of itemisation in the second cost agreement.

> **"Express Terms of Authority Contradict Application:-** The 3 February 2003 authority expressly stated that the client had the right to independent advice and that she was satisfied with the settlement. In the absence of compelling corroborated evidence, an actual persuasion of the occurrence of events or the existence of facts which are in issue and diligent criticism or complaint, the application must be dismissed *(**LPCC v Penkin**,* [2006]) Unanimous decision of SAT, at pages 8-9; ***Briginshaw v Briginshaw*** (1938) 60 CLR 336, 361-363)."

240 This submission again overlooks that the issue before the Tribunal was whether the client was aware of and understood the terms of the second costs agreement including in relation to obtaining independent advice.

> "**Failure To Itemize** (1.2 - 1.3) Defence of Estoppel or Prior Inconsistent Direction by Lawful Authority:-- The applicant directed the respondent by its letter of 12 December 2003 (Exhibit M tendered on 1 December 2006) to provide an itemization of his account within 10 days failing which he will be subject to a reference to this Tribunal. Exhibit M records that the applicant did on 12 December 2003 direct the respondent that "the Committee resolved that unless within 10 days you issued a properly itemized account to the client that a Reference issue in the Legal Practitioners Disciplinary Tribunal alleging unprofessional conduct by you".
>
> In reliance on Exhibit M, the respondent personally delivered that itemization to the applicant on 21 December 2003 and sent a copy to the client on that same day as directed by the applicant.

241 This argument seems to be that because the Committee required the practitioner to produce an itemised account on default of which it would refer the matter to the Disciplinary Tribunal and pursuant to that direction the practitioner did so, the Committee was thereafter estopped from pursuing a complaint for the earlier failure to itemise the account. The practitioner subsequently argues also that the Committee had no power to make this request. We accept, of course, that in pursuing a complaint and generally the Committee must act within its statutory powers and in good faith and not oppressively. We would think the Committee and the Law Complaints Officer on its behalf had authority to request an itemised account consistent with its statutory function to supervise the conduct of practitioners and the practice of the law and to enquire into complaints. (Section 25(1) of the *Legal Practitioners Act 1893*). We do not need positively to determine that issue. It is enough to say that:

(1) there is nothing in the direction to the practitioner which carries with it the implication that the Committee would not proceed with a reference in respect of the practitioner's earlier failure to itemise the account;

(2) compliance with the direction was not to the practitioner's disadvantage because it ended the period of the practitioner's delay in failing to itemise the account; and

(3) even if there were otherwise grounds for this remedy, there could be no estoppel precluding the Committee carrying out its statutory functions. Moreover, whatever the status of the Committee's direction, there remained the client's continuing request for an itemisation.

> "**Defence of No Failure to Itemize –** The respondent did not fail to itemize as he provided an itemisation on 21 December 2003 (Exhibit AI). The respondent's delay in itemizing was in compliance with the applicant's directions in Exhibit M to itemize before 22 December 2003. … "
>
> There is no allegation of a delay or neglect in itemizing in the Application. Delay or neglect to itemize is not a failure to itemize at all and the application is flawed. …
>
> The written requests for an account (itemized) of April or May 2003 are not requests for itemization. There was no account to itemize at that time in any event as the account was issued on 3 July 2003 as directed by the client on 3 February and 24 February 2003".

242 The first contention overlooks the delay prior to December 2003. The second contention ignores the Committee's Statement of Facts which state that in the periods (1) 24 February to 11 April 2003 and (2) 14 May to 21 December 2003, the practitioner failed to comply with the client's requests for a bill of costs with itemisation of the work done and charges for such work. That is an allegation of delay or neglect. The third submission raises the issue of when an account was issued, which is dealt with in our conclusions.

> "**Defence of Client never requested an Itemization after account issued** [The client] never requested an itemization of the lump sum account after it was issued on 3 July 2003. She never testified that she did and no evidence was produced that she did. …
>
> She directed the practitioner by her signed authorities dated 3 and 24 February 2003 not to issue an account until after 2 July 2003. She never contradicted those instructions verbally or in writing on the evidence."

243 In her letter dated 22 July 2003 the Law Complaints Officer referred to the client's earlier requests for an itemisation and asked whether the practitioner would provide an itemisation of the lump sum account of 3 July 2003. As to the client's supposed direction in the second costs agreement not to issue an account until after 2 July 2003, the client's entry into that agreement was the subject of the client's complaint and the Committee's investigation.

> "**Alternate Defence of Applicant Acting Ultra Vires -** Alternatively, the applicant cannot request an itemization itself on behalf of a complainant as to do so would be a conflict to its statutory responsibilities in impartially investigating, adjudicating and resolving complaints made to it against a practitioner."

244 As is apparent from the previous paragraph, the Committee in fact pursued the client's request for itemisation. We do not think that it was beyond the power of the Committee and the Law Complaints Officer to pursue the client's request for itemisation. Even if it were, it could not affect the substance of the complaint and its proper determination. In any event, the client's request for itemisation is to be regarded as a continuing request both before and after 2 July 2003.

Conclusions on the Conflict Complaint

245 We deal in turn with the second costs agreement and the requests for itemisation of the practitioner's bill of costs.

Terms and entry into of the second costs agreement

246 We have set out the evidence and our findings over the period of the Conflict Complaint.

247 The practitioner breached his fiduciary, statutory and professional duties and responsibilities with respect to the client's entry into and terms of the second costs agreement in the most fundamental respects. He concealed from her the content of the second costs agreement and procured her execution of it on the basis that it was a document related to the settlement. He made no disclosure of the important and highly disadvantageous (to her) terms concerning the fixing of his lump sum costs, the delay in delivering a bill until 2 July 2003, the waiver and barring of her rights to itemisation and taxation and any other claim against the practitioner. The practitioner failed to advise her of the significant diminution of her rights under the first costs agreement. He

provided her with no basis to determine the reasonableness of the lump sum figure for costs having regard to the work performed and how this might compare with the hourly rate charged under the first costs agreement.

248 In these respects the practitioner breached his fiduciary and professional duties to be open and frank with the client, to act fairly and in good faith, to give undivided fidelity to her interests unaffected by any interest of his own, to give her the benefit of his knowledge and to avoid a situation where his duty to her conflicted with his own interests. He used his position of reliance, trust and authority to procure execution of the agreement. He did not ensure her interests were advanced and protected but rather he advanced his own interests in direct conflict with those of his client. In contravention of the provisions of the *Family Law Rules 1984*: (1) the second costs agreement was not fairly entered into and was not reasonable in its terms; (2) the practitioner purported to exclude her rights to (a) itemisation; (b) taxation; and (c) to apply to set aside the agreement.

249 The practitioner also failed to provide the material required by the *Family Law Rules 1984*. Further, although we do not rely upon this consideration, if the *Legal Practitioners Act 1893* also governed the practitioner's obligations with respect to costs and taxation, he was similarly in breach of those provisions.

250 Similar considerations apply with respect to the practitioner procuring the execution of the withdrawal authority although, as we have said, the real prejudice to the client was in signing the second cost agreement.

251 It is relevant to the gravity of this matter that, as we have found, the client was not experienced in dealing with lawyers and trusted and relied upon the practitioner in assisting her with a personal and sensitive matter. She was vulnerable beyond the usual position of an inexperienced lay client dependent on the lawyer to fairly determine the necessary work and a reasonable charge, a consideration which, in the language of the Committee with which we agree, made the practitioner's conduct even more callous and reprehensible.

252 By so conducting himself, the practitioner in terms of the Conflict Complaint, failed to ensure that the client's interests were properly protected and advanced in relation to the client's liability for costs payable to the practitioner and improperly and calculatedly advanced his own

interests in respect of costs in conflict with and to the detriment of the client's interests.

253 We think that the practitioner's conduct as found would be regarded as disgraceful by practitioners of good repute and competence. But in any event we have no doubt that such conduct, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence.

254 Even if we were to have found that the practitioner did not conceal the terms of the second costs agreement, on the findings we have made as to the circumstances surrounding the client's signing of the agreement, the charge would have been made out. It would also be sufficiently made out based upon the practitioner's breach of his fiduciary and professional duties, if contrary to our view O 38 r 26 of the *Family Law Rules 1984* does not apply to a subsequent costs agreement.

255 Again, on these findings, the charge would have been made out even if we were to have found, as claimed in the practitioner's witness statement, that:

(1) he did give the client the second costs agreement and said to her:

(a) "it says what the settlement and costs are in there";

(b) "we can fix the agreed costs";

(c) "he would bill the account after 2 July and send her the account"; and

(2) the client read the agreement.

256 The practitioner did not provide any explanation as to its terms and, knowing her difficulty with reading documents, made no effort to ensure that she understood the agreement. He did not advise her to obtain legal advice.

Failure to itemise

257 The practitioner in his submissions has contended that there was no breach in this respect because he first provided his account on 3 July 2003 and (1) prior to this there was no account to itemise and (2) after this there was no request for itemisation. There are several answers to this.

258 The starting point is the *Family Law Rules 1984*. As set out above these provide a right to request an account and upon receipt, a right to request an itemised bill, each to be provided by the lawyer within 28 days of a request in that respect.

259 From 24 February 2003 the client made several requests for an "itemised account". This may be regarded as a request for an account. The practitioner on his evidence, understanding that the client was looking for an itemised account, provided a Trust Statement dated 19 March 2003. That would arguably constitute an account for the purposes of the *Family Law Rules 1984*. By her notice dated 3 April 2003 the client repeated her request for "the account (itemised)" which may be regarded as a request for an itemised bill. The practitioner refused and failed to provide such a bill until 22 December 2003. To the extent that the practitioner's letter dated 3 July 2003 is to be regarded as an account, the Committee in its letter dated 22 July 2003 referred to the client's requests for an itemised account and sought itemisation of that account. That was a sufficient request for a bill on the part of the client for the purposes of O 38 r 37 of the *Family Law Rules 1984*.

260 Independently of that, r 16.4 of the *Professional Conduct Rules* provides in plain terms that a practitioner shall, within a reasonable time after being requested by his client, render a bill of costs covering all work performed to which the request relates. The client made a request for an itemised account and the practitioner understood it was such. The only apparent justification for the practitioner not acting on that request prior to July 2003 was the second costs agreement. To the extent that the practitioner seeks to rely on that agreement however, the answer is that there was no justification for the practitioner inserting a term to that effect into the agreement and doing so, at least without full disclosure and informed agreement, was itself unprofessional conduct. Moreover, even after the 3 July account, the practitioner took some six months to prepare and deliver an itemised bill.

261 There is a further consideration. The practitioner deducted $22 000 from the settlement proceeds for the purposes of paying his costs. That money was retained in his trust account until 3 July 2003 and thereafter paid to the practitioner. In these periods the client was denied the use of such amount. Irrespective of the precise circumstances in which the second costs agreement was signed, the client told the practitioner that she was anxious to know how the sum of $22 000 was accounted for. There was no reason given by the practitioner why he would not itemise his account beyond his standing on his rights under the second costs

agreement. The position was even more serious following the making of the client's complaint to the Committee and the Law Complaints Officer's writing to the practitioner referring to the client's request for an account and requesting an itemised account. In our view a responsible practitioner in those circumstances would have immediately acted on the client's and the Committee's requests and prepared an itemised account.

262 In all these circumstances the practitioner, in terms of the Conflict Complaint, failed to ensure that the client's interests were properly protected and advanced in relation to the client's liability for costs payable to the practitioner and improperly and calculatedly advanced his own interests in respect of costs in conflict with and to the detriment of the client's interests.

263 We find the practitioner guilty of unprofessional conduct on this reference.

II The Overcharging Complaint

264 This complaint alleges that the practitioner was guilty of unprofessional conduct in 2003 by charging a grossly excessive fee for his services to the client.

The issues arising on the complaint

265 By its Statement of Issues Facts and Contentions the Committee's case of gross overcharging was put on three bases:

1. The first basis:

    (1) has regard to the decision of Registrar Moroni by which he reduced the practitioner's charges of $23 250 by $17 759 to $5490;

    (2) additionally, identifies other factors generally relevant to determining a reasonable charge for professional services (the *D'Alessandro factors*);

    (3) considers each of these factors in assessing the reasonableness of the practitioner's charges by reference to the evidence and including relevant findings made by Registrar Moroni;

    (4) submits that on this analysis the practitioner's bill of costs represented gross overcharging.

2. The second basis (the period objections):

   (1) divides the practitioner's work into four periods;

   (2) by a detailed examination of the evidence submits that the practitioner was not entitled to charge for:

      (a) the first period, when the practitioner claims to have been instructed by the client's son, the evidence being largely the practitioner's own file records;

      (b) the October function in the third period, the evidence including the practitioner file records; and

      (c) the fourth period, when the Committee claims the practitioner's work ceased, the evidence being largely the oral evidence of the practitioner and the client and the client's partner and the correspondence between them;

   (3) totals these amounts as $13 145;

   (4) submits that $13 145 as a proportion of the total charges of $22 250 establishes gross overcharging.

3. The third basis supports the specific objections to each of the items of work charged as identified in the client's Schedule of Objections before the Registrar. To a large extent, in respect of charges not specifically dealt with in the period objections, this position is taken in answer to the practitioner's claim to support each of the charges.

266 For his part the practitioner's defence of the Overcharging Complaint, as reflected in his Response Statement, Further Statement of Issues Facts and Contentions and witness statements:

1. Challenges the decision of Registrar Moroni on a large number of grounds.

2. Has regard to the other *D'Alessandro factors* to support his claim that the costs generally were reasonably charged.

3. Asserts that each of the items in the bill of costs:

(a) was fair, reasonable, supported by the evidence and properly claimed;

(b) ought to have been allowed by Registrar Moroni having regard to the evidence and particularly his file records tendered before him; and

(c) ought now be accepted having regard to his evidence and file records, including records additional to those before Registrar Moroni (which are not separately identified by the practitioner).

4. Disputes the Committee's period objections, including having regard to his reduction of his charges by $9300 as reflected in the bill of costs.

267 It is apparent that the complaint and defence cover the entirety of the practitioner's work and charges for the period April 2002 to April 2003 and raise a multiplicity of issues. It has involved not merely considering Registrar Moroni's decision and the practitioner's challenges to that decision, but also the work undertaken or said to have been undertaken by the practitioner and the reasonableness of the charges made.

268 In order to manage this material, we consider these issues and matters in the following order:

(1) the legal framework;

(2) the Committee's case and the practitioner's defence as reflected in their written "pleadings" and submissions;

(3) the proceedings before and decision of Registrar Moroni;

(4) the (other) *D'Alessandro factors*;

(5) the practitioner's objections to the decision of Registrar Moroni;

(6) preliminary views on a reasonable charge;

(7) the period objections:

(a) the first period objection (prior to 25 July 2002);

(b) the second period objection based upon the Notification of Costs dated 12 August 2002;

(c) the third period objection being the October function;

(d) the fourth period objection (period subsequent to 24 February 2003); and

(e) other matters instancing overcharging;

(8) the total overcharges for the period objections;

(9) summary of findings on the practitioner's case supporting the charges; and

(10) conclusions on gross overcharging and unprofessional conduct.

The legal framework

269 The Committee filed Supplementary Written Submissions outlining the legal principles and the leading authorities. There was no challenge to these from the practitioner (except in the respect mentioned below) and he adopted most of these as part of his defence. The principles may be summarised as follows.

1. Gross overcharging may amount to unprofessional conduct.

2. The inquiry into what amounts to a grossly excessive charging would ordinarily involve first, a determination of what, in the particular circumstances would be a reasonable sum to charge.

