

CITATION: Legal Services Commissioner v King [2013] QCAT 260

PARTIES: Legal Services Commissioner
v
Ms Karen Louisa King

APPLICATION NUMBER: OCR257-10

MATTER TYPE: Occupational regulation matters

HEARING DATE: 17,18,19 October 2011

HEARD AT: Brisbane

DECISION OF: **Justice Fryberg, Member**
Assisted by:

Mr Ken Horsley
Practitioner Panel Member; and
Dr Susan Dann
Lay Panel Member

DELIVERED ON: 2 July 2013

DELIVERED AT: Brisbane

ORDERS MADE:

1. **Charges 1, 2, 6 and 7 are proved.**
2. **Parties are to file in the Tribunal and give to each other written submissions in relation to each of the charges proved as to whether Ms Karen Louisa King had engaged in either unsatisfactory professional conduct or professional misconduct and the question of disciplinary orders by 4:00pm on 19 July 2013.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – Breach of undertaking

PROFESSIONS AND TRADES – LAWYERS –

COMPLAINTS AND DISCIPLINE –
 PROFESSIONAL MISCONDUCT AND
 UNSATISFACTORY PROFESSIONAL
 CONDUCT – TRUST MONEY – Transfer of
 money to meet costs and disbursements in
 breach of statute

PROFESSIONS AND TRADES – LAWYERS –
 COMPLAINTS AND DISCIPLINE –
 PROFESSIONAL MISCONDUCT AND
 UNSATISFACTORY PROFESSIONAL
 CONDUCT – OTHER MATTERS – False
 statement to Queensland Law Society in the
 course of an investigation

PROFESSIONS AND TRADES – LAWYERS -
 COMPLAINTS AND DISCIPLINE –
 PROFESSIONAL MISCONDUCT AND
 UNSATISFACTORY PROFESSIONAL
 CONDUCT – OTHER MATTERS – Failure to
 comply with written notice issued by the Legal
 Services Commissioner – *Legal Profession Act*
 2007, s 443(3)

PROFESSIONS AND TRADES – LAWYERS –
 COMPLAINTS AND DISCIPLINE –
 PROFESSIONAL MISCONDUCT AND
 UNSATISFACTORY PROFESSIONAL
 CONDUCT – SOLICITOR'S COSTS – Failure to
 provide itemised bill of costs at request – *Legal*
Profession Act 2007, s 332

Legal Profession Act 2007 (Qld), s 249,
 s 258(1)(b), s 330, s 331, s 332, s 443, s 443(3),
 s 452, s 708

Legal Profession Regulation 2007 (Qld), s 58,
 s 58(3), s 58(4)

Briginshaw v Briginshaw (1938) 60 CLR 336,
 cited.

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Legal Service Commissioner represented by BI
 McMillan, instructed by Crown Law

RESPONDENT: Ms Karen Louisa King represented by P Davis SC and P Morreau, instructed by Brian Bartley & Associates

REASONS FOR DECISION

- [1] **FRYBERG J:** On 11 October 2010 an application under s 452 of the *Legal Profession Act 2007* (“Act”) was filed in the Tribunal in Form 22 of the Tribunal's forms. It disclosed that the Legal Services Commissioner was the applicant, but did not name him. It sought “[d]isciplinary orders pursuant to section 456 of the Act” against the respondent, Karen Louisa King. It set out seven charges against Ms King. In relation to each charge it alleged that she had engaged in “unsatisfactory professional conduct and/or professional misconduct”.
- [2] The office of Legal Services Commissioner exists because s 583 of the Act provides, “There is to be a Legal Services Commissioner”. The Act further provides that the Governor in Council may appoint “a person” as the commissioner by gazette notice.¹ It specifies personal qualities of which the Minister must be satisfied before recommending an appointment² and the term of the appointment³, and makes provision for the Commissioner's remuneration⁴. Plainly it envisages that the appointee will be a natural person. It expressly provides, “The commissioner is appointed under this Act and not under the *Public Service Act 2008*”⁵. It contains no provision making the Commissioner a corporation.⁶
- [3] The functions of the Commissioner are broadly expressed:
- “590 Functions**
- (1) The commissioner has the functions conferred or imposed on the commissioner under this Act or another Act.
 - (2) The commissioner may appear, by Australian legal practitioner or government legal officer, and be heard by the Supreme Court in relation to the court's jurisdiction, or an exercise of the court's power, under a relevant law.
 - (3) Also, the commissioner may appear, by Australian legal practitioner or government legal officer, for

¹ *Legal Profession Act 2007*, s 584(1).

² *Legal Profession Act 2007*, s 584(2).

³ *Legal Profession Act 2007*, s 585.

⁴ *Legal Profession Act 2007*, s 586.

⁵ *Legal Profession Act 2007*, s 584(4).

⁶ Compare *State Development and Public Works Organisation Act 1971*, s 8.

the purposes of prosecuting a person as an unlawful operator.”

- [4] One of the functions permitted under the Act is making an application to the Tribunal against an Australian legal practitioner.⁷ The present application is brought in the exercise of that function. The Act makes no provision for the name under which the Commissioner should bring such proceedings. It apparently leaves such matters to be dealt with under the *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”). The latter provides:

“33 Making an application

- (1) This section applies if this Act or an enabling Act provides that a person may apply to the tribunal to deal with a matter.
- (2) The application must—
 - (a) be in a form substantially complying with the rules; and
 -”

- [5] The *Queensland Civil and Administrative Tribunal Rules 2009* provide that a discipline application must be made in the approved form.⁸ I assume that Form 22 (“Application or referral – disciplinary proceeding”) is an approved form. It includes in Part A provision for the applicant’s title, given names and family name. In that regard it appears to conform with the general principle that in the absence of statutory provision to the contrary, only a legal person can commence legal proceedings.
- [6] On the face of things, therefore, the application is defective. No point was raised about this on behalf of Ms King, and if there is a defect, it is doubtless easily fixed. Since the matter has not been the subject of argument, I shall hear the parties on the question of whether the application ought to be amended⁹ after the delivery of these reasons for judgment.
- [7] On 17 October 2011 charge five was dismissed by consent. The hearing of the remaining charges took place over that day and the two succeeding days. Judgment has been reserved for an inordinate time, a delay for which I am responsible. I have the benefit of my notes made at the time of the hearing as well as the transcript of evidence, and I have a reasonable recollection of the impression made by the witnesses. I am aware that since the matter was reserved, Ms King has been refused a practising certificate by the Queensland Law Society and that her application for a stay has been dismissed.¹⁰ I have not taken those facts into account and I have not read the reasons for either decision.

⁷ *Legal Profession Act 2007*, s 452(1).

⁸ *Queensland Civil and Administrative Tribunal Rules 2009*, r 115.

⁹ QCAT Act, s 135(1)(d).

¹⁰ [2012] QCAT 489.

[8] I shall deal with the charges more or less in chronological order.

Charge 7 - Mr Clark

[9] Charge 7 alleged:

"Charge Seven – Breach of Undertaking

7. The respondent, in breach of her duty as a solicitor, failed to honour an undertaking given or authorised to be given by her on 27 July 2006 to Rodney John Clark of Counsel.

Particulars

7.1 At all material times, the respondent:

- (a) was an Australian Legal Practitioner;
- (b) was engaged in legal practice as a sole practitioner under the name K.L. King & Associates;
- (c) employed Oriena Stephanie Moloney as a legal practitioner.

7.2 As at 27 July 2006 the respondent owed outstanding fees to Rodney John Clark of Counsel in the sum of approximately \$29,000.

7.3 On 27 July 2006, Ms Maloney gave the respondent's undertaking, with the respondent's authority, to Mr Clark via email in the following terms:

'I have spoken to Karen who has advised that she will undertake to have no less than \$5,000 paid to you on or before 1 September 2006 with the remainder to be paid within one month.' ('the undertaking')

7.4 The sum of \$5,000 was paid to Mr Clark on or about 2 September 2006.

7.5 The respondent has paid no further monies to Mr Clark which were due to him pursuant to the undertaking.

7.6 In breach of her duty as a solicitor, the respondent failed to honour her undertaking to Mr Clark by failing to pay the amount provided for in the undertaking within the agreed time."

[10] In her Response Ms King stated in relation to that charge:

" I deny charge 7.

As to the particulars:

[7.1]: Admitted

[7.2]: I admit that, as at 27 July 2006, I owed fees to Rodney John Clark of counsel in the sum of \$27,474.60. That amount included fees in relation to Ms Leonie Mills amounting to \$18,835.10 and otherwise related to fees owed to Mr Clark in relation to other clients.

[7.3]: I admit that on 27 July 2006 Ms Maloney gave an undertaking in the terms alleged in subparagraph [7.3] to Mr Clark. The undertaking related only to the fees owed to Mr Clark in relation to Ms Mills. I deny that the undertaking was given with my authority.

[7.4]: I do not admit subparagraph [7.4] because I believe that Ms Mills made payment of the sum of \$5,000.00 in cash to Mr Clark at some time before 1 September 2006.