3. Determining what would, in the circumstances be such a reasonable sum will often turn on multiple factors (the *D'Alessandro factors*) including:

   (1) the amount at which the costs (relevantly) have been taxed;

   (2) the difficulty of the case;

   (3) the novelty or complexity of the legal issues involved;

   (4) the experience of the practitioner;

   (5) the quality of the work;

   (6) the amount of the time spent;

   (7) the responsibility involved;

   (8) the amount or value of the subject matter in issue; and

   (9) any costs agreement entered into.

   D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198 at 214-5.

4. (1) Whilst the taxed amount is not necessarily the sole factor to be taken into account given the existence of the other factors, the Tribunal is entitled to rely upon the taxed amount as the appropriate standard (that is, of what is a reasonable sum) and to determine by reference to that, whether the amount

charged was grossly excessive. ***D'Alessandro v Legal Practitioners Complaints Committee*** at 220-221.

(2) The decision of a specialist court (here Registrar Moroni) on a subject matter in issue (relevantly a reasonable sum to charge) in disciplinary proceedings, may afford strong *prima facie* evidence of that matter, particularly where (as here) the practitioner was a party to the earlier proceedings and there has been no appeal. Nevertheless, it is not determinative of the issue and the practitioner is entitled to challenge the facts found and the correctness of the decision and introduce evidence to controvert the charge. ***General Medical Council v Spackman*** [1943] AC 627 at 635, 637-8.

5. (1) Where a fee has not been allowed on taxation because the basis upon which the fee is claimed is not supportable (as in that case upon the proper construction of the scale of costs) that may not itself be cogent evidence of unprofessional conduct if the charge was made on a basis which was reasonably arguable, although wrong. ***D'Alessandro v Legal Practitioners Complaints Committee***.

(2) That principle would arguably extend to a fee which has not been allowed on taxation because for example the facts necessary to support the claim are not established, but where the charge was nevertheless made on a basis which was reasonably arguable. (In favour of the practitioner we would regard the principle as so extending in this matter. The practitioner, following an exchange between the Tribunal and Senior Counsel for the Committee, adopted this argument, in relation to the charges made in the first period from April to 25 July 2002. In his closing submissions, the practitioner appears to rely upon this principle for all his charges.)

6. Whilst ordinarily the determination of whether an amount was grossly excessive would involve first a determination of what in the particular circumstances a reasonable sum to charge would have been, it is not necessary to do that in all cases. If it is evident that there is no justification for the amount actually charged, including for example that detailed work on the preparation for trial was undertaken immediately before a conference intended to achieve a settlement, the Tribunal is not required to determine first a sum that might reasonably have been charged. ***De Pardo v***

Legal Practitioners Complaints Committee [2003)] WASCA 274 at [18-20]*;* applied in ***Legal Practitioners Complaints Committee and Benari*** [2005] WASAT 213 at [99]. (This principle is relied upon by the Committee for the period objections.)

7. A practitioner shall charge no more than is reasonable by way of costs for his services having regard to the complexity of the matter, the time and skill involved, any scale of costs that might be applicable and any agreement as to costs between the solicitor and his client. Rule 16.5 of the *Professional Conduct Rules.*

270 The principle which the practitioner disputes (expressly by his Closing Submissions) is that on the strength of these authorities the Committee may "rely on the judgment" of Registrar Moroni or "that the judgment is *prima facie* evidence of overcharging". We think the authorities cited do allow the Tribunal to rely on the decision of Registrar Moroni as to what *prima facie* was a reasonable sum for the practitioner to have charged. In doing so however, the Tribunal is still obliged to hear and consider the practitioner's evidence and submissions challenging the decision and supporting the charges made, and must have regard otherwise to the *D'Alessandro factors*. That is how the Tribunal has proceeded.

271 We mention in this context that we are conscious that whereas under the *Family Law Rules 2004* (r 19.32) the onus is on the practitioner to establish each item of cost, the onus is on the Committee alleging misconduct by overcharging to prove it.

272 The practitioner also referred to:

1. Some general principles of taxation set out in *Civil Procedure in Western Australia*:

   (1) Regard must be had to the time reasonably spent in the provision of the services and by applying an appropriate rate;

273 Here the rate was fixed under the first costs agreement and is not in dispute and the issue is as to the time reasonably spent.

   (2) There must be an item by item taxation rather than a "swings and roundabouts" approach;

   (3) Taxation disallowances are erroneous where there is an error of principle, a discretion has been exercised in a manner which is manifestly wrong, the sum allowed

> has shown that some wrong principle has been followed or that no taxing officer acting reasonably could ever have taxed off the particular item in the amount in question.

274 We are prepared to assume that these principles generally operate in an assessment of costs by the Registrar in the Family Court of Western Australia. We do so although, arguably, an "assessment" allows for a more global approach than does a "taxation".

2. Under the *Family Law Rules 2004*:

(1) The Registrar must not allow costs if they are not reasonably necessary for the attainment of justice and not proportionate to the issues in the case. Rule 19.34.

(As to which see the comment below in dealing with the *D'Alessandro factors.*)

(2) The Registrar must assess an itemised account in accordance with the cost agreement. Rule 19.34.

275 We mention that it appears the *Family Law Rules 2004* apply to an assessment in respect of charges incurred and claimed during the currency of the *Family Law Rules 1984.*

276 The practitioner has also sought to rely on s 237(3) of the *Family Court Act 1997* by which, as he submitted, the Family Court must have regard in a costs order to the financial circumstances of a party and other matters. Section 237 makes provision for the court hearing the matter to make orders for costs as between the parties in special circumstances, having regard to certain specified matters. That provision does not appear to us to apply with respect to solicitor and client costs nor in connection with an assessment of costs as opposed to a court order in that respect.

The Committee's case and the practitioner's defence

277 For the purpose of considering and making findings of facts in this matter, it is necessary to understand how the parties presented their cases.

The Committee's allegations

278 The Committee by its Statement of Issues Facts and Contentions outlined the facts relied upon during the period from July 2002 to the Registrar's decision in June 2004. These included reference to the first

costs agreement, the practitioner's Memorandum of Notification of Costs dated 12 August 2002, the directions hearing on 10 October 2002, the request for and payment of $1500 for legal costs, the settlement negotiations, the consent orders, the second costs agreement, the account dated 3 July 2003 provided by the practitioner, the practitioner's itemised bill of costs dated 22 December 2003, the client's dispute of the bill and the taxation. The practitioner in his Response Statement concerning the facts included additionally reference to his Memorandum of Notification of Costs dated 9 October 2002, the Costs Disclosure Statement dated 30 December 2002 and the withdrawal authority dated 24 February 2003.

279 The Committee tendered the witness statements of the client, the client's partner and the client's friend previously referred to. It also tendered several files of documents in support of the charge including the practitioner's file in the property dispute (including court documents, file notes, telephone notes), documents relating to the dispute not on the practitioner's file, documents relating to the taxation including the transcript of the hearing before the Registrar and a bundle of the practitioner's timesheets for April 2002 to April 2003.

The practitioner's response

280 The practitioner's Response Statement attaches a Schedule of Charges & Evidence including reference to each of the items the subject of the itemised bill and including submissions why they are each properly chargeable. The practitioner's witness statement in this complaint deals with his relations with the client's son and verifies the correctness of his Schedule of Charges & Evidence. His responsive witness statement deals with the matters in the witness statements of the Committee's witnesses. His Further Statement of Issues Facts and Contentions addresses the *D'Alessandro factors.*

281 The practitioner's Responsive Statement does not clearly identify the issues in the matter or clearly advance the practitioner's case on the issues. Much of it consists of general statements or arguments without proper particulars or reference to the specific evidence relied upon (for example, the attack on Registrar Moroni's decision and the claim to the reasonableness of the charges made). Much of it consists of bald assertions without reference to the source (for example as to the alleged benefits received by the client), or consists of arguments which we regard as quite absurd (for example that those benefits include the amount of the practitioner's fees required to be repaid following the decision of Registrar Moroni). Sections of the submissions are entirely irrelevant (for example

the outcome of other taxations in other courts being some of the 200 taxations in which the practitioner had allegedly appeared).

282 The relevant submissions from the practitioner's documents may be summarised as follows.

283 The practitioner attacked the decision of the Registrar on the grounds that:

(1) he disregarded or failed to refer to or consider almost all of the evidence before him which was mostly corroborated and unopposed;

(2) the Registrar failed to sufficiently regard:

   (a) the law (including the principles of taxation identified above);

   (b) the evidence;

   (c) the exhibits tendered;

   (d) the first costs agreement; and

   (e) the taxation principles of reasonableness and procedural fairness including in his refusing to allow cross-examination and allowing insufficient time to give evidence;

(3) the taxation:

   (a) was not made on an item by item basis;

   (b) did not refer to the Family Law scale/schedule which grant allowances for telephone attendances and so on;

   (c) did not allow for preparation for meetings, perusing the husband's solicitors correspondence, lengthy telephone attendances, copying;

(4) the Registrar wrongly determined that the proceedings were simple whereas in fact they were complex; and

(5) the Registrar failed to consider the value and number of items in dispute and the failure of the parties to agree over some years.

284 As regards the practitioner's claim to support his charges, he replied upon:

(1) the small proportion that the charges bear to the value of

(a) the matrimonial estate; and

(b) the value of the client's benefits received

(A submission of "proportionality" as he described it, that the practitioner clearly regarded as of considerable importance).

(2) the substantial evidence produced in support of the charges in the form of timesheets, file notes, telephone notes, the "file" documents etc;

(3) the lack of evidence in opposition to his evidence;

(4) the benefit to the client in not having any interim account;

(5) the consideration that the majority of the property was in the possession of the husband;

(6) the large number of items in dispute;

(7) the efforts made to settle the proceedings;

(8) the failure of the client to make realistic concessions of the charges; and

(9) the write off made in the bill of costs of about $9300.

285 In the course of considering the various issues below, we deal with each of these submissions.

286 In support of all these submissions, some of which overlap, the practitioner tendered four files of documents. These include the documents tendered in the taxation (being exhibits "A" – "UUU") and what is described as "Other" material, including the affidavits filed by the practitioner in the taxation and a draft affidavit of discovery of the client prepared by the practitioner. We mention that the affidavit of Patricia Le Miere, filed on behalf of the Committee, identifies documents in the practitioner's files before us which are additional to the exhibits filed in the taxation.

The proceedings before and decision of Registrar Moroni

287 It is apparent that the proceedings before the Registrar and his decision assume significance in the parties' respective positions.

288 The Tribunal has regarded the learned Registrar's decision as *prima facie* evidence only of what is a reasonable charge – that is, as a starting point in its determination and independently considering the other

D'Alessandro factors and the practitioner's challenge to the Registrar's decision. To that extent however, and given the Committee's reliance upon the decision and the practitioner's comprehensive challenge as outlined above, it is necessary to consider the proceedings before the Registrar and his decision.

289 The practitioner provided an itemised bill of costs dated 22 December 2003 in the sum of $23 250 including disbursement of $896 and GST. The client filed a Notice Disputing Bill of Costs in the Family Court on 28 January 2004. The client subsequently filed an Amended Notice on 24 February 2004. This attached a Schedule of Items in Dispute and Grounds of Dispute. The amount offered in this Notice was $3550. An updated Schedule produced towards the end of the hearing shows the total bill as $30 475 (the amount of $29 550 shown on the bill being incorrectly totalled by the practitioner) plus disbursements of $896 but subject to the deduction. The amount offered in the client's updated Schedule was $4825 and $166 for disbursements. A total of $4991. (We mention that given the relatively small amount involved in the dispute as to disbursements, we have not addressed this in our Reasons.)

290 The matter was listed for hearing for one full day. In the afternoon of 10 May 2004 the hearing commenced, the proceedings not then being transcribed. The client relied upon her affidavit and an affidavit sworn by her son. The practitioner relied upon affidavits sworn by several witnesses including himself. There was some cross-examination. Items 1-18 (except item 10) they being with respect to the period 8 April to 25 July 2002 (when the practitioner and the client first met) were dealt with and disallowed. This was on the basis that, "leaving aside the question of whether the alleged services were actually performed in whole or part" on the basis of the affidavit material the Registrar was "a very long way from convinced" that the evidence establishes in this period "any legal liability on the part of the applicant to pay the respondent any money at all". He said "That is, the evidence does not satisfy me that there was any intent on the part of the applicant to create contractual relations with the respondent in respect of any communication which may have occurred between her son and the respondent." (See Registrar Moroni's file note dated 11 May 2004.) Item 10 being an alleged telephone conversation between the practitioner and client in June 2002 was subsequently disallowed, the Registrar finding that they first spoke on 25 July 2002. (Exhibit B2 page 607.)

291 The hearing continued on 13 May 2004 the proceedings then being transcribed. It continued on 19, 24-26 May 2004 and oral Reasons were delivered to the parties on 4 June 2004. (The transcript of the evidence and submissions runs for about 180 pages.) The transcript shows that the sequence generally was that the practitioner would tender documents and give evidence in support of each item or group of items. There was no cross-examination. Sometimes the items were conceded. On occasions the Registrar would deal with them. Otherwise he would reserve his decision on them. (Exhibit B2 page 476, 541.)

292 The Registrar in his Reasons gave an overview of the manner in which the taxation had been conducted. He referred to the oral evidence of the client (brief) and of the practitioner (extensive) and the limited cross-examination. He referred to important issues of credibility, as to which for reasons he explained, he preferred the evidence of the client to the practitioner, but bearing in mind that this was primarily a taxation matter. He referred to the time restraints put on the practitioner's evidence and submissions, but the Registrar believed the practitioner was nevertheless given "a very fair opportunity to speak to the various items". He listed 17 areas of concern as to the practitioner's conduct and why in some respects it caused him to treat his evidence "extremely cautiously". (Exhibit B2 page 601 - 602, 608). The specific matters considered included the practitioner's Memorandum dated 12 August 2002 compared with the costs ultimately claimed, the husband's solicitors' estimate of costs, hours worked as recorded in the practitioner's timesheets especially for the large sums claimed on certain days and the condition of those timesheets, and the total sum claimed. (Exhibit B2 page 612 - 614.)

293 As to the principles governing the taxation, the Registrar referred to and quoted rules 19.4, 19.5, 19.6, 19.12, 19.33, and 19.34 of the *Family Law Rules 2004*. He said (Exhibit B2 page 598):

> "The assessment of a legal bill must be carried out with a view to ensuring the charges levied by a lawyer are both reasonable and proportionate. And so, if a lawyer charges for work and undertakes work and conducts litigation in a way which is not reasonable in the circumstances and not proportionate to the matters in issue, then he or she runs the risk of not being able to recover costs charged in connection with such work."

294 The Registrar found on the evidence that the relationship between the practitioner and the client commenced on 25 July 2002 and terminated on 24 February 2003. (Exhibit B2 page 592.)

295 Concerning the nature of the property dispute and the professional services undertaken generally, the Registrar said:

> "So it has to be said that the financial statement filed by [the husband] paints a very simple picture. This was never a complex case. The parties owned a house in the suburbs which is easily valued. They own some chattels and the husband was apparently a TV antenna technician operating on a very small scale indeed. (Exhibit B2 page 595.)
>
> ... I am widely experienced in the conduct of property proceedings in this jurisdiction and I'm very familiar with the costs generally charged by lawyers for litigation of this dimension.
>
> When one looks at the proceedings ... in a micro sense, at the end of the day, the respondent turned up to two conferences, filed nothing but a notice of address for service, acted to implement the terms of a very simple settlement and then purported to say that ... he had actually spent more than $30 000 worth of time. The sheer size of this bill clearly rings alarm bells in a case of this nature. It is simply way out of kilter without further explanation to the proceedings to which it relates. (Exhibit B2 page 612.)
>
> I have absolutely no doubt at all that $30 000 or even $20 000 is far too much to charge for the representation of a lady who has a half interest in a house and a few chattels and some shares and nothing much else.
>
> I'm particularly fortified in that view by the consideration that the respondent filed no documents … other than the notice of address for service. In fact, he could not even lay claim to drafting the minute of agreed orders. That work was undertaken by [the husband's lawyer].
>
> So far as the implementation of the orders is concerned, nothing could be simpler. The applicant was signing over her interest in the house for an agreed sum of money. A very junior settlement agent could effect that work." (Exhibit B2 page 614.)