[7.5]: I admit subparagraph [7.5] but say that I believe that Ms Mills paid Mr Clark the further sum of \$3,249.90 on or about 2 September 2006.

[7.6]: I admit that I have failed to honour the undertaking given by my employed solicitor to Mr Clark."

- [11] By the end of the evidence it was common ground that as at 27 July 2006 Ms King owed Mr Clark \$27,474.60 and the Commissioner did not dispute Ms King's assertion that the amount owing in relation to Ms Mills was \$18,835.10.
- [12] It will be observed that in particular 7.3, the Commissioner alleged that the undertaking was given "with the respondent's authority". Issue has been joined on that point. I would have thought that allegation redundant. Without having researched the question, I would have thought that a solicitor was obliged to honour any undertaking given by an employed solicitor and within her apparent authority. The Commissioner chose not to conduct the case on that basis. Consequently, this charge is proved only if the Commissioner has shown that Ms Moloney had actual authority to give the undertaking.
- [13] The Commissioner did not contend that Ms Moloney's authority came from her position as an employee. His case was that Ms King expressly authorised the undertaking in a telephone conversation with Ms Moloney; and that the "remainder" in the undertaking referred to all other fees owed by Ms King to Mr Clark for all clients, or at least for Ms Mills' matter. Ms King submitted that the only undertaking which she authorised Ms Moloney to give was for the payment of \$5,000 on account of Ms Mills.

The events giving rise to the charge

- [14] In February 2006 Mr Rodney Clark of counsel appeared for Ms Mills in a four day trial in the Family Court in Sydney instructed by Ms King.

Judgment was reserved. Mr Clark's memorandum of fees to Ms King was dated 27 February and was duly received by her. In a covering letter Mr Clark confirmed his agreement to wait for payment of his professional fees "until we have an outcome". In the context that meant until the reserved judgment was delivered, and I am satisfied that Ms King so understood it. That bill comprised about 80% of the amount owed to Mr Clark in relation to Ms Mills.

The alleged agreement in July

- [15] The judgment was delivered on 30 June 2006. It was not wholly favourable to Ms Mills, and she wished to appeal. However she was in financial difficulty. It is likely that some time before 26 July a conference was held at Mr Clark's chambers attended by him, Ms Mills, Ms King and Ms Moloney. What happened at that conference assumed some importance at the hearing.
- [16] In her second affidavit, filed and sworn on the first day of the hearing, Ms King deposed that at the conference Mr Clark advised that Ms Mills had excellent prospects on appeal. He said he would "spec" the appeal. She claimed he was instructed to draft the grounds of appeal for the notice of appeal which was due to be filed by 28 July 2006. It was arranged that Ms Moloney would prepare the form of notice of appeal and insert the grounds which he was to draft. As to the outstanding fees, Ms Mills said that she should be able to pay \$5,000 by the end of July and another \$5,000 at the end of August. Ms King did not allege that Mr Clark agreed to that arrangement in either full or partial satisfaction of his outstanding fees in the matter.
- [17] After copies of that affidavit were provided, Mr Clark was cross-examined. He had not referred to any conference in his affidavit which constituted his evidence in chief. He testified that he recalled a meeting with Ms Moloney and Ms Mills, but he was unsure if Ms King was present. He said at the meeting that he would "spec" the appeal. He had some recollection of a conversation about Ms Moloney liaising with him about an appeal. He was asked if he recalled Ms Mills saying that she could pay \$10,000 toward his outstanding fees. He did not recall that figure being discussed, but did recall some discussion of his fees on the part of either Ms Mills or Ms King. He did not remember any mention of \$5,000 by the end of July and \$5,000 by the end of August, but was not prepared to say that this did not happen. He said that the backdrop to any conversation was that arrangements had to be made for his fees in total, either in one lump sum or instalments. It was not put to him that he had agreed to accept the two sums of \$5,000 at the times mentioned in either full or partial satisfaction of his fees, nor was it suggested that he had asked for or agreed to accept payment of one such amount in cash. There had been a discussion with Ms King about

payment of \$10,000 in June 2008, but that was quite separate from what happened in 2006.

[18] Ms Moloney was also cross-examined about a conference in mid-July 2006. She too had made no reference to such a conference in her affidavit. Ms Moloney testified that at some time before 26 July 2006 Ms Mills had instructed that she “had the funds” and would be “able to pay some funds”; she was “pretty sure” she phoned Mr Clark’s chambers and spoke to his secretary after receiving those instructions to let Mr Clark know that the firm had instructions to continue with the appeal. She could recall being in Mr Clark’s chambers on one occasion with Ms Mills and Ms King, but could not recall when that was or what it was about. It was possible the sum of \$5,000 had been mentioned, but she could not recall it.

[19] Ms King was cross-examined on the third day of the hearing:

“MR MCMILLAN: So you understood as at that date in mid-July that he expected to be paid for his work on the trial?

MS KING: No, that’s not exactly correct. There was a discussion as to the client’s lack of ability to pay and he agreed to accept the sum of \$5,000 by the end of July, which he was receiving in cash, and a further sum of \$5,000 a month later.

PRESIDING MEMBER: In full satisfaction of his bill?

MS KING: No, no, he expected to be successful on the appeal and he was happy to do it on that basis, your Honour. I think he says in his affidavit----

PRESIDING MEMBER: No, I’m not asking you what you think he said in his affidavit. I’m asking you what you say was the agreement that you reached.

MS KING: That was exactly the agreement, your Honour.

PRESIDING MEMBER: What was?

MS KING: \$5,000 by the end of July and another \$5,000 by the end of September.

PRESIDING MEMBER: And that’s it?

MS KING: There was no firm commitment for any payments after that date. Equally there was no agreement that that would be in full satisfaction of his bill.

PRESIDING MEMBER: Well then, since I gather you accepted, he did the trial on the basis that he would be paid?

MS KING: That’s so.

PRESIDING MEMBER: Then surely his whole bill would be payable?

MS KING: Well, he agreed to that arrangement at that meeting.

PRESIDING MEMBER: What, that his whole bill would be payable?

MS KING: No, he agreed----

PRESIDING MEMBER: I asked you a question. Surely it would still be the position that his whole bill would be payable?

MS KING: At some stage yes, definitely, but he agreed to \$5,000 and then another \$5,000.

...

PRESIDING MEMBER: When was the meeting with Mr Clark?

MS KING: I've actually looked back through my diary and tried to work out . My recollection was mid-July. I don't have it in my diary and I think the reason for that was because Mr Clark said, 'Look, I'll call you when I'm free and just make sure you can come straight in', and in fact that's what we did, but it was mid-July.

PRESIDING MEMBER: This was an agreement you say that was reached at the meeting about his fees?

MS KING: Yes, your Honour.

PRESIDING MEMBER: Did you write him a confirmatory letter?

MS KING: No, I didn't.

PRESIDING MEMBER: Did you make a file note?

MS KING: I assumed Ms Moloney had done a file note and I went back to check the file recently and it wasn't there.

PRESIDING MEMBER: You didn't make a file note, I gather?

MS KING: No, when Ms Moloney was with me I usually expected her to file note while I was discussing that and other matters."

[20] The following points should be noted:

- This was the first occasion on which Ms King alleged that Mr Clark had agreed to a proposal that he accept \$5,000 at the end of July and \$5,000 a month later (I assume the reference to the end of September was a slip of the tongue).
- This was the first occasion on which Ms King alleged that Mr Clark had agreed to a proposal that he accept payment in cash.
- There was no file note of any such agreement, yet Ms King testified that Ms Maloney "file noted very well".
- Ms King had great difficulty in accepting the obvious proposition that as at the middle of July the whole of Mr Clark's bill for the trial was and remained payable.

[21] The question of payment in cash arose again a little later in her evidence:

“PRESIDING MEMBER: Were you content for that to happen?

MS KING: For the payment to be made in that form?

PRESIDING MEMBER: Yes?

MS KING: Mr Clark requested that.

PRESIDING MEMBER: Mr Clark requested it?

MS KING: He did, your Honour.

PRESIDING MEMBER: Cash?

MS KING: He did, your Honour.

PRESIDING MEMBER: I see and were you content for that to happen?

MS KING: I didn’t feel that I could really say anything to the contrary.

PRESIDING MEMBER: Why?

MS KING: Because he asked for that to happen that way. He did the same thing in another matter in which I was involved. I didn’t feel – I probably didn’t feel strong enough to say not to.

PRESIDING MEMBER: But you knew it was wrong?

MS KING: Well he did the same thing in another matter.

PRESIDING MEMBER: You knew it was wrong did you?

MS KING: No.....(inaudible).....

PRESIDING MEMBER: You saw nothing wrong with a member of the Bar taking cash?

MS KING: I didn’t feel – I don’t think I really did think of it as wrong. I don’t think I really thought too much about it the way he’d asked her to do it. He’d done in a previous case with a client. I knew he had done it in that case.”

[22] I do not believe Ms King's evidence that Mr Clark agreed to accept \$5,000 at the end of July and \$5,000 at the end of August, nor do I believe her evidence that he requested payment in cash. It is likely that the question of Mr Clark's outstanding fees was raised at the conference (it would be surprising were it otherwise), probably in the context of his agreement to “spec” his fees on the appeal. I find Ms King invented Mr Clark's agreement in order to give credibility to her evidence about the subsequent undertaking.