296 Registrar Moroni arrived at his determination of the costs by accepting as a reasonable charge the amount of $4491 (excluding GST) being the total amount conceded by the client. He said that some

concessions had been made by the client at the outset and, as the hearing progressed and further information and documents came to hand, the client made further concessions as reflected in the updated Schedule. (Exhibit B2 page 593.) He said that he thought the client had been extremely fair in the concessions she had made and that had he ruled on those items he may not have ruled as favourably as the client conceded. (Exhibit B2 page 615.) He said these concessions both at the outset and during the course of the assessment were entirely appropriate. He otherwise upheld each of the objections made. He regarded the amount conceded, $4991 as fair and appropriate. With GST the assessment was $5490.10.

297 In his conclusion he said that in this case there were three questions:

(1) was the work actually performed;

(2) were the charges for it reasonable; and

(3) were the charges proportionate to the (issues in) the litigation?

298 He concluded that, even allowing for his concerns on the first questions, the amount charged was totally disproportionate to the issues in contention. (Exhibit B2 p 616) (He appears to have corrected his first reference in the preceding paragraph that the charges were out of proportion to "the amount in issue".)

299 The Registrar had serious concerns as to the manner in which the practitioner had conducted himself in the course of the Family Court proceedings and before and during the taxation. A considerable part of his Reasons is taken up with this subject. (The Registrar in his orders, pursuant to r 19.33 of the *Family Law Rules 2004*, included a reference to the Disciplinary Tribunal (*sic) with* respect to some aspects of the practitioner's conduct including, in effect, overcharging.) It might be said that this subject did not directly concern the Registrar determining a proper charge for the practitioner's costs. However, in dealing with the conduct of the practitioner, the Registrar:

(1) on a number of occasions in his Reasons sought to distinguish between his limited purpose of conducting a taxation and the issue of the propriety of the conduct of the practitioner;

(2) was required to consider the credibility of the practitioner in the context of the disputed claims as to the instructions given and work undertaken;

(3) was required to consider the practitioner's conduct in the context of an application for the costs of the taxation; and

(4) under the *Family Law Rules 2004,* was obliged or entitled to consider whether the practitioner's conduct was such that it ought be reported. (Rule 19.33).

300 As regards the actual decision made, it is the case that the Registrar upheld each of the objections made and accepted the concessions as the basis for his assessment. It is to be remembered however, that whilst almost all of the 165 items were in dispute, many of those were treated as subject to the same objection. Thus for instance all the items before 25 July 2002 and all the items after about 24 February 2003 were disallowed on the basis that there was no solicitor client relationship in this period. (That clearly did not offend the "item by item" principle.) Finally, although there are not discrete reasons given for rejecting each individual charge beyond reliance upon the client's objections, the Registrar was conscious of the requirement to disallow charges "not proportionate to the issues in the case".

301 With respect to the practitioner's allegations concerning the Registrar's decision, we repeat that we have used that decision only as *prima facie* evidence of what was a reasonable sum to charge. In our Reasons below we have considered in more detail the practitioner's submissions concerning alleged error on the part of the Registrar. However, from this summary of the proceedings before and of the decision of the Registrar, it is not apparent to us, with respect, that there was any incorrect principle applied, or an obviously incorrect application of a discretion, or that it was a decision that no taxing officer acting reasonably could have come to. Subject to considering the *D'Alessandro factors* and the practitioner's specific objections, we do not see that we are disqualified from reliance upon his decision for the purpose identified.

Consideration and application of the D'Alessandro factors

302 We mention some preliminary matters.

303 It seems to us in circumstances where, as here, there has been a taxation of costs, the *D'Alessandro factors* are generally matters likely to have been taken into account by the taxing officer. One way of applying the principle from the case is to say that the disciplinary body considering a complaint of overcharging will enquire as to whether the taxing officer did, and did appropriately, apply those factors.

304 Although we have considered each factor in turn we should say that we do not think the Full Court in this case was intending to lay down a "formula" by which in every case each of the factors is to be considered. In the leading judgment, Ipp J said that determining a reasonable charge would "ordinarily" involve a consideration of the matters identified. Moreover, the Full Court does not indicate that it regarded its enumeration of these factors as necessarily reflecting their order of importance. Whether each factor will be relevant and what weight will attach to it and what other factors may also be relevant, will depend on the circumstances. Here for example, the proceedings were in the Family Court and regulated by its rules and procedures as to the costs payable. Importantly, that involved consideration of what costs would be disallowed under an assessment as not reasonably necessary for the attainment of justice or as not proportionate to the issues in the case (r 19.34). That will necessarily be a relevant "factor" in determining a reasonable cost. Further, a reasonable cost in these proceedings must be examined on the basis that the matter was settled rather than concluded after trial.

305 (We observe also that the Full Court in ***D'Alessandro*** regarded the circumstances in which the relevant costs agreement was entered into as being part of the material circumstances of determining overcharging. However, the Committee did not pursue this argument and so we do not need to enquire in this context as to the circumstances of the first costs agreement.)

306 Both the Committee and the practitioner made submissions in relation to each of *D'Alessandro factors*. The Tribunal has considered these factors both in the context of their consideration by the Registrar and independently having regard to the work performed and the charges made for that work.

(1) The amount at which the costs in question were taxed.

307 As we have indicated, Registrar Moroni assessed the practitioner's costs at $5490.10, taxing off from the practitioner's bill of $23 250 the sum of $17 759.90.

(2) The difficulty of the case.

308 We have set out Registrar Moroni's description of his experience in the conduct of Family Court property settlement proceedings and his findings in relation to the complexity of this particular matter. He found that "this was never a complex case" and that as regards settlement "nothing could be simpler". There was no challenge from the practitioner

to Registrar Moroni's experience. Having ourselves examined the evidence (which is outlined further below) as to the nature of the property dispute, the extent of the negotiations and the work required to implement the settlement, we entirely agree with the learned Registrar's assessment and essentially for the reasons which he gave. This was a dispute over a small pool of matrimonial assets, the negotiations in which the practitioner was involved being centred largely on how much the husband would pay within a range of $130 000 to $150 000. These negotiations took place orally on 25 July 2002 and 10 October 2002 and in writing between 30 October 2002 and 18 December 2002. They resulted in consent orders prepared by the husband's solicitors.

309 The practitioner has made reference under this factor (and under the factor of the novelty or complexity of the legal issues involved) to:

(a) the number of items in dispute as identified in the conciliation conference particulars;

(b) "the research" undertaken; and

(c) the fact that "the matrimonial estate was completely in the control of the respondent husband."

310 As to each of these matters:

(a) Aside from the house and the shares, the items were mostly of a small value and in the respective possession of the client and the husband. In the solicitors' correspondence these were quickly put to one side in favour of determining a lump sum payment. The fact that in the time prior to the parties engaging solicitors there was no agreement on the value or distribution of individual items of property appears of little relevance.

(b) No research was required and such research as was evident from the practitioner's papers (obtaining copies of chapters from texts on research on the economic aspects of relationship breakdown, claims by de facto partners, setting aside property settlement orders and the like) appeared unnecessary at least for a practitioner who held himself out as an expert in, or at least as practising in, family law and charging $250 per hour.

(c) Of the items which were the subject of any dispute, it appears the house and the majority of the AMP shares were in the husband's possession. Although there was initially some contest about the client's right to enter the house to effect some renovations, this did not impede agreement in relation to who was to obtain ownership of it. We do not think these factors made the property dispute a complex one.

(3) The novelty or complexity of the legal issues presented.

311 There were no novel or complex legal issues arising during the property dispute.

(4) The experience of the practitioner.

312 We have set out above details of the experience of the practitioner.

313 We would think that in considering this factor, regard would be had to the hourly rate or other fee charged. In this case the practitioner charged $250 per hour, a sum substantially above that allowed under the relevant Family Court scale. He was allowed that sum on taxation. We note that the husband's solicitor, who the practitioner described as "an experienced family law lawyer", by his Notification of Costs charged the husband in accordance with the scale.

(5) The quality of the practitioner's work.

314 Having regard to the simple nature of the property dispute no particular quality in the practitioner's services was called for or was evident.

315 In any event, at a charge out rate of $250 per hour the client was entitled to expect a high quality of work.

(6) The amount of time spent by the practitioner on the matter.

316 Because the practitioner sought to justify each of his charges before us, we have considered this factor in some detail. In that respect we have had cause to examine the practitioner's file records and work product in the period from April 2002 to April 2003. In particular we have examined his file records supporting individual items charged for the period prior to his direct contact with the client (25 July 2002) and in relation to the function on 31 October 2002. For reasons explained below, we have found those records and the practitioner's evidence in relation to them an

unsafe and unreliable basis upon which to assess the time spent by the practitioner.

317 Moreover, we think this factor is necessarily directed to, or at least embraces, the time **reasonably** spent by the practitioner on the work performed. Given the lack of complexity of the matter, the nature of the work actually required of and performed by the practitioner, and the disparity between the costs claimed and those reasonably to be expected for a matter of this nature, we are satisfied that the time allowed by Registrar Moroni represents a reasonable amount of time for the services provided. We respectfully agree with the Registrar, that there was no proportionality between the amount charged and the issues in the proceedings.

(7) The responsibility involved.

318 We would think this must relate to the level of responsibility having regard to the complexity of the case and the amount in issue. We have dealt with these issues.

319 Moreover, as the practitioner charged $250 per hour, a high degree of responsibility was to be expected of him.

(8) The amount or value of the subject matter in issue.

320 We think the importance of this factor generally has diminished since the introduction of hourly rates as the basis upon which costs under the scale of costs in the Supreme Court (and District Court) are allowed. We note that the current *Family Law Rules 2004* (r 19.14(4)(b)) expressly disallow a provision in a costs agreement by which the costs are calculated by reference to:

(i) an amount ordered by the court;

(ii) the amount of an agreed settlement or consent order; or

(iii) the value of the property or money which may be recovered by the case to which the work relates.

321 The practitioner has claimed with respect to this factor, that his costs were reasonable having regard to the amount or value of the subject matter in issue namely $400 000. He does not support this figure in any sensible way. In the practitioner's letters dated 30 October 2002 (in one place) and 11 December 2002, he claimed that the value of the estate was $295 000. The husband's solicitors in their letter dated

28 November 2002 disputed some of the values attributed by the practitioner to the house and the husband's assets and would reduce these by, it appears, about $70 000. On these figures the value of the matrimonial property was between about $230 000 and $300 000.

322 The practitioner has also referred under some of the *D'Alessandro factors* to "the excellent result achieved of $219 000 to the client without debt" as a result of his experience and the quality of his services, a matter which he says "[Registrar] Moroni failed to consider at all".

323 This raises the issue of what the practitioner has described as "proportionality", that is, he alleges, the relatively small figure for his fees compared with the large value of the estate and of the value of the benefits achieved by the client on settlement. It is convenient to deal with that issue here.

324 The figure of $219 000 is again the practitioner's own assessment of the value received by the client (see Response Statement pages 4-5), the Committee not attempting to place a value on the client's settlement or of the matrimonial property. The practitioner includes in his assessment of $219 000 the sum of $1250 paid by the client to the practitioner on account of his fees and refunded by him, the refund of fees of $16 509 ordered by Registrar Moroni and the payment of her counsel fees of $8596 on taxation ordered by Registrar Moroni. None of these amounts could possibly be justified as included in the "value achieved" or in any way as the result of the practitioner's proper services. On the contrary. Other amounts included in the practitioner's assessment are the discharge of the mortgage loan of $15 000 (but the client disputed any liability for any share of this sum), half of the AMP shares of $13 000 (the source of the value of which is not evident – in his letter dated 30 October 2002 the practitioner gives a value of $13 000 seemingly for the total of the shares), the discharge of her liability of $5000 over two businesses and council and other rates (as to which there does not appear to be any evidence), the sum of $10 000 being the value of the client's retained assets (which were not treated as part of the matrimonial assets) and "waiver" of stamp duty of $15 000 (presumably because it was a Family Court settlement and therefore to be expected).

325 By the settlement the client, after 22 years of marriage, received essentially the sum of $114 000 (net) and half of the AMP shares, and retained the chattels, funds and superannuation in her possession.

326 As regards the efforts of the practitioner in achieving this modest and predictable outcome, the position was as follows. The client and her friend had completed the papers to institute the proceedings. The practitioner filed no papers in the proceedings except his appearance. Agreement was not reached as to the valuation and division of the assets at the conferences attended by the practitioner on 25 July 2002 and 10 October 2002. However, the correspondence between the solicitors evidences from the outset that whilst there was some quibbling about the values of some of the assets and the parties' share of the liabilities, the dispute was essentially about how much the husband would pay on the basis that he would acquire full ownership of the house and assume liability for the mortgage. There was no dispute that the AMP shares would be equally divided and the parties would keep the vehicles and chattels and bank funds and super funds in their respective possession. The client initially, on 30 October 2002, sought a payment of $150 000, the counter offer on 28 November 2002 was $130 000, the response from the client on 11 December 2002 was $142 000 and the matter settled "by splitting the difference" at $136 000.

327 In summary, the practitioner's contribution to the settlement was little more than attending two conferences and writing several letters arguing essentially that the client was entitled to a 50 per cent share of the estate. Thereafter he acted to give effect to a simple settlement of consent orders prepared by the husband's solicitors.

(9) Any costs agreement that might have been entered into.

328 The terms of the first costs agreement provided the practitioner would charge an hourly rate of $250 plus GST. The Registrar proceeded on this basis.

329 In the absence of a valid costs agreement, the *Family Court Itemised Scale of Costs* applicable in the period 1 October 2001 to 10 October 2002 applied. These provided for a maximum hourly rate of $160 inclusive of GST.

330 The practitioner has claimed in this context that Registrar Moroni failed to have regard to the clause of the agreement giving it retrospective operation and therefore covering the period of instructions from the client's son. In fact, the learned Registrar did consider that provision, questioning whether it was legal. In any event, he decided the matter on the basis that there was no legal relationship between the practitioner and the client prior to 25 July 2002. The practitioner's reliance upon this agreement being expressed to take effect retrospectively is of little

significance, given that it is said to apply after "1 July **1998**". Further, the reference in the first costs agreement to it applying to instructions received and "services incurred" after 1 July 1998, does not foreclose the anterior question whether the client (directly or by an authorised agent) provided instructions and received services before 25 July 2002. The practitioner did not suggest that at the meeting on 25 July 2002 he discussed with the client the retrospective operation of the agreement to include instructions given by her son.

The practitioner's other challenges to the Registrar's decision

331 We have outlined above the practitioner's challenges to the Registrar's decision. Some have been dealt with in our consideration of the *D'Alessandro factors*. As to the property settlement proceedings being simple in nature, we respectfully agree with the Registrar's assessment. The Registrar did give consideration to the first costs agreement. As to the other challenges:

1. We do not accept that the Registrar failed to consider the evidence. We have recited the time taken for the taxation the great majority of which was taken up by the evidence from the practitioner, the number of affidavits filed and the volume of exhibits tendered. We have referred also to the Reasons given by the Registrar for rejecting the evidence of the practitioner and preferring that of the client. The Registrar's Reasons reflect his consideration of the evidence and why he was prepared to adopt the client's objections made to the bill of costs.
2. It has not been shown to us that the Registrar failed to apply any principles of law or evidence or that he did not apply the principles of "reasonableness".
3. It is apparent from the transcript that the taxation proceeded on an item by item basis.
4. As to procedural fairness, this was largely a matter for the Registrar to determine. He was clearly entitled (and bound) to impose limits on the time involved in a taxation on a bill of costs ultimately allowed at about $5500.
5. As to a consideration of the practitioner's time involved in preparing for meetings and the like, the Registrar was clearly in a position to determine a reasonable time for such items and it has not been shown to us by reference to individual charges that he erred in reaching the conclusions he did.

332 It is material to observe in this context that if the practitioner genuinely believed Registrar Moroni's decision was erroneous in the manner the practitioner has recited before us, there was no substantive reason why he could not have sought a review of it before a Judge of the Family Court. It required only an application and an affidavit. To suggest, as the practitioner did, that he was precluded from doing so for "commercial reasons" is not persuasive. On his case before the Tribunal, the amount the practitioner could seek on a review was $17 759.

Preliminary views on a reasonable charge

333 Having considered Registrar Moroni's decision and had regard to the *D'Alessandro factors,* we have reached the preliminary conclusion that the Registrar's decision is an appropriate basis for determining that a reasonable charge for the practitioner's services was $5500. We leave a final decision on this issue until a consideration of the period objections and the evidence which the practitioner has given in answer to those objections and in support of the charges generally.

The period objections

334 As indicated above, the Committee has a second basis upon which it submits the amount claimed represented gross overcharging, independently of the Registrar's finding of what was a reasonable charge for the practitioner's services. It divides the practitioner's bill of costs into four periods. It submits that there was no justification for the amount actually charged having regard to:

(1) each of the charges falling within the first period;

(2) the charges generally in the first and second periods measured against the practitioner's August 2002 notification of costs;

(3) the charges for the October function within the third period;

(4) each of the charges falling within the fourth period; and

(5) other instances of unnecessary work performed.

335 For his part the practitioner has submitted by reference to the Schedule of Charges & Evidence attached to his Response Statement, that the Tribunal should find within each of the periods (and generally) that

each item in the bill of costs was supportable and the bill in total was reasonable, or at any event did not constitute gross overcharging.

336 It is convenient to consider the evidence in relation to this claim and defence together.

337 The Committee, in the course of cross-examination of the practitioner in this respect, focused attention on the practitioner's records said by him to support the charges made:

(1) in the first period up to 25 July 2002 when the practitioner first met the client;

(2) on 31 October 2002 (the third period); and;

(3) to a lesser extent, in the fourth period from 24 February to April 2003.

338 Our findings in that respect are of some importance to reliability on the practitioner's documentary evidence generally. Some concern was expressed by the Tribunal as to the nature of the Committee's allegations concerning the practitioner's records and supporting oral evidence and whether a finding of dishonesty was being sought in that respect. The Committee made clear that, with one exception, it would not be inviting a finding of dishonesty against the practitioner as concerns his records and evidence. The exception was in relation to the charges made for the October function. (T:172-179, 7.11.06; 2-9, 30.11.06) We ruled, against the objections of the practitioner, but before he was cross-examined in relation to the October function, that the Committee's submission in support of alleging dishonesty in that respect was permissible within the context of the Overcharging Complaint.

339 The times and charges for the four periods are as follows:

(1) Charges for the work for the period 8 April 2002 to 25 July 2002 for 14.9 hours in the sum of $3725 (the first period);

(2) Charges for the work for the period up to 12 August 2002 (the second period) for 25 hours in the total sum of $6250 (there is some overlap between the first period and the second period);

(3) Charges for work for the period between 12 August 2002 and 24 February 2003 for 73 hours in the sum of $18 250 (the third period); and

(4) Charges for work for the period after 24 February 2003 to 29 April 2003 for 23.9 hours in the sum of $5975 (the fourth period).

340 These figures for time and charges are taken or calculated from the Committee's "Extract from Practitioner's Itemised Account" to which the practitioner raised no objection. The practitioner uses some common figures in his Closing Submissions (par 74 and par 93). The figures are for the gross amount charged by the practitioner (correctly totalled), that is, before his reduction of about $9300 as reflected in his bill of costs.

Charges for the First Period (instructions through the client's son)

341 The practitioner's case by reference to his Response Statement and attached Schedule of Charges & Evidence was that the client authorised the client's son to give instructions and receive advice on her behalf. That is, a case of actual authority. However, during the hearing the practitioner in effect sought to argue that if there was no actual authority, nevertheless the charges were made on a basis which was reasonably arguable. Although this was never articulated by the practitioner, we regard that as including a case of apparent authority and, absent any agency, of a reasonable basis to claim the charges in the particular circumstances. The Committee, very fairly, did not object to the practitioner's change of position during the hearing. The Committee's case on the authority of the son as agent was the conventional one; namely that absent evidence of express authority between the client and the client's son, there could be no apparent authority without a representation of authority from the principal (the client) to the practitioner – that is, that any representation by the agent (the client's son) to the practitioner as to the son's authority could not establish any authority. With respect to the practitioner's alternative case generally, the Committee's position was that having regard to the nature of the relationship between the practitioner and the client's son and the circumstances in which their discussion of the Family Court proceedings took place, the practitioner did not have a reasonably arguable basis to claim costs for any work undertaken. To the extent the practitioner sought to rely upon his documents as supporting the time and content of the communications between the practitioner and the client's son, the Committee submitted that such were unreliable having regard to their content and the circumstances in which they were made.

Authority of the client's son to instruct the practitioner

342 In his witness statement the practitioner describes his relationship with the client's son. He says they met in 1998 and became good friends

and business associates. He says that the client's son constantly talked about the client's case. "He provided me with papers and information on her case and said he had talked with his mother about it." He says "I advised [the client] through [the client's son] at the beginning" and the client's son told me that he was telling his mother what I told him. He explained the nature of his advice. "I was called by [the client's son] and told that after my advice that [the client] had commenced in the Family Court. He had a copy of the papers. We met and exchanged documents. I advised [the client] what to do and what evidence she needed." He said "I had several conferences with [the client's son] about the basics of the case. [He] obtained a copy of the Conciliation Conference court hearing notice and gave me a copy and asked me to attend with [the client]." Then the client "called me to attend that conference as well and we spoke about the case for the first time directly. I told her that [the client's son] had kept me informed and had she received my advice and she said yes".

343 As to the details of the contact, the practitioner relied on his timesheets and file records. These record extensive discussions between the practitioner and the client's son.

344 The client for her part says in her witness statement that in 2001 or early 2002 her friend obtained the Family Court forms and they began to complete these. They were filed on 15 April 2002. In the early stages of the proceedings she tried to talk to her son about the property dispute but he did not show any interest. He was not living with her and they did not have much contact. He did tell her to get a solicitor. She had initially told him she did not need one because her friend was helping her. He had replied that if she did "he had a friend who is a solicitor and he is a good one who has helped people get legal aid". However, when she learned that her husband had a lawyer and that her friend would be away for the conference on 25 July 2002, she decided she needed a lawyer. She rang her son, obtained the practitioner's name and number and spoke to him. He agreed to attend the conference. He never mentioned to her that her son had been speaking to him about the case, nor gave any indication that he knew anything about the case.

345 In her supplementary evidence she confirmed she had never asked her son to instruct the practitioner on her behalf nor provided him with any documents. (T:51, 1.11.06)

346 Under cross-examination the client affirmed aspects of her witness statement. She denied ever being told by her son that the practitioner and he were discussing the case. She did not get or take advice from her son.

She denied that she knew the son proposed to purchase the property (T:81, 1.11.06) She never involved him in her business. (T:62, 3.11.06)

347 There was no direct evidence of actual authority for the client's son to act for the client.

348 Further, the practitioner did not put to the client that she had told or otherwise represented to him that her son had authority to act on her behalf. In the light of her evidence as to her contact with her son in this matter, she would clearly have rejected that proposition. We mention that in the practitioner's letter dated 12 May 2004 (the subject of the Communication Complaint) by which he purports to provide a summary of the first afternoon of the taxation proceedings, he records the client under cross-examination had said that the client's son had never provided information or instructions to the practitioner on her behalf.

349 It follows that the practitioner cannot justify his charges based upon the client's son having actual or apparent authority on his mother's behalf to engage or instruct or receive advice from the practitioner.

Reasonably arguable basis to claim for the first period

350 That leaves for determination whether in terms of the concept outlined in ***D'Alessandro*** the practitioner nevertheless had a reasonably arguable basis to charge as he did in the first period.

(a) Evidence of the client

351 As regards the client's evidence on this issue, she clearly disputes that anything passed between her son and her which, if it had been conveyed to the practitioner, would contribute to any belief in the practitioner that he was entitled to charge in the first period.

352 There was agreement between the practitioner and the client that there had been no face to face contact between the practitioner and the client until 25 July 2002. The client says there was no telephone contact until shortly before 25 July 2002. The practitioner maintained however that there had been a telephone conversation between them on 2 June 2002. The practitioner did not cross-examine the client on this call. He had no independent recollection of the call and relied entirely upon his records. The practitioner's telephone note of this date refers to the client's name (apparently in the son's handwriting) and telephone number and includes "calls to [her]". Then "wants lawyer". It was put to the practitioner and established that this was a Sunday. The practitioner accepted there was no timesheet for that day. This was so

notwithstanding that in the practitioner's Schedule of Charges & Evidence he supported this item by reference to his timesheets (Ex. SSS in the taxation proceedings.) Moreover, the practitioner had earlier given evidence that the itemised bill of costs was prepared by his secretary from the timesheets on the file. (T:45, 7.11.06) It was put to the practitioner that such a call never took place. He said that it had by reference to his telephone note. (T:157, 7.11.06)

353 There are doubts about the contents of this note. There is the client's denial of any conversation prior to 22 July 2002. Her evidence was that she first rang the practitioner on about 18 July 2002. She made a late decision to obtain representation for the hearing on 25 July 2002. This decision was taken when, knowing her friend was going on holiday on 21 July 2002, she first learned that her husband had engaged solicitors. It is consistent with her friend's evidence in her witness statement that she planned to be in Europe on 25 July 2002 and that a few days beforehand the client rang to say she had decided to obtain a lawyer. It is consistent with the husband's solicitors filing a Notice of Address for Service on 19 July 2002. Further, there is nothing from the way the proceedings were being managed by the client and her friend in early June 2002 which would suggest she then "wants lawyer". It seems odd that the practitioner would speak to her on a Sunday. Our concerns about other charges made on 2 June 2002 are discussed below. We accept the evidence of the client and find that this conversation did not take place.

(b) Evidence of the practitioner - overview

354 By his bill of costs dated 22 December 2003, the practitioner records his work as commencing on 8 April 2002. Thereafter until 25 July 2002 there are a number of items variously described as telephone calls and conferences with the client's son, attendance to "Family Court Forms, Questionnaire" and perusal of "documents, information, notes". In the Schedule of Charges & Evidence the practitioner provides references to evidence in support of the charges, being his timesheets, telephone notes and file notes.

355 However, looking at the matter broadly, there is reason to doubt that the practitioner could reasonably have believed he was entitled to charge for this period.

356 First, the claim in respect of them is first made after the client's complaint to the Committee. There is no reference to work between April 2002 and July 2002 to the value of about $3725 in the first costs agreement. As we have said, the practitioner's reliance upon this

agreement being expressed to take effect retrospectively is of little significance, given that it is said to apply after "1 July **1998" (**Our emphasis**.)**. There was no reference to these costs in any of the practitioner's correspondence with the client. Indeed, the practitioner's letter to the client dated 21 October 2002 includes: "we have incurred substantial work since you instructed us in the matter in **July** 2002". (Our emphasis.) At no time prior to December 2003 did the practitioner advise the client of the costs which he had raised for work done on her behalf through the instructions of her son.

357 Second, in his Memorandum of Notification of Costs dated 12 August 2002 the practitioner advised the client that "your actual costs up to and including today are $1000". We have discussed this Memorandum above. This was a document prepared and provided pursuant to the Family Court orders made on 25 July 2002. It was a typed record without the handwritten additions of his subsequent cost notifications. When challenged as to this document, the practitioner said in his evidence, variously, that this figure: (1) was only an estimate based on guess work; (2) was made without looking at his records; (3) represented work only on 25 July 2002; and (4) included figures carried forward from another form.

358 As we have earlier discussed, we find this evidence to be wholly unsatisfactory. Had the practitioner in fact undertaken work to a total value of $6250 to this time (12 August 2002) for which he believed he was entitled to charge, it seems most improbable that he would not have provided an estimate in that range. If in fact he had taken the position that he would not charge anything for any "advice" provided to the client through the client's son and any amount incurred was written off in his bill as part of the $9300 deduction (as the practitioner subsequently maintained in his Closing Submissions), there was no justification for including these items in his bill of costs and maintaining the claim for them throughout the taxation and the proceedings before us. (We deal further below with the practitioner's claim that this sum was included in the amount said to have been written off.)

359 Third, other than his claim that he was generally "advising" the client through the client's son, the practitioner gave no evidence as to what he understood to be the scope of the son's authority and the practitioner's role in this period. He was told that the client had initiated proceedings with the help of her friend. He was not on the record. He did not attend the first Family Court directions on 16 May 2002. He did not prepare any Family Court documents. He did not communicate with the client.

(Except in relation to his alleged telephone call on 2 June 2002 discussed above.) There was no discussion much less agreement as to his charge of $250 per hour in this period. There was no evidence that the practitioner kept the son advised as to the practitioner's fees and that these were being relayed to the client. There was no credible evidence that the client received any value for the "work" that the practitioner was allegedly undertaking on her behalf in this period.

360 Fourth, the practitioner did not call the client's son to support the charges made for this period. It was a matter which troubled the Tribunal during the hearing. The practitioner (and Senior Counsel for the Committee) was asked why he had not done so. His initial response was that he had chosen not to do so "out of loyalty" - because the client's son had been his "best friend". (T:169, 7.11.06) However, it subsequently emerged in the evidence before us that in support of the client's objections to the practitioner's bill of costs, the client's son had sworn an affidavit which was tendered during the taxation. This affidavit was not put into evidence before us. However, the practitioner did put into evidence the affidavits which he had prepared and filed in the taxation, including his own. In several of these affidavits, including the practitioner's, the witnesses had deposed to the fact that "[the client's son] is untruthful when he states in his affidavit in this action that 'I have no business relationship with the respondent. ... and at no time whatsoever did I ever relate or convey any information to the respondent regarding the applicant's [the client's] case'". The Registrar did not permit the client's son to be cross-examined on his affidavit, a matter which the practitioner has complained before us. However, whatever challenge might have been made to the client's son's statement in his affidavit, it is clear that his making it would provide strong reasons why the practitioner would not wish to call him before us. That proposition was put to the practitioner. He answered that neither party had called the client's son and that was the end of the matter.

361 We give little weight to the client's son's statement as to the truth of its contents. We do however regard the existence of this statement as the real reason why the practitioner did not call him. Putting the matter most favourably to the practitioner, we draw the inference from his not calling the client's son that there was nothing which the client's son could have said which would have supported the practitioner's claims that the son was acting on behalf of his mother in instructing the practitioner.

362 Fifth, in the course of the practitioner's cross-examination and by reference to the practitioner's records (examined in detail below) it is

apparent that many of the communications between the practitioner and his "best friend" took place on social occasions. These included at soccer matches, in a car travelling to soccer matches, at the client's son's apartment, in a pool and in a spa bath. Moreover, they were often at weekends or late at night. The Committee's submission in this respect was that whilst it may be accepted that on such occasions the practitioner and the client's son did discuss the client's property dispute, at least in general terms, that could not provide a reasonable basis for the practitioner to believe he was entitled to charge for these occasions.