The chain of e-mails

[23] Ms Moloney deposed that on or about 25 or 26 July Ms Mills indicated that she should be able to fund the appeal. In cross-examination she said that she spoke to Ms Mills. She deposed that she spoke to Ms King, who was away from the office, by mobile phone. Ms King asked her to draw up the

grounds of appeal. She told Ms King that she had not done that work before and Ms King suggested that she contact Mr Clark for help.

- [24] On that basis, Ms Moloney said, she rang Mr Clark's chambers and told his secretary of Ms King's suggestion. At 4.49pm on Wednesday 26 July she sent an e-mail to Mr Clark:

"I have attached a copy of the notice of appeal. If its ok Rod I need

1. the grounds of appeal
2. the orders sought

I will fill out the form, just thought I would show you what it looks like. The document must be filed by Friday and we have found an agent who will file documents for us.¹¹

I am in the office all day tomorrow if you need any. Thanks for your help."

- [25] At 5.04pm Mr Clark responded, "I take it I have your undertaking that my minimum fee of 5k will be met in 7 days?" Given Mr Clark's agreement to "spec" his fees on the appeal, that must have related to his fees for the trial. Mr Clark said in cross-examination that he thought there was earlier e-mail correspondence between him and Ms King about his fees, but no such correspondence was placed before the Tribunal. He said he was "quite certain" that his e-mail was about a promise made to him to start to pay off the outstanding fees in relation to Ms Mills' matter. Such a promise "had been made to me and broken on at least one or two previous occasions". It had been made by Ms King, not Ms Mills.

- [26] Ms Moloney deposed that she telephoned Ms King and informed her of Mr Clark's position. Ms King told her that she would need to speak to the client to find out when she could put funds into trust. She therefore contacted Ms Mills who said "she would bring in \$2,000 in the following week and have \$5,000 at the end of August." She then e-mailed Mr Clark:

"I mentioned to Tanya that she is bringing in some cash tomorrow and the remainder in the first week in September. She has lump sum payment coming from the Gold Coast Show beginning of September and will pay the remainder then.

Is this ok?"

Tanya was Mr Clark's secretary.

- [27] Mr Clark did not respond until 11.16am the following day. He wrote, "What I am looking for is an agreed undertaking and payment timetable for my

¹¹ K.L. King and Associates' office was at Southport.

existing fees. I am agreeable to risking my fees on appeal.” Mr Clark testified that he was referring to all his fees in all matters, but conceded that the chain of e-mails made it seem as if he was referring only to the Mills case. He reiterated that he was certain there were other communications. No such communications have been proved.

[28] Ms Moloney replied a little over half an hour later:

“I have attempted to contact the client. She will be in later this afternoon. She has advised that she will have money to us by the beginning of August. I will confirm all once I can get in contact with her.

I understand your position, but can you advise as a matter of urgency whether you are willing to draw the grounds of appeal and orders sought as the time to file runs out tomorrow and I will have to find someone else to do them this afternoon.”

Ms Moloney testified that this e-mail related to the instructions which she had received from Ms Mills the previous day. If that is right it must have been based on a misunderstanding, since those instructions were that Ms Mills would bring in \$2,000 in the following week, i.e. the beginning of August.

[29] Mr Clark was evidently unimpressed. Seven minutes later he replied, “I have drawn the grounds of appeal. I want a proper arrangement made for the payment of my fees. This is a professional issue K L King & Co is ethically obliged to do.”

[30] Ms Moloney deposed that when she received this e-mail she contacted Ms King:

"16. When I received Mr Clark's email I contacted the respondent on her mobile telephone. I read the contents of Mr Clark's email to her. The respondent asked me when the client would be able to pay the money and I advised her of my conversation with the clients.

17. The respondent then directed me to provide an undertaking to Mr Clark with respect to the payment of his fees as follows - 'we would pay him \$5000.00 by the first of September and the rest in a month.' The respondent also stated that she was upset by Mr Clark's comments and told me that I should also advise him that we would not require his services any longer. The respondent then assisted me with the drawing of the grounds of appeal over the telephone."

In cross-examination she denied the suggestion that there was only one phone call, namely the one “which preceded the last email being sent to Mr Clark”.

- [31] In accordance with those directions Ms Moloney e-mailed Mr Clark at 12.26pm:

“I have spoken to Karen who has advised that she will undertake to have no less than \$5000 paid to you on or before the 1 September 2006 with the remainder to be paid within one month.

She has also asked me to advise that she is upset by your early e-mail and advises that we will no longer need your services in this matter.”

Whatever Mr Clark may have believed, I find on the evidence that the undertaking related only to fees in relation to Ms Mills, not to all of Mr Clark's outstanding fees.¹²

- [32] Mr Clark testified that he was “certain, absolutely certain, unequivocally certain” that he had sent the appeal (presumably, the grounds of appeal and orders sought) to Ms Moloney. He said it was sent in hardcopy form, probably shortly before the last e-mail and possibly earlier or possibly later that day or the next. No such document was tendered.¹³

- [33] I turn to Ms King's evidence. The gravamen of the charge against her was her failing to honour an authorised undertaking. In her Response filed on 26 November 2010 she admitted Ms Moloney had given the undertaking but denied that it was given with her authority. Her principal affidavit was filed on 23 June 2011, by which time she had received Mr Clark's affidavit with the attached e-mails. Her affidavit did not refer to those e-mails and it contained no assertion that any undertaking was given without her authority. That changed in her second affidavit, filed on the first morning of the hearing.

- [34] Ms King then deposed that on 27 July 2006 Ms Moloney telephoned her and “read out Mr Clark's e-mail”. She referred only to one telephone call and one e-mail. She said that in this conversation she told Ms Moloney to tell Mr Clark that she would not require his services further, and she then dictated some basic grounds of appeal. In relation to para 16 of Ms Moloney's affidavit she deposed:

"Paragraph 16: I agree that Ms Moloney read Mr Clark's email to me. I then told Ms Moloney to tell Mr Clark that he would

¹² Of course, that finding does not bind Mr Clark. He had no control over the Commissioner's conduct of the case.

¹³ In fairness I should point out that Mr Clark gave evidence by mobile phone from interstate, somewhere on a highway.

have his \$5,000.00 by the end of the month (as agreed in conference). I did not instruct Ms Moloney to give the undertaking sought by Mr Clark. At not [*sic*] time was I told by Ms Moloney that Mr Clark was, in the context of drafting Ms Mills' grounds of appeal, seeking to require payment of fees other than those relating to Ms Mills' trial and certainly not fees owing in respect of other clients."

- [35] In cross-examination Ms King was pressed with the proposition that it was clear to her that Mr Clark was seeking an undertaking about his fees. She responded:

"MS KING: No, that's not. It was clear that he was seeking an undertaking but not – I didn't know what the undertaking was. I thought it in fact related to that \$5,000.

MR MCMILLAN: But you were aware that he was seeking that undertaking from you?

MS KING: Yes, that's correct."

That evidence sat very uncomfortably with the cross-examination of Ms Moloney, for which Ms King was present:

"MS MORREAU: I'm suggesting to you that at no time did you raise with Ms King the fact that Mr Clark was seeking an undertaking?

MS MOLONEY: Yes, I most definitely did. In the first phone call when we discussed the emails I said that I'd given him assurances and he wasn't willing to accept them. He wants an undertaking and he wants a payment plan."

- [36] Ms King's case early in the hearing was that the only e-mail of which Ms Moloney spoke was the one which preceded the sending of the undertaking to Mr Clark.¹⁴ That e-mail did not mention an undertaking. That raises the question, how did Ms King know that Mr Clark was seeking an undertaking. Ms King explained that in cross-examination by saying that Ms Moloney had told her of two of Mr Clark's e-mails. Pressed for particulars, she stated unequivocally that during the conversation Ms Moloney read Mr Clark's e-mail timed at 5.04pm on 26 June and paraphrased that timed at 11.16am on 27 June. Neither of these was the one which preceded the sending of the last e-mail to Mr Clark.

- [37] The case presented by Ms King at the hearing contrasts with what she wrote in a letter to Mr Clark on 18 October 2006. Mr Clark had e-mailed her asserting the existence of the undertaking in Ms Moloney's e-mail. Ms King responded:

¹⁴ Paragraph [30].

“We note in correspondence you referred to an ‘undertaking’ having been given by the writer to pay all of your fees by the end of October. It is not correct to refer to an undertaking having been given. It is correct that the writer said to Ms Moloney, who was dealing with you in relation to this matter in her absence, that she would attempt to pay the account dated 27 February 2006, that is \$5000 and any further sum owing, which she calculated at approximately \$8000 (the disbursements having already being paid.) Ms Moloney passed that on to you.”