363 Sixth, to the extent the practitioner relies upon his records generally, we are not satisfied they are a reliable basis to establish the events and dates recorded. The practitioner made some significant admissions under cross-examination. He said that his practice was, generally speaking, to write up the file notes at the time, but there were occasions he would do this on a subsequent date. Asked whether he prepared a number of his 2002 files notes around the time that he prepared his bill of costs in December 2003, he said "I don't recall that". Asked about his practice as to timesheets he said that he sometimes filled them out during the course of the day and sometimes a few days later. However, he sometimes inserted additional items based on records viewed at a subsequent time. He did not always enter the times recorded sequentially according to when the work was actually performed. Sometimes he left gaps in the timesheets for work he would do later. Asked whether he inserted time on his timesheets around December 2003, he said that at a time he could not exactly remember he "corrected" about five to ten. He explained that he added time "because some of the timesheets didn't record the work was done in particular conferences, telephone calls and other things like that". Asked further about when he made entries for 1 November 2002 in relation to the client's matters, he said that "the range I would say is between 1 November 2002 and 11 July 2003". (T:145, 1.12.06) He was not able to say without looking at his files whether he had amended the timesheets after his services terminated. (T:46-51, 7.11.06) As discussed further below, with respect to his file note for his "conference" on 31 October 2002 at Miss Maud Restaurant, he admitted this was not written on that day and may have been written at any time within six months after 31 October 2002. The specific records for the first period are examined in detail in the next section of these reasons. Regarded individually and collectively there are some disturbing features about these records.

364 Seventh, Registrar Moroni found that there was no evidence before him to support the practitioner's charges for this period: "there was

nothing in the evidence before me which would convince me that a solicitor, client relationship had commenced before the applicant first met the practitioner".

(c) Evidence of the practitioner – specific records

365 The practitioner's defence to the Overcharging Complaint relies specifically upon his records showing work done and time recorded on certain days. In answer to the Committee's response that the Tribunal is *prima facie* entitled to place reliance upon the Registrar's assessment, the practitioner answered that he was not then given a proper opportunity to introduce his evidence and to the extent he did, the Registrar erred in rejecting it. In fairness to the practitioner it is necessary to examine these individual records. The parties focused attention on these records for the first period and for the October function in the third period.

366 The first items concern events on 8 April 2002. In the practitioner's bill of costs there is a claim for the costs of a telephone conversation with the client's son (18 minutes) and for "Attendance Family Court Forms, Questionnaire" (36 minutes).

367 The practitioner relied upon his notes on a telephone message pad. This was addressed to "Tom" (the practitioner). Underneath this the client's son's name is written. The practitioner's evidence was he wrote both these items, that is, he wrote his own name on the telephone note. He said that his receptionist or secretary wrote out the caller's name on a "yellow sticker", gave this to him and he then wrote the details onto the message pad. He was not sure whether he also ticked the boxes "telephoned" and "please phone". In the notes underneath these items it reads "Family Court - Go to Court - Forms → 17, 8" and "She needs to see me → Court hearing". The practitioner claimed that the client's son had told him about getting the Family Court forms ready. In fact, the client had sworn and filed "form 17" on 9 April 2002 as the practitioner knew from the time he obtained the client's file. However, the client's evidence and that of the client's friend, was that they had been preparing the forms for some time prior to their filing. Further, as at 8 April 2002 no court hearing date was set. When cross-examined about the reference "go to Court", the practitioner said it was written because he presumed there was going to be a court hearing coming up. As to the claim for attending to Family Court forms the practitioner said that in fact this related to blank forms the practitioner had for a new client as well as form 17 and form 8 which he said the client's son had requested. The practitioner said he extracted these from his files and computer and delivered these to the client's son at his apartment. (T:100-121, 7.11.06)

368 As a matter of logic and in our experience, it seems to us unlikely that a genuine record produced by a lawyer from a note provided by his receptionist as to an incoming call, would include the lawyer writing his own name on the note. In the normal course also the receptionist would have filled out the telephone message slip. Moreover, the other entries do not fit with the objective facts.

369 The next charge is for 9 April 2002, which is said to be in respect of a conference with the client's son for three and a half hours. The practitioner relies upon a two page file note which records the time as 8 pm – 11.30 pm. He could not remember when this entry was made but said it was made from his independent recollection. The practitioner said that the conference took place at the client's son's apartment where the son had said he wanted to "go through some of the papers and through the issues involved". The note includes "needs to attend, sign up". The practitioner said this related to a costs agreement. But he denied that this demonstrated that he was then aware that he was not then instructed by the client.

370 The practitioner also relied upon his timesheet for 9 April 2002. This records 3.5 hours. However, the relevant entry is made about three quarters of the way down the entries on the page. That is, there are a number of following entries for work undertaken, one of which is for one hour and another for 2.4 hours. That fact casts considerable doubt on the genuineness of the entry for a visit to the client's son's apartment having taken place in the late evening of that day.

371 The next item is for a telephone attendance on the client's son on 10 April 2002. This is again on a telephone message slip which the practitioner has completed and addressed to himself. The note included "Forms – F/Ct explain" and "[Client] go ahead, needs help". By this time the client had sworn her financial statement. Senior Counsel for the Committee asked the practitioner "Is it the case that this document was created some time in 2003?" The practitioner said "Look, I can't remember, but I'd be --- I would not think that's --- that would be the case. I can't remember that form." He was asked by a member of the Tribunal: "You say that you can't recall whether it was created in 2003? ... Are you suggesting that it might have been created in 2003?" The practitioner answered "No, look, I can't remember what date it was --- made." There was some further evidence as to when it might have been made. (T:130-131, 7.11.06)

372 The Tribunal is concerned about the practitioner's several responses to this effect. In the usual course if a lawyer prepares a document which bears a date and which records work undertaken on that date it can be assumed that it was prepared on that day or perhaps the following day. If it were suggested to that lawyer that it might have been prepared six months later in the following year, one would expect an emphatic and confident denial. The need to keep scrupulously fair and accurate records of the work undertaken and the time involved was evident in the present case, where the practitioner was charging $250 per hour in six minute intervals.

373 The next charge is for 12 April 2002, for a further conference with the client's son for two and a half hours. The practitioner again relied on his timesheet. However, the total time for that day is 24.2 hours. Moreover, the third entry records an appearance in court finishing at 11.30 am. There is then another 18.7 hours recorded before the final entry of a conference with the client's son which is shown as occurring between 4 pm-6.30 pm. Finally, the preceding entry to the client's work shows work on the "Halas matter" taking place between 3 pm-8 pm. Clearly work on both matters could not have been undertaken at the same time. The practitioner's explanation was that the entry for the other matter was wrong and should have shown the work as having being done between 3 am-8 am. When the practitioner was asked whether the entry for the conference with the client's son was a late correction, he answered "I don't recall that. I don't believe so. Do you have some evidence to put to me on that?"

374 All of these factors indicate that the timesheet produced by the practitioner is not a genuine record of the events of that day. Clearly the practitioner could not have worked for anything like 24.2 hours. The fact that (again) the last entry is in respect of the client's matter suggests strongly, in the circumstances, that it was an entry made much later than the day and time it purports to relate to. The only sensible explanation as to why the practitioner would do this was in order to create a record showing that specific time was spent on the matter and that an appropriate charge for it might therefore be claimed. The Tribunal has formed the view from the practitioner's answers, that the reason he has been unsure as to the exact date of entry of the relevant time in these records is because he was aware that the entries were made by him after the date recorded. He was concerned that if he committed himself to saying the entry was made on the date recorded, there might have been "some evidence to put to [him] on that".

375 The next item is for another conference with the client's son on 13 April 2002 for which the practitioner charged $550. The practitioner relied upon a file note and his timesheet. That was a Saturday. The practitioner gave evidence that he went to the client's son's apartment at 1 pm where they discussed the case and he made some notes. They then drove to a soccer match. They talked further in the car. The game was between 3 pm - 5 pm. However, he said he did not go there to watch the soccer but to confer with the client's son in the VIP room. They had lunch. Beverages were provided. The client's son had a pint of Guinness. He does not remember if in fact they watched the soccer game. He said that he was taking notes while the game was being played. He was referred to his timesheet. The date on the note has been amended with respect to the year. Moreover, the record shows work done on the Halas matter between 2 pm and 6 pm. It was put to the practitioner that the relevant entry on the timesheet was made well after the event. The practitioner said he could not remember when it was made. (T: page 144-153, 7.11.06)

376 The Committee's case with respect to events at these times and locations is that they demonstrate the degree to which the communications between the practitioner and the client's son were of a social nature. There may have been some discussion about the Family Court proceedings. But that could not justify an entitlement to charge for the time taken up in these discussions, or a reasonable belief of such. We think that is persuasive.

377 There are charges on 19 April 2002 for a telephone attendance on and conference with the client's son. The telephone note is again one which the practitioner directed to himself. It includes a reference to "client instruction form". The practitioner says that he gave the "client instruction form" to the client's son to be completed by the client. It was not completed, at least before 25 July 2002. The practitioner nevertheless maintained that this did not show he was aware that he had not been engaged at this time.

378 The next charge is for a telephone conversation with the client's son on 2 June 2002. (The charge for the call to the client has been dealt with above.) This was at the weekend and there was no timesheet.

379 There are further claims for a telephone conversation and conference with the client's son on 22 June 2002. This was a Saturday. There is no timesheet. The practitioner's record of the conference is in the form of his handwritten notes, including a reference to the date, on a typed page

headed "Disputed $14 000". This was a document which on the evidence of the client's friend had been provided by the husband to the client. By this document the husband had disputed the client's claim that the husband was liable for the $14 000 mortgage loan as set out in the client's "Conciliation Conference Particulars" dated 17 July 2002. It followed that the client and the client's friend had necessarily received the typed page after 17 July 2002. Moreover, at about the time the client's friend received the document she said she had made some notes on the typed page (which she identified) and had placed the page in her file which she kept on behalf of the client. At this time there were no other notes on the page (and not therefore any notes of the practitioner). She had given the file to the practitioner after the conference on 10 October 2002. (T:115-119, 130, 6.11.06) It was put to the practitioner that on the evidence of the client's friend, the dispute over the $14 000 (and the record of it) did not arise until mid to late July 2002 and that he could not therefore have considered the document or put any notes on it on 22 June 2002. It was further put to the practitioner that he had made notes and dated the document well into 2003. The practitioner disputed that he had received the document in October 2002 and that this was the evidence of the client's friend. He did not agree he had dated the document in 2003.

380 This evidence again casts doubt on the dating of the document as "22-6-02" by the practitioner, because on the evidence:

(1) the typed page was first produced in mid-July 2002;

(2) the typed page was in a file kept by the client's friend and was first provided to the practitioner on 10 October 2002;

(3) the client says she did not discuss the Family Court proceedings with her son much less provide him with documents in connection with it; and

(4) there was no explanation as to how a copy of the page could have come into the client's son's possession so as to be provided by him to the practitioner.

381 The inferences which we draw on this evidence is that:

(1) the practitioner annotated and dated the document some time after he received it on 10 October 2002; and

(2) this was probably during 2003 when the practitioner knew he was facing a challenge as to his bill of costs.

382 The next charge is again for a telephone attendance and conference with the client's son, on 8 July 2002. The file note shows the conference

took place between 5.30 pm-6.30 pm at the client's son's apartment. The notes include "He's got a solicitor ... Mum needs a solicitor also". However, the evidence shows the husband's solicitors did not file a notice of change of address until 19 July 2002. There is no evidence from the client to suggest she knew of the husband's solicitors' engagement prior to this date. It was put to the practitioner that this fact demonstrated that the note was a reconstruction made in 2003 when he was trying to justify his costs. The practitioner disagreed with that. (T:164, 7.11.06)

383 Again, we think the content of the note casts doubt about when it was generated and suggests that the records are not a reliable source for determining that the communications recorded took place. Moreover, the time, location and general nature of what was discussed suggest that the occasion was a social one.

384 Similar observations are to be made as to the records for 18 July 2002 which purport to record a telephone attendance and conference with the client's son. The practitioner's telephone record suggests that the conference took place at the client's son's apartment. It also refers to "New solicitor → [named]".

385 We mention also in this context, that in the taxation proceedings the practitioner filed affidavits, prepared by him, from two of his family members in support of his charges. Both deponents swore to being present at "meetings" between the practitioner and the client's son. One witness refers to such a meeting in a spa bath and another witness refers to such a meeting in a pool.

386 We infer from these affidavits that the practitioner regarded discussions with the client's son about the Family Court proceedings however informal as properly chargeable.

387 Looking at the totality of this documentary evidence for the first period, we find that the practitioner's records are not a reliable source for establishing the communications between the practitioner and the client's son and (on one occasion) the client. Further, having regard to these records and to the oral evidence given in relation to the communications between the practitioner and the client's son, in particular as to the times and locations of their calls and meetings and the general description of the Family Court proceedings, we find that they were of a social nature. They do not provide any reasonable basis for the claim to the fees of $3 725 charged the client in respect of them, or for any part of that sum.

Charges for the Second period (to 12 August 2002)

388 The Committee does not seek to show in this period that specific charges were not properly made, but rather that having regard to the practitioner's own notification of costs, the charges made in this period are unsupportable.

389 The bill of costs claimed for the period up to 12 August 2002 is $6250. This figure includes the sum of $3725 claimed in the first period.

390 By his Memorandum of Notification of Costs dated 12 August 2002, the practitioner informed the client that her "actual costs up to and including today" (that is, for the second period) "are $1000". That is, an amount representing 16% of the sum ultimately claimed for this period in the practitioner's bill of costs.

391 In considering this Memorandum the Registrar said: "The memorandum is dated 12 August 2002. It is dated a couple of weeks after the conciliation conference of the 25th of July 2002. It is in typed form, it was not rushed, and in the Court's view, the practitioner will need to have a very good explanation for the disparity between the statement in paragraph one of his notification, and what it is that he actually charged until that time."

392 We think that was an apt observation. As outlined above, the practitioner was cross-examined at length about the Memorandum and the discrepancies between it and the subsequent cost notifications in October and December 2002 and his bill of costs. We think the practitioner's responses were wholly unsatisfactory. We find that the Memorandum dated 12 August 2002 was a genuine record by the practitioner as to the amount of costs actually incurred (at least approximately) and as to his estimate of future costs for the relevant periods.

393 Logically, the Committee might have claimed that the costs claimed to this point of $6250 are properly no more than $1000 and the balance represents an overcharge. However, it has not done so and in the absence of this being put to the practitioner, we are not prepared to make that finding ourselves.

Charges for the Third Period (the October function)

394 With respect to this period the Committee has isolated the charges for the October function. In this respect, as it had earlier foreshadowed, the Committee submitted by its Closing Submissions: "The practitioner knowingly charged for work in relation to an occasion which was social in

nature at which no professional services were provided. That was dishonest and the practitioner has kept up the pretence throughout these proceedings." That is an allegation which again requires sufficiently cogent evidence for the Tribunal to be persuaded as to its occurrence. It is to be borne in mind that the practitioner's charges for his services on this occasion were based upon documentary records upon which the practitioner relied before us in supporting his claim. Rejecting the practitioner's evidence involves at least in part rejection of those records and consideration of whether they were fabricated after the relevant events to support the practitioner's claimed charges.

395 The total professional costs claimed relating to the arrangements for and the attendances at the October function are $2250 plus GST. The Committee has produced a table showing the make up as follows:

Description	Units Recorded	Amount Charged
Telephone attendance on client and client's son	0.8	$ 200
Conference with client's son	2.3	$ 575
Conference with client, client's son, friend at Miss Maud Restaurant	4.3	$1075
Travel to and from conferences with client's son and travel CAT bus	0.6	$ 150
Preparation for client meetings - tactics, issues	1.0	$ 250
Total	9.0	$2250

(a) The practitioner's evidence

396 In his Schedule of Charges & Evidence the practitioner supports these charges by reference to his testimony (in the taxation proceedings), his timesheets, telephone notes, trust account receipt and conference notes (Exhibits V, W, X, Y in the taxation). The accompanying submission in the Schedule in support reads "conferring with a key witness and evidence

gatherer after recent court hearing is chargeable time, especially where matter proceeding to trial without settlement".

397 The practitioner's telephone notes for the day show calls to the client and the client's son in relation to settlement negotiations.

398 His file notes for the day includes:

(1) conferring with the son in West Perth [at the client's son's apartment] from 2 pm to 4:30 pm "but say 2.2 hours";

(2) conferring with the client, the client's partner and the client's son:

(a) 5.15 pm to 5.45 pm; and

(b) 5.45 pm to 11 pm.

399 He was unable to say when he prepared the notes, except that they were prepared after the conference. He eventually conceded it was possible that they were made at any time up to six months after the event.

400 The practitioner's timesheet for 31 October 2002 records the times for the items, including an entry for one hour for preparing for the client meeting. The timesheet shows these items at the end of the timesheet. Preceding these is an additional 12.3 hours of work. If the practitioner was working on the client's matter as alleged from 2 pm onwards, he would have to have started work at around 1:30 am that day.

401 The practitioner gave evidence that on 30 October 2002 he had telephone discussions with both the client and client's son in relation to his settlement offer made by letter that day. He said that either that day or the next day the client or client's son mentioned that there was to be a "meeting" at Miss Maud Restaurant so that he could meet all the witnesses. The practitioner said that on 31 October 2002 the client's son rang him and asked to see him before the meeting that night. He went to the client's son's apartment. He said he discussed the client's son's opposition to the settlement offer. This was so even though he had discussed the settlement offer with the son the previous day and despite there having been no response to that offer. This conference finished at 4:30 pm. He was initially unsure what happened thereafter. He might either have continued at the apartment or been at Miss Maud Restaurant. Later in his evidence he said that between 4.30 pm and 5.15 pm he travelled from the apartment to his office and checked if any response had

been received from the husband's solicitors. There was none. He then went straight to Miss Maud Restaurant. He charged at his hourly rate for the time taken to travel on a CAT bus from his office to West Perth and to the restaurant.

402 The practitioner said under cross-examination, that in accordance with his records, between 5:15 pm-5:45 pm he had a "conference" with the client on the footpath outside Miss Maud Restaurant. (This conference was not put to the client during her cross-examination. Moreover, the client and her partner say, including by reference to telephone records, they were at the client's son's house from about 6:45 pm to 7:30 or 8 pm.) During this conference the practitioner said he told the client that no reply had been received from the husband's solicitors and went through with her his recent discussion with the client's son. The practitioner said that the client's friend and the practitioner's partner (now wife) were present during this conference. He said his partner had finished her day's work and joined them. (She worked part time in the evenings for the practitioner.) He did not believe she was with him at the client's son's apartment. (Contrary to the evidence of the client and the client's partner.) The practitioner was unclear whether the client's son was also present, having said he was with the client's son at this time and later saying that the client's son was running late.

403 As to the time at Miss Maud Restaurant, the practitioner acknowledged that he did not know all of the people in the client's son's group. He conceded that not all the people present had anything to do with the case. When it was suggested that that it was extraordinary that he attended Miss Maud Restaurant for a conference with strangers to the matter, the practitioner then said that the people attending were not strangers to the case. The practitioner said the occasion was an important information gathering exercise. It was, he claimed, a "watershed meeting". (T:131-132, 1.12.06) He wanted to get down what was said by the potential witnesses in the form of witness statements. When asked to identify these statements, the practitioner eventually acknowledged that he had not prepared any. He disagreed with the proposition that there was nothing in his one page of notes for this occasion which would help with the drafting of witness statements. He said that the notes were to remind him of what had been discussed. He said further that he had prepared an affidavit for the client as examination in chief evidence and that information he had obtained from her at the restaurant was used for that purpose. He agreed that the people who attended ate dinner and drank beverages. However, he said he did not know it was the client's son's birthday celebration until around 10 pm-11 pm that night. This was when

people started saying "happy birthday" to the client's son. He said that the client's son had not mentioned to him that it was his 30th birthday that day. He says their table was the furthest away from the music, which only started at around 8 pm or 9 pm and the atmosphere was quiet.

404 The practitioner's partner (now wife) also attended the restaurant. When asked why it was necessary for her to attend, the practitioner said that she was his casual legal secretary at the time and he had asked her to attend in order to take notes and assist him. He denied that she was invited for social reasons and claimed he wanted someone as an "independent observer" at the restaurant. After initially giving evidence that he did not remember if his wife made notes, the practitioner said he saw her taking notes during the evening, but could not remember exactly which discussions she took notes of. He had not seen the notes; he had not asked her to produce them nor did he ask her about the notes prior to resuming giving evidence on the next day (1 December 2006). Nor was there any mention of her taking notes in his wife's affidavit which refers to the Miss Maud Restaurant occasion and which he relied upon in the taxation proceedings. (T:79-125, 30.1.06 and to 133, 1.12.06)

(b) The Committee's evidence

405 The client in her witness statement said the function at the apartment and Miss Maud Restaurant was a social one, being a celebration of her son's birthday.

406 She said that she arrived at her son's house at 6.40 pm for his party. She knows that was the time because she had to ring the client's son to ask him to open the front gate to his complex to let her in, and had a record of the relevant entry in her telephone account. She said that at the apartment she spoke to the practitioner and his partner socially. They all then went to Miss Maud Restaurant. The practitioner was sitting diagonally opposite her. Towards the end of the evening she passed him $1250 cash. But otherwise, she "did not discuss my case at all as it was a social occasion". Outside the restaurant she asked the practitioner for a receipt and he said he would send it.

407 In her supplementary evidence, the client identified from photographs taken at Miss Maud Restaurant the people in her son's group who attended the dinner. They were her partner, her daughter, her daughter's boyfriend, the client's son, the client's son's girlfriend, the practitioner, the practitioner's partner and another friend of the client's son.

408 In the course of her cross-examination, the client gave evidence that there was no telephone call either to or from the practitioner on 31 October 2002. At the client's son's apartment the practitioner talked to his girlfriend and apart from saying "hello" to each other there was no conversation between the client and the practitioner. The practitioner put to her that she had discussed with him the client's son buying the house from the husband. The client denied any such conversation. She said the practitioner was not taking any notes. At the restaurant she confirmed that the practitioner did not discuss her case with her and with the client's son. It was put to her that the practitioner was taking notes (notwithstanding the practitioner's own evidence that he did not take notes here). She denied this. She was also clear that he did not have his briefcase with him.

409 The client's partner in his witness statement said the occasion was a social one. He sat next to the client and he did not hear her talk about the proceedings. "The talk was of a social nature". He did not see her hand over the $1250.

410 Under cross-examination the client's partner gave evidence that when he and the client arrived at the son's apartment, the client telephoned the client's son in order to get access to his apartment. He then referred to the time shown on the client's mobile phone records to ascertain the time of that phone call, which was shown as 6.43 pm. He said that at the apartment the practitioner talked to his girlfriend and he heard no conversation between the practitioner and the client about her case. At about 8 pm they left the client's son's apartment to go to Miss Maud Restaurant. The client and he went there in their own car. He denied that there was any meeting outside Miss Maud Restaurant. It was a buffet dinner in a large room with other tables around and near to where an accordion was being played. The practitioner was with the "young people" and "having fun". The client and he left Miss Maud Restaurant at around 10.30 pm-11 pm and went home in their own car.

(c) The parties' submissions

411 The practitioner in his Closing Submissions deals with this aspect of the complaint in a perfunctory way. He challenged the order of the Tribunal that the Committee might properly raise an issue of dishonesty with respect to the claim for these particular charges (par 97). We do not intend to revisit that order. The practitioner then (par 100) makes some assertions on the facts which we do not think are material. He then says that he did not charge for all the time and further that "he wrote off $9000 of time which covers 'any issues'" (par 101). He says further that

nine hours were billed on this day at a charge of $2250 in a claim of an estate valued at $400 000. (par 103). Those propositions do nothing to allay our fears that the practitioner continues to misunderstand the nature and gravity of the charge made.

412 Rather more convincingly, the practitioner suggests that as the "conference" occurred around important events and settlement offers "it is implausible to think that the matter would not be discussed when money was handed ... " (par 102). We have given some thought to this submission. There may have been some limited and casual discussion about the proceedings as between the practitioner and the client. However, we accept the evidence of the client and the client's partner that they do not recall any such conversation and that this was a social occasion. Even if there were a passing reference to the proceedings or the settlement negotiations, it was not one which would justify the practitioner raising any charge in respect of it. Much less was it an occasion which, on the practitioner's case, was a "watershed" of "evidence gathering".

413 In its Closing Submissions the Committee relies upon the following matters as evidencing the occasion was a social one:

(1) it was held at a social venue in a large room with other tables around;

(2) it was the client's son's 30th birthday;

(3) the client's son was the practitioner's best friend at the time and the practitioner brought his partner to the restaurant [and to the apartment, we add];

(4) the other people in attendance were the client's son's family and friends;

(5) the people attending ate dinner, drank beverages and there was music played from around 8 pm onwards; and

(6) photographs of the evening were taken showing, amongst other things, the practitioner and others at the table all clapping their hands.

414 Further, the Committee submitted that there was no reliable evidence to show that the practitioner carried out any work at this occasion:

(1) the practitioner's note of this occasion was, on the practitioner's own evidence, not written at Miss Maud Restaurant and may have been written at any time up to six months later;

(2) the practitioner's stated purpose in attending the occasion was to meet witnesses and get down what they said in the form of witness statements, but he conceded that no witness statements had been prepared [except to the extent the practitioner claims the meeting contributed to his drafting the client's affidavit we add];

(3) the practitioner's note of the occasion was not sufficiently detailed to enable the practitioner to prepare any witness statement;

(4) no other notes have been produced relating to this occasion; and

(5) this occasion occurred the day after an offer of settlement was made by the client, no response had been received and the estimated time by which witness affidavits needed to be filed was May 2003 (based on the directions made on 10 October 2002).

(d) The Tribunal's findings on the October function

415 Whilst cautious about making a finding involving dishonesty, we think the Committee's submissions are compelling. The assertion that a solicitor would attend a birthday function at his friend's apartment, followed by a dinner at a restaurant attended by members of the friend's family and other friends, some of whom were not known to the solicitor, for the express purpose of discussing the friend's mother's Family Court proceedings and obtaining witness statements, all at a cost to the client of $250 per hour or part thereof, is inherently improbable. That this is so is demonstrated by the absence of any witness statements produced at the end of the "meeting". In the usual course a solicitor would require his client and witnesses to attend at his office during normal business hours to take witness statements. Statements would be taken, checked and signed. On the client's and her partner's evidence, which we accept, the practitioner took his partner to the client's son's apartment as well as to the restaurant. That could only have been for social purposes. Again, it strikes us as highly unlikely that the practitioner could have been invited to and attended the function at the son's apartment and at Miss Maud Restaurant in the company of the other guests without knowing, as he claims, that the occasion was the celebration of the son's, his best friend's, 30th birthday. The practitioner's evidence as to a "conference" on the street outside the restaurant was not credible. The practitioner's evidence as to the purpose of the evening and as to the events which took place was contrary not only to the evidence of the client and the client's partner but to the probabilities of the matter. The practitioner did not call any other person present at the "conferences" to support his version of it. The inconsistencies and inherent improbabilities in the practitioner's version of events and its conflict with that of the client and the client's partner are

evident from the outline given above. We think the client's and her partner's account of the evening reflects their better recollection of events and is more congruent with the probabilities. The practitioner's admission that his file note of the event may have been made up to six months after the event not only means it cannot be regarded as a reliable record for this occasion, but is damning of the practitioner's records generally. The practitioner's records disclose times and locations for "conferences" that day which are contradicted by the evidence, including the telephone records, of the client and her partner. Finally, we note the cursory manner in which the practitioner has dealt with these charges in his Closing Submissions, and to the reference there (par 92 t- par 96) to these charges being included in that part of his fees which were "written off". That seems to us to demonstrate, to some degree, that the practitioner had little confidence that his evidence and records of the day would be accepted.

416 We mention that on the day following the October function, the practitioner claimed a further $750 for a three hour conference with the client's son. At that time, no response from the husband's solicitors had been received.

417 We find on the whole of the evidence that to the practitioner's knowledge:

(1) the function at the client's son's apartment and Miss Maud Restaurant was a social one at which both the practitioner and his partner attended;

(2) there were no professional services performed by the practitioner during his time at the apartment or at the restaurant (save receipt of $1250);

(3) the practitioner's file notes, telephone notes and timesheet entries were not made at the time they record but much later and probably in late 2003, and are a fabrication of what took place; and

(4) none of the practitioner's charges for that day are supportable and were included by the practitioner in an attempt to justify his bill of $22 000.

418 We think the Committee's serious allegations that the practitioner's claims for his costs for this occasion were dishonest and that he kept up the pretence throughout the proceedings, have been made out.

Charges in the fourth period (from 24 February to April 2003)

419 The Committee's case is that the practitioner's services were completed by the end of the day on 24 February 2003 and therefore there was no basis upon which the practitioner could charge $5975 for the period following this. The practitioner's case is that his work continued after that date up until 29 April 2003 in completing settlement and, more significantly, in dealing with the new instructions from the client to advise in relation to and institute an "appeal" from the consent orders signed in January 2003.

420 We have covered the communications between the practitioner and the client in the period 24 February to May 2003 in considering the facts of the Conflict Complaint. It will make these Reasons a little longer but it will be convenient if we repeat an outline of those communications to the extent relevant. We will also make the findings relevant to the Overcharging Complaint in relation to them.

421 On 24 February 2003 the client signed the withdrawal authority and received the cheque for $114 000. On 24 February 2003 and 26 February 2003 the client directly and by her partner requested that the practitioner provide an itemised account of his costs.

422 On about 27 February 2003 the practitioner wrote a long letter to the client referring to the "seven telephone conversations with you and your family members over the last few days". He copied a number of documents including the second costs agreement and the withdrawal authority. The letter purported to summarise the client's instructions concerning settlement. On the last page it recorded that "We have no further instructions from you ... We will bill our file and trust [*sic*] the transfer the balance of funds in due course and thereafter close your file ... We confirm that all work required to meet any of your instructions has been completed".

423 When cross-examined as to this paragraph, the practitioner said that it must have been a "mistake" that he included "the file closing section". (T:229, 1.12.06) We think that was a convenient answer in an attempt to avoid the consequence of the statement in the letter, namely that no further work could be billed on this matter. There was no basis suggested for the "mistake". We find that the statement reflected the practitioner's then state of mind. When pressed for an itemised account, he subsequently decided to generate further work on the file.

424 We observe that the preparation of this letter was apparently included in the practitioner's bill of costs for work undertaken on 26 February 2003. In addition to the time recorded by the practitioner for work on behalf of the client, the timesheet records work on other matters giving a total time charged of 20 hours. Again, the times recorded for the client's file are the final entries appearing on the timesheet for that day, again suggesting they have been added after the date for which they are recorded.

425 Upon receipt of the practitioner's letter dated 27 February 2003 the client's partner took this to his solicitor and received advice to recover the file from the practitioner. He relayed this advice to the client.

426 The client, by her new solicitors by letter dated 11 March 2003, requested a fully detailed and itemised bill of costs in accordance with the terms of the first costs agreement. For reasons given above we find that the new solicitors' letter was sent on about 11 March 2003 and received by the practitioner a day or so thereafter. The fact that to the practitioner's knowledge (on this finding) the client had engaged new solicitors and was pressing for an itemised account, is not consistent with the practitioner's claim to receiving further instructions from the client.

427 On about 19 March 2003 the practitioner wrote a letter stating that he confirmed the client's instructions "relayed as usual through your defacto husband Barry [*sic*] and your son that you are considering an appeal to the Full Bench of the Family Court" and that as instructed by them he had "researched the appeal issues and papers ... prepared the appeal documents".