In that letter there was no suggestion that Mr Clark had made any agreement in the conference in June; there was no suggestion that Mr Clark was to receive less than the full amount owing to him; and there was no suggestion that Ms Moloney acted outside her authority. On the contrary it is accepted that Ms King spoke of paying “\$5000 and any further sum owing” and that Ms Moloney passed this on to Mr Clark. Ms King’s point was that what Ms Moloney wrote did not constitute giving an undertaking. This was not a point pursued at the hearing.

- [38] I do not believe Ms King’s evidence regarding her phone conversations with Ms Moloney. I generally accept Ms Moloney’s evidence, although I take into account that she was at times uncertain (it was not suggested that she was lying). I find that Ms King authorised Ms Moloney to give the undertaking.

Performance of the undertaking

- [39] In his affidavit sworn in February 2011 Mr Clark deposed that he received \$5,000 in respect of Ms Mills’ matter on 2 September 2006. Ms King produced a copy of a cheque for \$5,000 drawn in favour of Mr Clark on her firm’s trust account dated 30 August 2006, and there seems no doubt that this is the payment to which Mr Clark referred. The next payment which Mr Clark acknowledged having received was in June 2008. He was not cross-examined about that and it was not suggested that he received other money in 2006 in respect of the amount outstanding in June of that year.
- [40] Ms King made two affidavits dealing with this charge. In neither did she suggest that the undertaking given to Mr Clark had been honoured. She did not suggest that Mr Clark had been paid other sums in 2006 or even that she believed other sums had been paid. None of those suggestions was raised by her counsel in opening her case.
- [41] In cross-examination she was asked about whether the undertaking had been honoured:

“MR MCMILLAN: You accept that on any construction, even if it relates only to the fees that were payable to Mills, those

fees weren't paid within the timeframe specified in Ms Moloney's email either were they?

MS KING: Yes, he was paid \$5,000 by the end of July in cash by the client and he was paid a further \$5,000, I think it was a day late. He says 2 September. I'm not sure why he didn't receive it on 1 September but he was paid two separate lots of \$5,000. He was then paid a further amount and it was an odd amount, \$3,000 and something, the next day after that."

Ms King further testified that at a later unstated time she rang a Mr O'Donnell at the Queensland Law Society to get advice on her professional obligations in relation to the undertaking given by her firm. She testified that at that time, "I knew that the agreement had been to pay the \$5,000 and that was paid by the client." A little later Ms King testified, "I knew that the undertaking had been given and in my view it had been honoured."

[42] There were two obvious problems with that evidence.

[43] One was that this was the first allegation of an actual payment of \$5,000 at the end of July by the client. Ms King had earlier alleged that Mr Clark had agreed to accept two payments of \$5,000 each, one by the end of July¹⁵, but it had not been suggested that any such payment was made. Ms King made no attempt to prove the truth of these assertions. Ms King was aware from 5 October 2006 that Mr Clark claimed that no funds had been received since the cheque for \$5,000 on 2 September. She did not address this claim in her letter to him of 18 October 2006. In fact at no time did she raise the alleged direct payment of \$5,000 with Mr Clark. She said she did not attempt to clarify the amount that was owing because she thought he would be unwilling to talk to her or discuss the matter with her. She said that she tried to deal with the matter through the Law Society and the Bar Association. She was given the opportunity to check the file during the overnight adjournment to see if she had any diary notes or file notes about any efforts made to pay Mr Clark, but she produced no document referring to the alleged cash payment.

[44] The weakness of Ms King's position was demonstrated in cross-examination:

"MR MCMILLAN: Ms King, are you sure that the \$5,000 that you refer to was paid by Ms Mills at the end of July; are you sure that's the case that there were two separate payments of \$5,000?

MS KING: I believe so, yes.

MR MCMILLAN: Well, you're giving sworn evidence.

MS KING: I do believe yes, that that happened.

¹⁵

See para [19].

MR MCMILLAN: You're not sure?

MS KING: No, no, I always believed that that's what happened, exactly what happened.

MR MCMILLAN: So you responded----

PRESIDING MEMBER: What's the basis of that belief?

MS KING: There was an extensive discussion when we had the meeting in July as the fact that Ms Mills was receipting the \$5,000 in cash and she was receipting it shortly after mid-July. She said that she would bring it up, ring Mr Clark and see in that amount and she told him on several occasions after that date that she'd done so.

MR MCMILLAN: You say you still have that belief?

MS KING: I do.

PRESIDING MEMBER: You've seen that Mr Clark says he didn't get any such money?

MS KING: Yes.

PRESIDING MEMBER: Surely that would lead you to try to verify if it was correct?

MS KING: Well, I haven't been able to contact Ms Mills in recent times but she told me that she'd done that.

PRESIDING MEMBER: And she told you that. Mr Clark's evidence you've heard and you've seen his affidavits but you persist in your belief?

MS KING: I believe she did."

[45] The lateness of the allegation, the absence of any corroborating documents and the irrationality of her belief in the circumstances suggest that the alleged payment was something which she thought of for the first time during cross-examination. She made it up.

[46] The other payment which Ms King relied upon was an alleged amount of about \$3,000 on 3 September 2006. That apparently was referable to para 7.5 of her Response, where she alleged a "belief that Ms Mills paid Mr Clark the further sum of \$3,249.90 on or about 2 September 2006." That allegation was not verified by affidavit. On the contrary, in the affidavit filed on the first day of the hearing Ms King deposed:

"15 My response to the application refers to a further payment of \$3,249.90 on 2 September 2006. I cannot now recollect the basis of that assertion, but to the best of my recollection, it derives from a copy of an invoice dated 16 October 2005 from Mr Clark which records that payment (page 9 of the bundle).

[47] The invoice was not put to Mr Clark and it was not suggested in his cross-examination that he had received the payment. A copy of the invoice was exhibited to Ms King's first affidavit as a copy of a fee note from Mr Clark. The provenance of the annotation was completely unproven. How it got onto a document in Ms King's file remains unknown.

[48] I am not satisfied that any such payment was made to Mr Clark.

[49] The second obvious problem with the evidence was that the total of the amounts allegedly paid to Mr Clark (somewhat over \$13,000) was substantially less than what was admittedly owed to him (over \$18,000 in relation to Ms Mills). That made it difficult to conclude that the undertaking had been honoured. Ms King attempted the task:

“PRESIDING MEMBER: Mr McMillan’s question was that you knew that the undertaking was given and to pay the balance owing by the end of the month and you knew that that undertaking had not been honoured; is that correct?

MS KING: No, that’s not correct because by reference to the meeting in mid-July the rest of the money that was owing was a further \$5,000, not all of the bill and that was what we specifically agreed to.

PRESIDING MEMBER: The meeting was before the undertaking was it not?

MS KING: It was, your Honour.

PRESIDING MEMBER: Well then an undertaking is given to pay the remainder within a month?

MS KING: That’s correct.

PRESIDING MEMBER: And that didn’t happen?

MS KING: I assume that the remainder was the further sum referred to at the meeting, not the entire amount owed on the bill. It was clearly discussed at the meeting that the client didn’t have the capacity to pay that.

PRESIDING MEMBER: You thought the word remainder didn’t mean the balance of the bill?

MS KING: No, I thought it meant the remainder of what had been discussed at the meeting, the amount of.....

PRESIDING MEMBER: I see. Have you expressed that thought anywhere in your affidavits?

MS KING: I certainly have.

PRESIDING MEMBER: Where in your affidavits have you expressed that thought please?

MS KING: I was going to say I certainly haven’t mentioned the LSC or the Law Society where I say I queried what the ----

PRESIDING MEMBER: I asked you have you expressed that?

MS KING: I don't think I do.....

PRESIDING MEMBER: Thank you. Yes, Mr McMillan.”

[50] For reasons which have already been made apparent, the attempt failed.

Conclusion – charge 7

[51] I find that Ms King dishonoured her undertaking.

[52] Consequently I find charge 7 proved.

Charge 1 – Ms Martin, and Charge 4 – Queensland Law Society

[53] Charge 1 and charge 4 are so closely related that it is convenient to consider them together.

Charge 1

[54] Charge 1 is in these terms:

“Charge One – Unlawful drawing of trust monies

1. On 30 January 2008, the respondent withdrew trust monies in the amount of \$87,000 from her trust account in breach of r. 58 of the Legal Profession Regulation 2007.

Particulars

- 1.1 At all material times, the respondent:
 - (a) was an Australian Legal Practitioner;
 - (b) engaged in legal practice as a sole practitioner under the name K.L. King & Associates;
 - (c) acted for Kerri Anne Martin on an application in matrimonial matters to the Federal Magistrates Court of Australia.
- 1.2 On 25 January 2008, King received trust moneys on behalf of Kerri Anne Martin
- 1.3 On 30 January 2008, King transferred from those trust monies to her general account the sum of \$87,000.00 purportedly on account of costs and outlays for the matrimonial matter.
- 1.4 At no time prior to 30 January 2008 did the respondent render to Kerri Anne Martin a bill relating to costs and outlays in the matrimonial matter.
- 1.5 At no time prior to 30 January 2008 did the respondent obtain written authority for the withdrawal of trust monies from Kerri Anne Martin or provide

Kerri Anne Martin with a request for payment or notice of withdrawal."

[55] In her response in relation to this charge, Ms King admitted particulars 1.1 and 1.2 and that she transferred \$87,000 from her trust account to her general account on 30 January 2008. It was common ground that on 25 January 2008 Ms King had received \$87,389.44 and on 6 February 2008, \$19,330.78 into trust for Ms Martin from her ex-husband. She pleaded in relation to particulars 1.3 to 1.5:

"(a) I admit transferring the sum of \$87,00.00 from my trust account to my general account on 30 January 2008.

(b) At the time of such transfer, I believed that I was entitled to effect that transfer because Ms Martin had been billed fees in the sum of \$87,000.00, in that accounts had been given to her as follows:

23 August 2007 - \$82,185.05

16 January 2008 - \$84,602.61 (replacing account dated 23 August 2007)

17 January 2008 - \$16,500.00, but reduced to \$2,397.39

Total \$87,000.00

I am unable to say when those accounts were actually sent to Ms Martin. As at 30 January 2008, I believed on the basis of information provided by my book-keeper, Sue Beilby that:

(i) The account dated 23 August 2007 had been given to Ms Martin in about August/September 2007;

(ii) The accounts dated 16-17 January 2008 had recently been sent to Ms Martin.

(c) The funds were transferred in reliance upon the authority contained in Ms Martin's client agreement, clause 7 of which provided:

'The client authorises the firm:

(a) *to receive on the client's behalf any monies due to the client in the course of or as a result of the proceedings;*

(b) *to deduct from any such monies as may be received by the firm and to transfer to the firm's own account, such monies or accounts as are necessary to pay the firm's costs and disbursements in accordance with this agreement, such monies or accounts to be transferred the next business day after issuing*

an account for such monies or accounts to the client.'"

[56] Both the form of the charge and the form of the response present some difficulties. The charge suggests that Ms King acted in breach of s 58 of the *Legal Profession Regulation 2007* ("Regulation"), which regulates the withdrawal of funds from trust accounts. That suggestion is misleading. Section 58 relevantly provides:

"58 Withdrawing trust money for legal costs

- (1) This section prescribes, for section 258(1)(b) of the Act, the procedure for the withdrawal of trust money held in a general trust account or controlled money account of a law practice for payment of legal costs owing to the practice by the person for whom the trust money was paid into the account.
- (2) The trust money may be withdrawn in accordance with the procedure set out in either subsection (3) or (4).
- (3) The law practice may withdraw the trust money—
 - (a) if—
 - (i) the money is withdrawn in accordance with a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or
 - ...; and
 - (b) if, before effecting the withdrawal, the practice gives or sends to the person—
 - (i) ...
 - (ii) a written notice of withdrawal.
 - (4) The law practice may withdraw the trust money—
 - (a) if the practice has given the person a bill relating to the money; and
 - (b) if—
 - (i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or
 -"

[57] Section 58 does not oblige a legal practitioner to do anything. It prescribes a procedure for the purposes of s 258(1)(b) of the *Legal Profession Act 2007*. That section too does not oblige a practitioner to do anything. It simply confers a permission. That permission is of utility to a practitioner who wishes to withdraw money from trust to pay legal costs owing to the practice or to do the other things set out in the section. Its utility derives

from the fact that it relieves practitioners of the duty imposed by s 249 of that Act:

“249 Holding, disbursing and accounting for trust money

- (1) A law practice must—
- (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received; and
 - (b) disburse the trust money only under a direction given by the person.

Maximum penalty—50 penalty units.”

If a practitioner disburses trust money and fails to comply with s 58 of the Regulation or some other enabling provision, an offence under s 249 of the Act results.

[58] Ms King raised no objection to the wording of the charge and did not require amendment of the charge. It is unnecessary to say any more about the point.

[59] Ms King’s Response pleads a belief about certain matters. That was an inadequate plea, since Ms King’s intent was also to allege those matters as matters of fact. That was how her case was conducted, and no objection was taken on behalf of the Commissioner. Whether mere belief was sufficient to negate the charge is considered below. The matters of fact pleaded invoked both s 58(3) and s 58(4) of the Regulation.

Charge 4

[60] Charge 4 alleged:

"Charge Four - False Statement to QLS

4. On 21 May 2008, the respondent dishonestly or recklessly made a false statement to the Queensland Law Society in the course of an investigation pursuant to the *Legal Profession Act 2007*.

Particulars

- 4.1 The applicant repeats and relies upon particulars 3.1 to 3.3 above.
- 4.2 In the course of the investigation a Bill of Costs dated 23 August 2007 was located on the client file kept by the respondent in relation to Kerri Anne Martin’s matrimonial matters.
- 4.3 In a letter dated 21 May 2008 to the Society, the respondent stated that the said Bill of Costs dated 23 August 2007 had been prepared by her employee, Christine [Trueman].

- 4.4 That statement was false in that the said Bill was in fact prepared by the respondent.
- 4.5 At the time of making the statement referred to in particular 4.3 above, the respondent knew, or ought to have known, that the statement was false."

[61] Ms King responded:

"I deny charge 4.
As to the particulars:
4.2 - 4.3: Admitted
4.4 - 4.5: The statement that the bill of costs dated 23 August 2007 had been prepared by Christine [Trueman] was true. Alternatively, I believed (and still believe) that the statement was true."

[62] A minor difficulty in relation to this charge is that, as will appear, there were three slightly different versions of documents answering the description in particular 4.2. The Commissioner did not specify which version was the subject of the charge, nor was he asked to do so. As will appear, that uncertainty interacted with the ambiguity of the word "prepared" in particular 4.3.

[63] Potentially a more serious difficulty is that notwithstanding the admission of particular 4.3 in Ms King's Response, her letter of 21 May 2008 did not state what it is alleged to have stated. The nearest it came was the following:

"That application [for indemnity costs] was made in September 2007, I believe. (I cannot be more specific as I do not have the file in front of me as it is with the Law Society. In any event, nothing turns on the date.) The matter was handled by a solicitor then in my employee, Christine Trueman. Ms Trueman was required to prepare a bill of costs, presumably to provide to the Court for the purposes of the indemnity costs application."

[64] Ms King did not say who or what had required this of Ms Trueman, but clearly she was not asserting that the requirement was imposed by her. She probably meant that the requirement arose as part of the proper preparation of the application. It does not matter. What Ms King did not say was that Ms Trueman did prepare the bill.

[65] As noted below, in a letter to the Law Society which Ms King enclosed with her letter of 21 May, Ms Beilby said that Ms Trueman prepared the bill . However the case against Ms King was not conducted on the basis that her fault lay in knowingly forwarding a false letter.

[66] Fortunately it is unnecessary to resolve those difficulties.

The August 2007 invoice: s 58(3) of the Regulation

[67] Ms King on behalf of her firm made a contract entitled “Engagement and Retainer Agreement” with Ms Martin as the client.¹⁶ It was dated 1 February 2005. Clause 7 of the agreement was set out above.¹⁷ I assume that “accounts” in cl 7(b) is a typographical error for “amounts”.

[68] In written submissions delivered after the hearing, Ms King also quoted cl 8 of the agreement. As far as I can determine, that clause was not pleaded, nor was it referred to during the hearing. I do not understand it to be submitted that Ms King can succeed by relying upon cl 8 if she is unable to succeed by reference to cl 7. In any event, it seems to me that cl 8 does not in terms apply to the circumstances of the case. For all of these reasons I shall not refer to it further.

Paragraph (a)(i) of s 58(3): “complies with the legislation under which it is made”

[69] The first question is whether the agreement was one which “complies with the legislation under which it is made”. Ms King submitted that this question “can be quickly dealt with”. She referred to s 8(1) of the *Trust Accounts Act 1973*. The Commissioner did not favour me with any submissions on the question.

[70] Implicit in that reference is the proposition that “complies” in s 58(3) of the Regulation means “complied on the date on which the agreement was made”. I am prepared to assume that proposition is correct. Even so, the reference to the *Trust Accounts Act 1973* is misconceived. It is so for two reasons. First, s 8 of that Act is not concerned with agreements; it deals with trust account withdrawals. Second, the agreement was made under s 48 of the *Queensland Law Society Act 1952*, not under the *Trust Accounts Act 1973*.

[71] In the absence of submissions from the Commissioner it is not the Tribunal's function to parse and analyse the agreement and the legislation under which it was made. Nothing obvious appears to suggest non-compliance with the legislation. I find that the agreement complied with the legislation under which it was made.

Paragraph (a)(i) of s 58(3): “that authorises the withdrawal”

[72] On 25 January 2008 Ms King's firm received \$87,389.44 in trust for Ms Martin as a result of the proceedings covered by the costs agreement. It

¹⁶ I shall refer to it as “the costs agreement” or “the agreement”.

¹⁷ Paragraph [55].

was paid into the firm's trust account. The amount was a part payment under an order made by the Federal Magistrates Court on 20 August 2007. Receipt of that money was authorised by cl 7(a) of the agreement. The money was covered by the words “such monies” in cl 7(b).