428 The client says in her witness statement that she was incredulous as to these statements given that she had never spoken to the practitioner nor anyone else about an appeal. She confirmed this position in the course of her cross-examination. The client's partner emphatically denied giving any such instructions. The client responded by letter dated 26 March 2003, referring to the practitioner's letter of 27 February 2003 to the effect that her matter was at an end, and stating in the plainest terms in her letter that the practitioner was not instructed to do anything. This was one of several documents the practitioner denied receiving from the client in the mail until faxed to him on 14 April 2003 and said by the practitioner to have been received personally by him on 28 April 2003.

429 On the client's evidence, on 31 March 2003 the client and her partner went to the practitioner's office for the purpose of collecting her file. The practitioner came into the reception area and asked the client to sign some

more papers apparently relating to the settlement of the consent orders. She refused saying she just wanted to collect her files. The practitioner became aggressive and said the client would have to write requesting the file and that she would not get it until he was paid. She told him that he was not working for her any longer and the practitioner replied that he wanted that in writing also. She was cross-examined on this meeting and repeated the events. The client's partner corroborated this account of the meeting in his witness statement and under cross-examination (T:104, 2.11.06) The client's partner was emphatic that on 31 March 2003 the client made clear that the practitioner's engagement was at an end.

430 The practitioner did not address this meeting in his witness statement. In cross-examination he said that his telephone note revealed that the client had rung to arrange to collect her file and that at the meeting he had said he refused this until they paid him. (In his witness statement in the Overcharging Complaint he had denied that he has said this.) He denied that she had said "you're no longer working for me" and denied, then could not remember, that he asked for that in writing. He said by reference to his "conference note" for that day that they had wanted the file and he had refused. They had then instructed him that they "want to go ahead" with the appeal. He was challenged as to the startling inconsistency in this evidence, but asserted that this is what happened. (T:232-2, 1.12.06) This note also records "Cost notification received". None of the witnesses suggested that this was discussed. (The practitioner was not cross-examined on this note.)

431 The practitioner by letter dated 8 April 2003 referred to the "conference" on 31 March 2003 and "confirmed" that "you instructed us that ... you are going ahead with the matter – the settlement and the appeal." It referred to the grounds of appeal. It invited the client to attend to swear the appeal affidavit and affidavit of discovery.

432 We find that the meeting on 31 March 2003 took place substantially as recited by the client and the client's partner. We find that the references in the practitioner's "conference note" to the client's instructions to proceed with the appeal are false. The statements in the practitioner's letter dated 8 April 2003 (above) are also false. The whole course of events from 24 February 2003 reveals that the client's sole concern was to understand how she had received $22 000 less than the settlement sum. When the practitioner in his letter dated 19 March 2003 first made reference to instructions to appeal, the client upon receipt of this replied on 26 March 2003, denying that any such instructions or any instructions since 24 February 2003 had been given. In the weeks which followed the

client again wrote to the practitioner (as detailed below), desperate to ensure the practitioner undertook no further work. The client and her partner saw the practitioner on 31 March 2003 with the express and sole purpose of recovering her file in accordance with advice they had received from other solicitors. Having regard to the objective facts (the client's correspondence) as well as the evidence of the client and the client's partner, it is inconceivable in these circumstances that the client and her partner would in the course of these events instruct the practitioner to advise in relation to an "appeal".

433 By a note headed "Termination Notice" and dated 3 April 2003 the client again wrote expressly terminating the practitioner's engagement and requesting her "account (itemised)" and her files. For reasons given above, we find that the letter of 3 April 2003 was sent by registered post to the practitioner and arrived in the ordinary course of the post at the practitioner's office. There may have been a short delay in the practitioner reading the letter due to his absence in Queensland.

434 By a notice headed "Second Termination Notice and Letter of Reality" dated 11 April 2003 the client, following receipt of the practitioner's letter dated 8 April 2003, wrote:

> "Accept this letter as FINAL ... TERMINATION OF YOUR SERVICES FOR THE SECOND TIME... Nobody but nobody including myself have given you ... instructions to do anything further for me as from the time you handed me the cheque on the 24th February 2003 (which you would recall I asked you was there a second cheque coming as I then, in shock disputed the $114 000), except the TERMINATION NOTICE LETTER (copy enclosed) I sent you on the 3rd April 2003 by registered post. Nothing since receiving that cheque in February 2003 have I ever instructed you to do any more for me ...
>
> I therefore offer you the opportunity before this is taken any further to withdraw this deceptive [second costs agreement] and orchestrated by you, and decently re-cost (itemized) the account up to and not beyond the Settlement Conference Family Court Action and dated 24 February 2003, when you handed the cheque of $114 000 over to me."

435 The terms of this letter reveal the client's anguish at the state of affairs; that is, the practitioner apparently commencing further and costly proceedings, which the practitioner had deliberately and callously brought

about to further his own ends. It is to her credit that the client was even then encouraging the practitioner effectively to put forward a revised and reasonable amount for his costs. It suggests there was nothing vindictive in her challenging the practitioner in relation to his claim for costs and when he refused even to produce an itemised account, pursuing the matter by way of a complaint to the Committee and to taxation.

436 The client's partner said he faxed this notice to the practitioner on 14 April 2003 (Monday morning). He was clear on the matter because he had purchased a fax machine for the very purpose. (T: 112, 2.11.06) His fax records show, and his evidence confirmed, that on 14 April four pages were faxed being copies of the letters dated 26 March (1 page), 3 April (1 page) and 11 April (2 pages). (T:11, 2.11.06)

437 Such was her concern that the client on 14 April 2003 also wrote a letter to the husband's solicitors advising in effect that the practitioner was no longer acting for her.

438 The practitioner wrote a letter dated 14 April 2003 without reference to the client's letters and dealing further with the client's alleged instructions concerning an appeal. In his evidence the practitioner said, by reference to his records, that this was prepared on 11 April 2003, he dating it on 14 April 2003 (the Monday) "in anticipation" of it being received on that date, that sometimes being his practice. Or the date inserted could have been his typist's mistake. (T:71-7, 7.11.06) He was not sure whether he signed it on 11 April 2003 or 14 April 2003.

439 The last items of work charged for are on 29 April 2003.

440 In his further letter dated 2 May 2003 the practitioner refers to the client's letters dated 3 April and 11 April 2003 "apparently faxed on 14 April". As to the letter dated 3 April it is said that it was not received by post. The practitioner says in his letter in effect that he had been away in Queensland from 3 April 2003 returning to his office on 28 April 2003. For reasons given above we do not believe that to have been the position. The practitioner's pretence at not receiving the client's correspondence is to be explained because he was using the time to claim he was continuing to work on her matter and generating fees doing so, in support of his costs of $22 000.

441 As concerns the practitioner's claim to having received instructions from the client both directly on 31 March 2003 and indirectly from the client's partner and the client's son, we find on the whole of the evidence that no such instructions were ever given. We accept the evidence of the

client and the client's partner that at no time did they give instructions to pursue the settlement or any appeal. In the period March 2003 and April 2003 (1) the client and her partner were (a) respectively consulting other solicitors about the matter; (b) preparing and sending the letters of 26 March, 3 April, and 11 April 2003 to the practitioner and (2) the client was communicating with the Law Complaints Officer concerning the practitioner's conduct.

442 The suggestion that in this same period the client, who on all accounts was extremely concerned about legal costs, was issuing instructions to the practitioner to undertake further work at further cost is unbelievable. Moreover we can discern no credible motive for the client to have so instructed the practitioner and then claimed she did not do so. But there was a motive, although a discreditable one, for the practitioner to have invented such instructions.

443 We further accept the evidence of the client that she at no time spoke to her son concerning an appeal. Her evidence, which we accept, was that she had spoken to her son relaying her distress at the practitioner deducting $22 000 from the settlement. It is unlikely that the son would thereafter contact the practitioner purporting to convey instructions relating to further services. By reason of the practitioner's failure to call the client's son, we infer there was nothing the son could have said which would have supported the practitioner's position on this matter.

444 Notwithstanding this, the last item charged for by the practitioner is a half hour telephone conversation with the client's son on 29 April 2003.

445 We find that the practitioner's engagement ceased on about 24 February 2003 following his conference with the client. There were no further instructions given after that date and there was no justification or reasonable basis for charging for any work performed after that date.

Other matters instancing overcharging

446 In the course of cross-examination some other aspects of the practitioner's charges were explored. The Committee has not sought to place a value on the amount of these charges which it submits were charged in error or were unjustified.

447 In his bill of costs the practitioner included $750 for three hours' work on 5 November 2002 for perusal of a letter from the husband's solicitors. In the Schedule of Expenses & Evidence, the truth and correctness of which was affirmed in his witness statement, the

practitioner maintained that perusal of the opposing solicitor's letter was billable time. However, the timesheet for this entry records 0.1 hour, that is $25. Under cross-examination the practitioner said that the claim for $750 must have been his secretary's error. (T:147, 1.12.06) In the normal course one might expect an error like this in a long list of chargeable items. But here the item was first included in the bill which had taken months to emerge after its first request, then objected to and reviewed on taxation, then included in the Schedule of Charges & Evidence attached to the Response Statement and specific "submissions why charges fair" made in relation to it, and the practitioner has then deposed to the truth and correctness of the content of the Schedule. It seems extraordinary that in the course of this work the practitioner would not have corrected his error. It gives the Tribunal little confidence in the accuracy of the practitioner's records and submissions.

448 The practitioner included charges on 8, 14 and 29 November 2002 for the work involved in preparing an affidavit of discovery (107 items) on the part of the client. Further unquantified work had been undertaken in relation to this on 30 October 2002. The quantified charges made total $1400, this amount including the time he took to type the affidavit, for which he charged at $250 per hour.

449 On 2 December 2002 the practitioner undertook further work preparing the matter for trial, including drafting subpoenas.

450 This discovery and trial preparation work was against a background in which on 30 October 2002 the practitioner had written a letter proposing a settlement, including payment by the husband of $150 000. On 28 November 2002 the husband's solicitors had made a counter offer of payment of $130 000 and proposing an "immediate settlement". According to the practitioner's timesheets(which he said may not have reflected the order of events) having considered that letter on 29 November 2002, he then undertook further work preparing the matter for trial on that day and on 2 December 2002, before contacting the client about the counter offer. (T:150-156, 1.12.06) Under the orders made discovery was not due until 5 December 2002 and it appears that on about 3 December 2002 the practitioner had agreed with the husband's solicitors that they would suspend the time for discovery whilst negotiations were underway. As regards the trial preparation work, no trial date had been set or could be fixed until after the pre-trial conference. The Court estimated time for the conference was June 2003.

451 We accept the Committee's submission that these substantial fees for work said to be in preparation for trial were unjustified in the circumstances.

Total overcharges for the period objections

452 We find each of the objections to the charges for the period objections has been established. The total sums overcharged for the period objections are as follows:

Period	Objection	Total
The first period	Time charged prior to commencement of solicitor/client relationship	$3725
The third period	Time charged for social function on 31 October 2002	$2250
The fourth period	Time charged after solicitor/client relationship terminated	$5975
Sub-total		$11950
Plus GST		$1195
TOTAL		$13145

Summary of findings on practitioner's case supporting the charges

453 We have considered much of the practitioner's case in support of the total charges and on the individual charges made. We summarise our findings and add some additional comments:

1. The practitioner claims he was justified in charging $22 250 on the basis that this amount represented a small proportion of the value of the total estate and of the value received by the client. The practitioner calculated the lump sum fee as "between 3% and 9%" of the value the client obtained, on a basis which is not apparent.

454 It seems evident that it was this notion which motivated the practitioner to determine a lump sum fee of $22 000, deduct this sum from

the settlement proceeds and include reference to this in the second costs agreement and the withdrawal authority.

455 The practitioner's claim in this respect is unsupportable for a number of reasons.

(1) In support of his argument, the practitioner has quoted and relied upon r 19.34 of the *Family Law Rules 2004* which provides that costs will not be allowed where these are "not proportionate to the issues in the case". This provision is directed to issues not values and is moreover a limiting not an enlarging provision.

(2) It is well recognised that there is no or no necessary correlation between the amount of work undertaken by a lawyer and the value of the subject matter. Fees in the Supreme Court are no longer calculated on an *ad valorem* basis. As we have mentioned, the *Family Law Rules 2004* expressly disallow fees in a written agreement based on the value of an agreed settlement or the amount or value of what may be recovered from the proceedings (r 19.14(4)(b)).

(3) Having regard to the issues in the property dispute, there was no justification for the practitioner charging $22 000 or anything like that sum.

2. In support of his charges, the practitioner referred to and relied upon a body of documentary and oral evidence, much of it uncontradicted.

456 We recognise the force of this submission and the unlikelihood of a practitioner fabricating records to support his bill of costs. It has caused us to undertake a close examination of a number of the practitioner's file records and to consider these 'internally' and against the objective facts (the correspondence, the state of the Family Court proceedings), the evidence of the Committee's witnesses and the probabilities of the matter. It has also caused us to consider carefully the practitioner's oral evidence in support of his charges. We have also considered the practitioner's admissions concerning his late additions to some documents and entries and the inferences to be drawn from those admissions as to the accuracy of his records generally. Having undertaken this exercise, we have found the practitioner's records to be an unreliable basis upon which to determine the work undertaken and the reasonableness of his charges. We

have also, regrettably, found the practitioner in this context to be an unreliable witness.

3. The practitioner claims he wrote off about $9300 from his bill of costs (using his figures) which he says covers the "questionable" charges of the first period and the fourth period. He argues that allowing for some additional time for completing the settlement and some other matters, this sum covers all the period objections ("any issues") including the October function, of $10 250 (Practitioner's Closing Submissions par 84, par 92-par 96, and par 101).

457 This argument is damning rather than exculpatory. The practitioner after repeated requests from his client and the Committee, finally prepared a bill of costs in which he included the charges the subject of the period objections. He defended those costs before Registrar Moroni, by oral evidence and including in his affidavit filed in those proceedings. In the practitioner's witness statement tendered in these proceedings, he verified that the content of his Schedule of Charges & Evidence was true and correct and that "the charges were fair reasonable and proportionate". These "charges" include each of the charges made for the four periods. It seems to us a wholly untenable position for the practitioner to, in effect, swear to the truth of these individual charges, but to claim at the end of the hearing that, to the extent they are "questionable" (the practitioner's expression) they may be disregarded as absorbed in his write off of costs. Moreover, we regard the practitioner's claim to have undertaken work to an additional value of $9300 as demonstrating the extent to which the fees claimed bore no relation to the issues in the case (as Registrar Moroni found) and as casting further doubt on the claim that the work claimed for was in fact undertaken and that his records genuinely demonstrate this.

4. The practitioner submitted that the fees were reasonable having regard to matters such as the property being in the possession of the husband, the large number of items in dispute and the efforts he made to settle.

458 We have dealt with each of the arguments. None of these claims affect our assessment that the property dispute was a simple matter.

5. The practitioner claims consideration should be given to the fact that he conducted the matter without providing any interim account.

459 As to that:

(1) his engagement was for a relatively short period from 25 July 2002 to February 2003;

(2) he sought and received $1500 on account of his costs or disbursements;

(3) on the client's evidence, she had initially told the practitioner that she preferred interim fees because she did not wish to receive a large account at the end of his services; and

(4) under the first costs agreement the practitioner was entitled to provide interim bills.

6. Finally, the practitioner has argued in his Closing Submissions that the client's evidence before the Tribunal demonstrates that certain items should have been conceded before Registrar Moroni. The argument is that had these concessions been made less would have been taxed off the bill and that it demonstrated that the client misled the taxing officer and her counsel.

460 We observe generally that the amounts conceded at taxation were largely under the control of the client's counsel and that the Registrar specifically mentioned that the client had been reasonable and generous in the concessions made.