- [73] Clause 7(b) of the agreement expressly authorised the deduction from that money of an amount “necessary to pay the firm's costs and disbursements in accordance with this agreement”. Ms King claimed that as at 30 January 2008 her firm was owed at least \$87,000 for costs and disbursements in accordance with the agreement, and deducted that amount as such. Neither side has squarely addressed the question whether costs and disbursements in accordance with the agreement amounted to \$87,000 and, while the evidence suggests that the fees properly chargeable were significantly less than this amount, it was in the end inconclusive. In his final submissions the Commissioner did not challenge Ms King’s claim. I therefore find that the agreement authorised the withdrawal.

Paragraph (a)(i) of s 58(3): “withdrawn in accordance with a costs agreement”

- [74] Clause 7(b) of the agreement required the money to be transferred one business day after an account has been issued to Ms Martin. Precisely what accounts were issued to Ms Martin was a hotly contested issue of fact. That issue also arises in relation to s 58(3)(b)(ii) of the Regulation. It was not argued that any distinction should be drawn between “issued” and “sent”.

Paragraph (b)(ii) of s 58(3): “sends”

- [75] Relevantly, s 58(3)(b) of the Regulation required the practice to give or send a written notice of withdrawal to Ms Martin before effecting the withdrawal. “Send” would be satisfied by posting the notice to Ms Martin's last known address.¹⁸ Ms King contended that she believed, and that it was the case, that a tax invoice dated 23 August 2007 was sent to Ms Martin. Much of the time taken by the hearing was devoted to the question whether that indeed occurred.

Creation of the invoice dated 23 August 2007

- [76] Ms Martin was the respondent and cross-applicant in proceedings in the Federal Magistrates Court relating to residence/contact issues with respect to a child of her marriage, property settlement, spousal maintenance and child support. The proceedings were reasonably complicated and prolonged. They began in about April 2005, which was when Ms Martin retained K.L. King & Associates. Judgment had been reserved in relation to financial issues in February 2007. It remained reserved in July 2007

¹⁸ *Acts Interpretation Act 1954*, s 39(1)(a)(ii).

when Ms Christine Trueman commenced employment with Ms King, with responsibility for the day to day management of client files, including that of Ms Martin. At that time Ms King, who lived in premises above her office at Southport, had scaled back her day to day involvement in the practice for the period of her pregnancy and post-natal recovery

[77] On 30 July 2007 the court gave judgment on financial matters in favour of Ms Martin. It ordered her former husband to pay her more than \$100,000 despite the fact that the marriage had subsisted for only eight months and also ordered payment of child support. Issues relating to child contact remained ongoing. On 1 August Ms Trueman wrote to counsel engaged in the matter, Mr McGregor, reminding him that he was to prepare a written submission in support of an application for an order for costs. On the next day, following a request from Mr McGregor, Ms Trueman sent him information about the history of the matter on which to base the submission. Under the Magistrate's order the submission was due to be exchanged and properly filed within 14 days of the judgment. Supplementary information for inclusion in the submission was sent to Mr McGregor on 13 August and on the following day, Mr McGregor e-mailed the draft submission to Glenda Henry, a secretary employed by Ms King, for formatting. He wrote in the e-mail, "Please find the necessary attachments and have a schedule of [Ms Martin's] costs from the beginning prepared to be annexed as a schedule." The draft submission made provision for such a schedule.

[78] On an unknown date (but not later than 23 August 2007) Ms Henry typed an urgent memo to Ms King:

"Karen,

Chris needs to know the total amount of fees Kerri Martin has been billed.

I can't find any evidence of her ever being billed and Sue confirms this.

Could you please advise of an amount she should be invoiced for the work on her file.

It is so we can give an amount to the Federal Magistrate for the Costs Order.

Thanks, Glenda"

That memo was created following a request from Ms Trueman, who made some handwritten amendments to bring it into the form quoted before it was delivered.

- [79] Ms King responded by a memo to Ms Trueman:
- “Chris,
- I haven't done an account as I assumed other side would agree to us having an assessor tax the file and both share the cost –
- I can do an account – would estimate \$65,000 + disbursements, but then the issue is where we would take the account from (ie date etc) –.”
- [80] It is not certain on what date the submission was filed, but it was probably 20 August 2007, the day Ms Henry e-mailed a copy of it to Ms Trueman at the Federal Magistrates Court. It must have been filed without the schedule of costs envisaged by Mr McGregor. On the same day Ms Trueman sent it to Ms Martin. She responded by a text message asking for the submission to be expanded to include a claim for interest. On the following day Ms Trueman contacted Mr McGregor and he prepared a supplementary submission on that topic. Ms Henry e-mailed that submission to the Magistrate’s associate on 22 August and later that day faxed some “attachments” which should have accompanied the principal submission. They did not include the schedule of costs.
- [81] On 23 August 2007 someone prepared a tax invoice addressed to Ms Martin setting out the fees owed by her. Outlays were itemised and professional fees were included as a lump sum of \$65,000 plus GST. The first version contained a mathematical error which was corrected in handwriting. In cross-examination Ms Trueman said that the handwriting was that of Ms King, and that evidence was unchallenged. The error was corrected in the second version. I find that Ms Henry sent this version by e-mail to the Federal Magistrate’s associate on that day. I am satisfied that whoever instructed Ms Henry to send the bill to the court, Ms Trueman was complicit in that process. After it was sent the invoice was seen by Ms Sue Beilby, the firm's bookkeeper, who noted that it incorrectly included counsel’s fee (\$8,740) as a disbursement when counsel had not been paid, and wrongly charged GST on the filing fee which was GST-exempt. Ms Beilby created a corrected invoice in the sum of \$73,445.05, still including \$65,000 plus GST.
- [82] Ms Trueman, Ms King and Ms Beilby all denied preparing the invoice or sending it to Ms Martin. Ms Martin denied receiving it. There were important differences in their versions of what occurred.
- [83] Ms Trueman deposed that her work involved only maintenance of client files and providing legal services to clients. According to her, Ms King was responsible for the production of accounts for clients; she (Ms King) was adamant that the bills were “her thing”. She “would usually dictate bills for the secretaries and then settle the accounts. She was very guarded about

the account production process.” Ms Trueman deposed that she vaguely recalled that “a bill was produced in Ms Martin's matter as part of an application for costs”.

- [84] Under cross-examination her memory improved: she said Ms King prepared it. She was unable to identify any particular form of invoice on the file as the one which was produced. Her belief was that it was produced only for annexing to the submission and was not sent to Ms Martin. She claimed that it was her understanding that party and party costs could be claimed in the Federal Magistrates Court even if the client claiming them had not been sent a bill. That claim does not sit comfortably with the opening sentence of the memo to Ms King.¹⁹ For the first time she made an even more serious allegation. She said she would not have sent the invoice on the file to Ms Martin because she “knew that the bill was not a reflection of the actual costs that were incurred on her file”. The figure for costs was “over-inflated” by Ms King. She specifically discussed with Mr McGregor that the submissions he was making to the court might prove embarrassing because he was being asked to make submissions on a false basis.
- [85] Counsel for Ms King pointed out to Ms Trueman that she had obligations to the court. He suggested that there was never any discussion about the bill being inflated and that she had made that up in an attempt to “slurry” Ms King's reputation. She denied that suggestion. I do not believe her denial. I am satisfied that had she believed that the costs in the invoice were over-inflated she would not have allowed it to be used as the basis for the submission for costs on an indemnity basis. Ms King's submission that this account was not over-inflated is accepted.
- [86] That reflects adversely on Ms Trueman's credibility, but it does little to resolve the question of who prepared the invoice.
- [87] Ms King deposed that she ceased being involved in her practice on a daily basis in June 2007 because she was pregnant. Her twins were born on 19 September 2007, but she did not return to work immediately for health reasons. At the time she ceased her involvement a judgment on Ms Martin's matter, which had been to trial on property issues in February 2007, remained reserved. She further swore:
- “I do recall being asked by Ms Trueman, following delivery of the trial judgment, how much Ms Martin should be billed.”
- That is apparently a reference to the memo created by Ms Henry. Ms King continued:
- “I told her that I estimated that the professional costs would be about \$65,000, but I provided the estimate without

¹⁹ Paragraph [78].

reference to the file and I expected that Ms Trueman would review the file to determine an appropriate charge and would discuss the matter again with me if she formed the view that the costs should be significantly different from that figure.”

In cross-examination Ms King went further. She said that she expected Ms Trueman to do the bill. She did not expect a bill in taxable form but she did expect one which broke down what was done into the various events performed, whilst also indicating the period for each event. As she put it, “I expected Ms Trueman to do a proper bill.” According to Ms King, none of the August invoices was a proper bill.