461 The practitioner in his Closing Submissions provided five specific instances. (That is sub-paragraphs 81 (a) to 81 (d), and 81 (g). Sub-paragraph (e), where the reference should be to 25 July 2002, is a repeat of sub-paragraph (a), and sub-paragraph (f) fails to identify why the time conceded was in error.) As to the five instances:

(1) Sub-paragraph (a)/(e) claims that before the Tribunal the client had acknowledged she had met with the practitioner at 9 am on 25 July 2002 and the hearing was at 11.30 am demonstrating two hours of claimed "preparation/perusals – taxed down to zero – despite her knowledge of the same".

462 It is not clear how the alleged meeting "demonstrates" time for "preparation/perusal". But in any event, that was not in fact the evidence. In her witness statement the client said the meeting with the practitioner at the Court on that day was about 30-40 minutes before the husband's lawyer arrived. That is consistent with the Registrar's Conciliation Conference File Note showing the conference on that day from 11.30 am to 12.50 am. (The time and cost for which was conceded.) That is, the

practitioner and the client met at about 11 am. During her cross-examination, the practitioner put to the client that they had met "just about or just before 11 am". The client, without the benefit of any records, answered (having regard to the records, probably in error) that she thought it was just before 9 am. That does not support a claim for two hours of claimed "preparation/perusals".

(2) Sub-paragraph (d) claims there were admitted telephone calls by the client to the practitioner on 18 July and 23 July 2002 which had not been allowed at the taxation.

463 That again was not the evidence. The client in her witness statement and in evidence said, (1) on 18 July and 25 July 2002 she had called the practitioner's office, but he was not available to speak to her; and (2) she had first spoken to the practitioner on 22 July 2002 to ask him to act. The reason this second call had not been allowed at taxation was, apparently, that the practitioner had claimed this was a call to the client's son, although he had sought an amendment for this purpose which had been refused. (T:71-72, 3.11.06) This does not support a claim for a telephone call on 22 July 2002 given that the practitioner had not then been engaged. In any event it does not reflect adversely on the client.

(3) Sub-paragraph (b) implies that the client admitted a conference with the practitioner on 30 October 2002.

464 The client said in evidence that she recalled a meeting on 30 October 2002 but other than that it was "very short"; she does not recall how long it took. The practitioner cannot base any submissions on that evidence.

(4) Sub-paragraph (c) claims that the client "swore" to a conference of 0.5 hour on 30 December 2002 whereas at the taxation she had said it had taken 0.1 hour.

465 As the practitioner must have known, that written submission is a distortion of the client's evidence before us. In cross-examination the practitioner put to the client that the conference on that day took half an hour. Her answer was "Yeah. Could be. I don't know. I don't remember. Don't remember the time exactly". A few moments later the practitioner then put to her that at the taxation she had only conceded it was five minutes. He then put to her: "Your evidence earlier was that the conference on 31 December 2002 was half an hour". A member of the Tribunal pointed out that this was not what she had said. The practitioner argued that it was and repeated the proposition to her. He put to her that her "earlier evidence" of 30 minutes was accurate and the claim that it was

only five minutes was untrue. She responded that he was "confusing everybody". (T:50-55, 3.11.06)

466 The practitioner cannot use this evidence in support of any charge. It serves only to reveal an improper and inappropriate cross-examination by him.

(5) Sub-paragraph (f) implies that the client admitted to a conference of 0.5 hour on 24 February 2003, whereas at the taxation the client had conceded only 0.2 hour.

467 In truth, the practitioner in cross-examination put to the client that the meeting took 30 minutes. The client responded that she did not believe that. She did not know how long it took but it was, as for the other meetings, "short". (T:54, 6.11.06) Clearly again, the evidence does not support the practitioner's submission.

Conclusions on the Overcharging Complaint

468 We reject the practitioner's challenge to the decision of Registrar Moroni. We find the Registrar's decision is a reliable basis upon which to find that a reasonable fee for the practitioner's services was $5500. Further, we have considered the practitioner's evidence and submissions in support of the charges made and find that they do not demonstrate an entitlement to fees above $5500.

469 In considering the extent of overcharging, we note the effect of Registrar Moroni's decision was to reduce the practitioner's bill of costs by $17 759.90 from $23 250 to $5490.10. The amount allowed represents about 23.6% of the amount charged by the practitioner. Clearly the practitioner's charges were more than was reasonable generally and in terms of r 16.5 of the *Professional Conduct Rules*.

470 We conclude that the practitioner was guilty of gross overcharging in the manner alleged.

471 It is again relevant to the gravity of this matter that, as we have found, the client had difficulty in reading and communicating in English, was not experienced in dealing with lawyers and trusted and relied upon the practitioner. She was vulnerable, in the sense described, and as the practitioner was aware. The practitioner by his conduct sought to take advantage of her vulnerability.

472 We find that overcharging in the amount found constitutes conduct which falls below to a substantial degree the standard of professional

conduct observed or approved by members of the profession of good repute and competence.

473 Additionally and independently, we have had regard to specific items of the bill of costs charged with respect to the first, third and fourth periods.

474 For the reasons given with respect to each of the periods, we find that there was no justification for these charges. Further, to the extent the practitioner claims there was a reasonable basis upon which to charge for not only the first period, but for the third and fourth periods also, we would reject that submission for the reasons given.

475 The total for the objections in these periods is $13 145. This sum represents 56.5% of the total sum charged by the practitioner and claimed in the bill of costs, namely $23 250. It follows that whatever might be regarded as a reasonable charge for his services, there was no justification for the amount actually charged. That again constitutes a breach of r 16.5 of the *Professional Conduct Rules*. In addition we take into account the charges made for the second period in the light of the August 2002 Memorandum and the other matters identified evincing overcharging.

476 We find that overcharging to this extent constitutes conduct which falls below to a substantial degree the standard of professional conduct observed or approved by members of the profession of good repute and competence.

477 We find the practitioner guilty of the Overcharging Complaint.

III The Communication Complaint

478 The terms of the complaint are that the practitioner was guilty of unsatisfactory conduct by unprofessional conduct in May 2004, in communicating with a judicial officer in proceedings in which he was involved, in the period after the commencement of the hearing of the matter and prior to the continuation of the hearing on a subsequent day, on issues relevant to the proceedings and the evidence in and conduct of the proceedings, without the leave or request of the Court, without first notifying the other side that he proposed to make the communication and of its terms, and without forwarding a copy of the communication to the other side prior to, or around the same time that he sent it to the court.

479 We observe the charge involves more than writing to the Registrar without also sending a copy to the client's solicitors. It includes the

content of the letter and it being sent "without the leave or request of the Court".

The facts

480 This complaint can largely be dealt with by reference to the papers. There is no dispute as to the facts.

481 The taxation commenced on the afternoon of 10 May 2004. On 13 May 2004 the practitioner, at about 11.32 am faxed his letter dated 12 May 2004 to the Registrar. At the commencement of the hearing on the afternoon of 13 May 2004, at 2.15 pm, the Registrar determined from counsel for the client that she had not received a copy of the letter and himself arranged to obtain a copy for her. The practitioner arrived a few minutes later and, without reference to the letter, proceeded with the evidence in the hearing. The Registrar interrupted him to refer to the "practice direction" requiring that when correspondence is addressed to the court, a copy must be sent to the other party. The practitioner said that he had a copy for that purpose and provided this to the client's counsel.

482 The practitioner's letter claims that "for the purpose of completeness of the Court record" he records that Registrar Moroni made certain rulings. The practitioner then purports to set these out. However, they are clearly not couched in "neutral" terms. They include that the Registrar had made his determination with respect to items 1-9 of the bill and the issue of the client's son's authority "in five minutes"; that he had disregarded the evidence of the practitioner in making that determination; that the Registrar, "despite evidence of the falsity of the client's son's evidence" was not prepared to reconsider his determination, and so on. There is then a recital of certain "matters and things" in the course of taxation, including that the Registrar "continually interrupted the cross-examination" of the practitioner "even explaining and altering evidence provided by [the client]", that he had "disregarded the inconsistent or false testimony of the applicant wife", and that he "had prejudged the issues in the matter as is evidenced by the conduct of the taxation".

The legal framework

483 There was no dispute as to the existence of the appropriate rules and guidelines.

1. Counsel representing an interested party shall not initiate communications with the Court about the facts or issues in a case

that the Counsel knows is pending ... unless he has first informed Counsel for all other interested parties of the nature of the matters he wishes to discuss with the Court and has given them an opportunity to be present. *Professional Conduct Rules*, r 13.10(1).

2. All correspondence sent to the Court concerning proceedings ... must be copied to the other party or that party's lawyer and the original letter must show that this has been done. *Family Court of Western Australia Case Management Guidelines & Directions* par 35.2.

The practitioner's defence

484 The practitioner by his witness statement in the Communications Complaint made submissions in answer to this charge, upon which we comment as follows:

1. Registrar Moroni did not include the practitioner's conduct in this respect in his referral of certain matters to the appropriate disciplinary body.

485 We do not regard this as significant. Registrar Moroni in his Reasons, described the practitioner's conduct in sending the letter as "highly improper".

2. The practitioner complied with the relevant provision of the *Family Court of Western Australia Case Management Guidelines & Directions* by handing a copy to counsel for the client shortly after the resumption of the hearing.

486 Clearly the practitioner did not so comply. The Guidelines require the original letter to the Court to show that it had been copied to the other side. That requires that such copy be sent no later than when the original is sent to the Court. That did not occur.

3. The practitioner was entitled as of right to respond to Registrar Moroni's File Note dated 11 May 2004.

487 This proposition assumes that the practitioner had received a copy of this Note at the time of writing his letter. Assuming this to be so, for the practitioner's submission to be persuasive his letter would at least have needed to refer to the Registrar's Note. It did not. But even if that were so, it was not the proper method of responding to that Note. If the practitioner believed the rulings were in error he had a right at the conclusion of the hearing to seek a review of the assessment. That did not involve writing to the Registrar.

4. It was common practice for counsel in the Family Court to take a record of what occurred at untranscribed proceedings.

488 That may be accepted. But the practitioner's letter was clearly no mere record of what had taken place. It was an attack on the Registrar's conduct and rulings. There was no justification for sending such a letter to the Registrar and the conduct was compounded by failing to provide a copy to the other side.

5. As a litigant in person, the practitioner was entitled to make representations and present his version of the evidence.

489 Although appearing for himself, the practitioner remained a counsel and legal practitioner bound to comply with the various rules and guidelines.

6. Counsel for the client had also written to the Court on 16 February 2004 in relation to seeking an adjournment of the hearing and had sent this letter to the practitioner.

490 In fact, the records show that the solicitors for the client had on 16 February 2004 sent a letter by fax to the practitioner inviting him to consent to the hearing for the following day being brought forward by 15 minutes; and if so, requesting that the practitioner sign the attached letter and return it to them. The attached letter was directed to the Court notifying it that the parties had consented to the application being heard at 9.30 am. The attached letter was signed by those solicitors and provided a place for the practitioner to sign. The evidence does not make clear whether the practitioner in fact signed the attached letter and if so whether it was then sent to the Court.

491 A letter notifying the Court of an agreed adjournment evidencing that it had previously been agreed to by both parties was unexceptional. It serves to expose the improper content of the practitioner's letter and the inappropriate communication of it.

492 In his Closing Submissions the practitioner included certain further defences as follows:

7. The practitioner had a constitutional right to communicate with the Registrar.

493 This is perhaps intended as a challenge to the validity of the Guidelines and Rules on the grounds that they impermissibly burden an individual's implied constitutional freedom of comment on "government matters"; specifically on the conduct of certain proceedings (the taxation

proceedings) before a court (the Family Court). Assuming that the freedom extends this far, we take the view that the Guidelines and Rules do not by their terms, operation or effect restrict comment on matters in court, but rather they regulate the manner by which parties and legal representatives may communicate with the court during the currency of proceedings. Further, they are intended to serve the interests of justice by prohibiting "secret" communications with the court by one party and are reasonably appropriate and "proportionate" to that end. The practitioner had various avenues open by which he might appropriately have communicated his position on the conduct of the taxation proceedings, most obviously by a right of review. He did not do so, but communicated in a manner contrary to the provisions of the Guidelines and Rules. We therefore reject this submission.

8. The practitioner complied with the requirements of the Guidelines and Rules by delivering a copy to the other side within "1.5 hours".

494 This is clearly untenable. The requirements of the *Professional Conduct Rules*, to the extent they contemplate any letter to the Court, are that the other side be first informed of the proposed communication; and of the Guidelines that the copy be sent no later than when it is sent to the Court.

Findings

495 The letter, under the guise of being a record of the court proceedings, contains serious allegations of actual and perceived bias by the Registrar and unfair and prejudicial conduct by him. Such allegations were made in the course of proceedings.

496 It is not apparent what the practitioner thought he was achieving in writing in these terms. There is no suggestion of an application that the Registrar disqualify himself on the grounds of bias and neither could such an application be made in the form of a letter. In commenting on the matter, Registrar Moroni said that the practitioner had taken a "very highly improper step". He believed the practitioner may have been motivated to write the letter by a desire to put pressure on him. That was an understandable belief. It reflects how improper and ill conceived was the practitioner's conduct.

497 Moreover, the practitioner's conduct in writing the letter without copying it to the client's solicitors was a serious matter. It would be destructive of confidence in the judicial system if a party believed that the

other side was communicating directly to the court. As the *Professional Conduct Rules* make clear a party's case must be put during the course of a hearing. The practitioner's conduct in writing a letter in these terms and without notice to the other party was particularly serious.

498 We are satisfied that the practitioner's conduct in sending this letter in the circumstances constituted conduct which falls below to a substantial degree the standard of professional conduct observed or approved by members of the profession of good repute and competence.

499 We find the practitioner guilty of unprofessional conduct on the Communication Complaint.

Orders

1. The Tribunal finds the practitioner guilty on each of the three charges of unprofessional conduct.

2. The Tribunal will hear from the parties on the question of penalty and costs.

I certify that this and the preceding [499] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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HON R VIOL, SUPPLEMENTARY DEPUTY PRESIDENT

Corrigenda

Reference	Correction
[35]	For "…that at the end of February 2003 the client had acknowledged…" read "…that at the end of February 2003 the practitioner had acknowledged…".
[76]	For "…focus attention on the appropriate standard of proof by which these matters must be established. As to that, the well known judgment of Dixon J in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 sets out the principles." read "…focus attention on the appropriate standard of proof and the strength of the evidence by which these matters must be established. As to that, the well known judgment of Dixon J in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 confirms the applicability in these circumstances of the civil standard of proof, that is, proof on the balance of probabilities, but the strength of the evidence required increasing with the gravity of the allegation, and sets out the principles.".
[77]	For "…we have sought reasonably clear and congent evidence in order to be reasonably satisfied they have been established." read "…we have sought reasonably clear and cogent evidence in order to be reasonably satisfied on the balance of probabilities that they have been established.".
[93]	For "…the costs provisions of *Family Law Act 1975*," read "…the costs provisions of the *Family Law Act 1975*,".
[153(2)]	For "no copy of that agreement was provided…" read "no copy of that document was provided…".
[254]	For "…O 38 r 26 of the *Family Law Rules 1984* does not apply to a subsequent costs agreement." read "…O 38 r 26 of the *Family Law Rules 1984* does not apply to a subsequent costs agreement (in which case there was no legislative authority for the second costs agreement).".
[265.2(2)(b)]	For "…including the practitioner file records;" read "…including the practitioner's file records;".
[289]	For "…including disbursement of $896 and GST." read "…including disbursements of $896 and GST after deducting the sum of $9300.".
[415]	For "The practitioner did not call any other person present at the "conferences" to support his version of it." read "The practitioner did not call any other person present at the "conferences" to support his version of the events.".

I certify that these corrigenda have been made in accordance with s 83 of the State Administrative Tribunal Act 2004 (WA).

JUSTICE M L BARKER, PRESIDENT