- [88] To undertake such a task, Ms Trueman would have needed full details of all attendances on Ms Martin. There was no system of time recording in the practice, but Ms King deposed that she placed all her file notes in a separate folder so that they were available during the course of the trial for review of the client's instructions. As well as recording instructions, the file notes recorded the time spent on attendances. She had not seen that folder since the trial; it was not with the rest of the file when she inspected it at the Commissioner's offices; and she was unable to say when or in what circumstances it went missing.
- [89] On this point I do not believe Ms King. She made no effort during the hearing to prove the existence of the separate folder. Her affidavits were silent on this point. She said she had discussed it with her solicitor “at length on several occasions”, but the solicitor was not called to give evidence even though he was available. Witnesses who worked in her office were not cross-examined about it or even about a practice of using separate folders for file notes in other cases. No evidence of any attempt to locate the separate folder was led. Ms Campbell, who exhibited large portions of Ms King's file, was not cross-examined. I am not satisfied that any such folder existed.
- [90] Ms King deposed that she “did not prepare the 23 August 2007 account”. However she was well aware that what was required was simply an amount “so we can give an amount to the Federal Magistrate”. She responded, “I can do an account.” Later, when the first version of the invoice was prepared, it was she who detected the arithmetical error.
- [91] That evidence suggests the real possibility that it was Ms King who instructed someone, possibly Ms Henry, to prepare the August invoice.
- [92] The third candidate for that finding was Ms Beilby. The Commissioner put to Ms King that she had instructed Ms Beilby to create the August invoice. Ms King denied this. So did Ms Beilby. Unfortunately, the reliability of Ms Beilby's testimony was severely compromised by a stroke and a cerebral haemorrhage for which she underwent neurosurgery in September 2010. Her recollection of past events was adversely affected and she had

difficulty remembering facts in detail. For example, by the time she testified in mid-October she was unable to recall making her affidavit in late June. It did not help that she had spoken to Ms King about the preparation of her affidavit “about what to put in it, what were the issues”; she has been a personal friend of Ms King's since 2005.

- [93] Ms Martin terminated Ms King's retainer on 2 April 2008 and complained to the Commissioner two days later. He referred the matter to the Queensland Law Society for investigation. On 14 April the Director of Professional Standards wrote to Ms King after examining her files, claiming that there was no evidence that the August account was ever shown to Ms Martin. Ms King replied by letter dated 21 May,²⁰ enclosing a letter addressed to the Law Society and signed by Ms Beilby:

“During early September 2007, as the bookkeeper at KL King & Associates, I was presented with a draft tax invoice for the client, Kerri Martin. This bill was given to me, and had been prepared by, an employed solicitor, Chris Trueman. As was the standard practice, the purpose was for me to check if there were any paid disbursements and/or outstanding outlays and ensure that figures tallied.”²¹

- [94] How that letter came into existence is unclear. What is clear is that Ms Beilby did not have access to the Martin file at the time she wrote it. I infer that she had forgotten by that time that the invoice was prepared for submission to the Federal Magistrates Court in support of Mr McGregor's submission.

- [95] Nearly two years later Ms Beilby was asked to revisit the question in the course of providing a formal statement to the Law Society. In that statement she wrote:

“I have since [the 2008 letter] checked the file and ascertained by reference to file notes dated 22, 23 and 27 August 2007 that the draft tax invoice was in fact provided to me by Ms Trueman on 22 August 2007.”

That seems to contradict Ms Beilby's own file note of 23 August. That note, which Ms Beilby identified in evidence as one of the three to which she referred in her statement, strongly suggests that Ms Beilby did not see the account until after it had been sent to the Federal Magistrates Court. Nothing in the other documents which she identified cast any doubt on that suggestion. I so find.

- [96] That conclusion does not necessarily mean that Ms Trueman did not ask Ms Beilby for a list of outlays to be included in the draft invoice. It points to

²⁰ Exhibit DCG-3, p 427.

²¹ *Ibid*, p 430.

Ms Beilby as the immediate author of the final version, but not the version sent to the court.

- [97] Who prepared the latter version? Ms King fixed the amount of the claim for professional costs in response to Ms Henry's memo and had the arithmetical error in the first version corrected. Ms Trueman urgently needed a schedule of costs to go with the submission and she was aware that the invoice was used for this purpose. The invoice may have been prepared by Ms Henry at the request of either Ms King or Ms Trueman. The Commissioner had obtained an affidavit from Ms Henry. Ms King gave notice requiring her attendance for cross-examination. I do not know what efforts he made to secure her attendance beyond sending her e-mails, but they were unsuccessful. In her absence, her affidavit was not read.
- [98] I am not satisfied to the necessary standard²² that any of the versions can be said to have been "prepared" by Ms King. The Commissioner has not proved that the statement relied on by him was false.

Was the August invoice sent to Ms Martin?

- [99] Ms Beilby's 2007 letter to the Law Society concluded:

"I returned the bill to Chris Trueman for her to sign it off and send it out to the client. A week or so later I was informed by Chris Trueman that said bill had indeed been sent to the client."

Her 2010 statement was somewhat different:

"3. After checking the tax invoice and correcting some inaccuracies in relation to disbursements, I gave it back to Ms Trueman and requested that she send it to the client. She later told me that she had done so on about 27 September 2007.

4. The account was addressed to Ms Martin at Cageput Court. I understand that Ms Martin has asserted that she did not receive the account at that address. I am able to say that the file records that Ms Trueman wrote to Ms Martin at that address on 13 August and 27 September 2007. Any mail returned unclaimed would normally be referred to me. There was no mail returned in relation to Ms Martin so far as I am aware."

- [100] No explanation was offered in Ms Beilby's evidence for why she should have requested Ms Trueman to send the invoice. The reference to 27 September 2007 was also unexplained. It is true that Ms Trueman wrote to

²² *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Ms Martin on that date. That letter dealt with three matters not presently relevant and concluded:

“In relation to our application for costs, I advise that as yet Federal Mag Burnett has not as yet [*sic*] handed down that decision. I will contact you immediately when I receive that decision.”

The letter was signed by Ms Henry on behalf of Ms Trueman. It contained no reference to the enclosure of any invoice, although three other enclosures were highlighted.

[101] Ms Trueman flatly denied any conversation with Ms Beilby in which she said she had sent the invoice to Ms Martin. Ms Beilby said under cross-examination that she had a specific recollection of Ms Trueman telling her that she had sent the bill to Ms Martin. However the firmness of her evidence was tempered:

“PRESIDING MEMBER: Do you understand that what Mr McMillan’s suggesting to you is that you would have looked at page 77 and seen that it was addressed to her and he’s suggesting that you would have looked at that and if that was on the file you would have assumed that it had been sent to her?

MS BIELBY: Well, you would make that assumption, yes.

PRESIDING MEMBER: That’s what Mr McMillan is trying to put to you?

MS BIELBY: I suppose you could make that assumption.

MR MCMILLAN: I’m suggesting that you did make that assumption on the day?

MS BIELBY: Well, anything’s possible, but I couldn’t recall and I’m not one for assuming usually.

MR MCMILLAN: You say, ‘I will do an amended invoice of today’s date’?

MS BIELBY: Well, that’s the one without the Barrister’s fees.

MR MCMILLAN: Yes. Would you then have sent the amended invoice to the client yourself?

MS BIELBY: Well, Christine had control of all of that and really I didn’t do anything without her or the solicitor, so I can’t recall that I would have said that necessarily myself.”

[102] Ms Martin deposed that the first tax invoice which she received from the practice was received on or about 26 February 2008, when she received two invoices at once. Neither was the August 2007 invoice.

[103] Ms Martin’s reaction to the amount of the first of those two invoices was, to put it mildly, indignation. It was a reaction which would have been

inconsistent with her already having knowledge of the magnitude of that invoice. It is difficult to imagine that she would not have said anything to Ms King in September or October 2007 had she then received the August invoice.

[104] In her 2010 statement Ms Beilby wrote:

“5. Further, I spoke to Ms Martin by phone in late September or early to mid-October 2007. We discussed the account she had received from the firm. In particular, Ms Martin enquired whether the firm could reduce the amount of the bill payable by her whilst claiming, as against her husband for purposes of her costs application, that the bill was for the full amount. I told Ms Martin that I could not assist in that regard and that she should speak to one of the solicitors.”

[105] The 2008 letter did not refer to any such conversation, and if a file note of it existed, none was tendered. In cross-examination Ms Martin flatly denied the conversation. Given her subsequent indignation of the magnitude of the professional costs, it would be surprising were she to have received it and remained silent.

[106] Three other matters, albeit somewhat more peripheral, should be mentioned. First, Ms Trueman could hardly have been unaware of Ms King's view that the August invoice was not a proper bill.²³ Form did not matter for the purposes of the submission to the Federal Magistrates Court; what was required was a schedule of costs, and that was required urgently. Ms King's perception of the form of a proper bill can be seen from the invoice dated 16 January 2008. In the absence of any urgency, there is no reason why an invoice intended for the client could not have been put into that form.

[107] Second, it may reasonably be inferred from Ms King's response to Ms Henry's memo²⁴ that Ms King did not envisage the creation of an invoice in a form to be sent to the client. The “issue” to which she referred in her response was the need to apply dates to the various pieces of work done in the matter. This she saw as necessary because in the circumstances the court might choose to award indemnity costs only after a certain date.²⁵ Such a breakdown would be helpful only for the purposes of the submission; it would be unnecessary in an invoice intended for the client.

²³ Paragraph [87].

²⁴ Paragraph [79].

²⁵ That was because the application for indemnity costs was founded in part on Ms Martin's ex-husband's failure to make full disclosure of his assets (a step not required at the outset of the proceedings) and, possibly, because Mr McGregor's submission sought indemnity costs in the alternative from the date of an offer to settle on terms less favourable than those ultimately awarded, which Ms Martin had made at an early stage.

- [108] Third, there was no reason why an invoice should have been sent to Ms Martin in August or September 2007. None had previously been sent and it was known that Ms Martin would be unable to pay until she received payment from her husband. He was being uncooperative in carrying out court orders for the sale of property during the second-half of 2007, and there was no prospect of an early payment.
- [109] For the foregoing reasons, I find that the August invoice was neither issued nor sent to Ms Martin.²⁶ I find Ms Beilby's evidence to the contrary as unreliable, at least as to timing. It follows that the August 2007 invoice did not justify, wholly or in part, Ms King's withdrawal of money from her trust account on January 2008.
- [110] In making this finding I have attempted to rely on objective facts and inferences drawn from them rather than simply accepting or rejecting evidence based on findings of credibility. Nonetheless, I have paid attention to the submissions made on behalf of Ms King in relation to the credibility of Ms Trueman and Ms Martin. I agree that Ms Trueman was keen to distance herself from any involvement with the August 2007 invoice, and that this led her on occasions to exaggeration or understatement, particularly in relation to her role in the firm in relation to the preparation of invoices. I also accept that Ms Martin demonstrated animosity toward Ms King, an animosity which on occasions affected the framing of her answers. She had a predisposition during her cross-examination to "shoot from the lip". Sometimes she unresponsively stated her conclusions rather than referring to the primary facts the subject of a question. She had only a rudimentary knowledge of how the family law system worked and had a great deal of resentment toward that system which impaired her willingness to try to understand it. She blamed Ms King for such things as unanticipated adjournments. Above all, mainly as a result of events in February 2008, she felt that Ms King had tried to cheat her.
- [111] These aspects of the evidence on the credibility of Ms Trueman and Ms Martin must be weighed against my views on the credibility of Ms King and Ms Beilby, to which I have previously referred²⁷ or refer below.²⁸ The fact is that all four women found the process of giving evidence very stressful and all four were emotionally involved to such an extent that, at some stage, each could not resist bitchy remarks about someone else. In all cases, parts of their evidence must be treated with reserve.
- [112] In the circumstances I have preferred to base my findings on inferences from the written records wherever possible.

²⁶ In making this finding I have not taken into account any findings in Exhibit 7.

²⁷ Paragraphs [109]-[110].

²⁸ Paragraphs [148] and [212].

Paragraph (b)(ii) of s 58(3): notice of withdrawal

- [113] “Notice of withdrawal” is not a defined term. Because the notice has to be given before the withdrawal is effected, the term must refer to a notice of intention to withdraw money. No particular form is required for such a notice. However it cannot be that a mere invoice is sufficient. Nothing in the August invoice suggested an intention to withdraw funds from trust. That is not surprising since there were no funds in trust. The invoice was not a notice of withdrawal.
- [114] For this reason also, the August 2007 invoice did not justify the withdrawal under s 58(3) of the Regulation.

The August 2007 invoice: s 58(4) of the Regulation

- [115] Ms King also relied upon the August invoice and ss 58(4)(a) and 58(4)(b)(i) of the Regulation to justify the withdrawal.
- [116] It is unnecessary to examine the proper interpretation of “given” in para (a) of that subsection. It was not suggested that the invoice was provided to Ms Martin in any other way than by being sent to her. I have found that it was not so sent.
- [117] Were that finding wrong, the question would arise whether the August 2007 invoice was a “bill” within the meaning of s 58(4)(a) of the Regulation. “Bill” is not a term defined in the Regulation. However billing is dealt with by Div 6 of Pt 3.4 of Ch 3 of the *Legal Profession Act 2007*. Section 330 provides that a bill may be in the form of either a lump sum bill or an itemised bill. It could not be suggested that the August invoice was an itemised bill.
- [118] To be a lump sum bill it is necessary that the bill describes the legal services to which it relates.²⁹ The description in the August invoice was:

“RE: MATRIMONIAL MATTERS

TO OUR PROFESSIONAL COSTS of and incidental to acting on your behalf in this matter and any and all other sundry matters not herein mentioned, and general care and consideration in your case. This invoice can be itemised if required.

	COSTS	GST	AMOUNT
OUR FEES	65000 .00	6500.00	71500.00”.

- [119] In my judgment that is not a description of the legal services to which the bill related. It follows that the August 2007 invoice was not a bill within the meaning of the Act.

²⁹ *Legal Profession Act 2007*, s 300.

[120] That is enough to dispose of the argument based on s 58(4) of the Regulation in relation to the August 2007 invoice. However I should add that there is no evidence that the invoice complied with s 331 of the Act:

“331 Notification of client’s rights

- (1) A bill must include or be accompanied by a written statement setting out—
- (a) the following avenues that are open under this Act to the client in the event of a dispute in relation to legal costs—
 - (i) costs assessment under division 7;
 - (ii) the setting aside of a costs agreement under section 328; and
 - (b) any time limits that apply to the taking of any action mentioned in paragraph (a).”

My tentative view would be that it would be necessary for a bill to comply with this section in order to be a bill within the meaning of the Regulation. It is unnecessary to decide this point.

The invoices dated January 2008

[121] Ms Martin received two invoices dated 16 January and 17 January respectively by facsimile under cover of a faxed letter dated 26 February 2008.³⁰ As noted above, she swore that these were the first invoices which she received.³¹

[122] Ms King's affidavit regarding these invoices was scarcely more informative than her pleading.³² Ms Beilby did not refer to them at all in her 2008 letter or her 2010 statement. In her affidavit Ms Beilby deposed:

- "14 I am not entirely sure just what happened in relation to the sending of the January and February 2008 accounts to Ms Trueman. Copies of the following documents are exhibited:
- (i) account dated 16 January 2008 without trust account details (page 6 of the bundle);
 - (ii) account dated 17 January 2008 without trust account details (page 7 of the bundle);
 - (iii) account dated 16 January 2008 with trust account details (pages 8-9 of the bundle);
 - (iv) account dated 17 January 2008 with trust account details (page 10 of the bundle).

15 To the best of my recollection:

³⁰ Copies of the invoices are annexed to these reasons for judgment.

³¹ Paragraph [102].

³² Paragraph [55].

- (a) I prepared accounts (i) and (ii) on or about 16-17 January 2008 and left them for the secretarial staff to send to Ms Martin. I cannot now say which member of the secretarial staff was to send them out because there were staff changes at the time and a temporary secretary for a period. However, I am fairly certain that I was told that the accounts were sent with other correspondence to Ms Martin. The professional costs in those accounts amounted to \$88,000.00; that was the figure Mrs King told me in mid-January 2008 was to be charged. The accounts did not include outlays, the amount of which had not, at that stage, been finalised;
- (b) About one month later, the accounts were updated with details of the trust transactions, payment having been received from Ms Martin's former husband by that time. Details of outlays and the narrative describing the work done were also added at that time. Apart from inserting details of the trust transactions, I did not attend to those matters; my only other contribution at that stage was to check and correct a draft list of outlays provided to me by Ms Trueman. After correcting that list, I gave it back to her or to one of the secretaries, for inclusion in the accounts. I did not change the dates of the accounts. The updated accounts, (iii) and (iv), were then sent to Ms Martin.
- 16 It was part of my responsibility to arrange for transfer of funds from trust to general in payment of the firm's accounts. I did not (and could not) effect such transfers myself. I would identify funds available to be transferred from trust and refer them to Mrs King or Ms Trueman for approval.
- 17 In particular, the transfer of funds from trust to pay Ms Martin's accounts would have been authorised by Mrs King after I had told her that the August 2007 and January accounts ((i) and (ii)) had been sent to the client."

In the following reasons I shall describe the documents referred to in para 14 of the affidavit by reference to the subparagraph numbers assigned to each of them in that paragraph.

- [123] January 2008 seems to have been a busy time as far as Ms Martin's matter was concerned. With the sale of his land³³ imminent, Ms Martin's ex-husband lodged a notice of appeal (presumably against the property settlement order) and applied for a stay of that order. Ms Martin apparently applied for an injunction to restrain the release to him of the proceeds of sale and for security for costs. The case regarding contact with the children was ongoing.

Communications between the firm and Ms Martin

- [124] On 18 January Ms Trueman wrote to Ms Martin informing her that it then appeared that settlement of the sale would take place on or around 25 January. She had provided the necessary documentation to the lawyers handling the sale to enable the amount owing to be deducted from the proceeds and on 22 January (apparently her last day at work before a period of leave for an operation) wrote to those lawyers:

“Please confirm by return that on Friday, 25 January 2008 a cheque will be made payable to KL King and Associates in the amount of \$106,720.22 and that the cheque will be available for collection by this firm.”

Matters were then complicated by a demand from the Child Support Agency for part of that money. It seems that that claim was subsequently withdrawn but not until it was too late for fresh cheques to be prepared for the settlement.

- [125] On the day of settlement Ms Beilby made a file note:

“Robin Slipper [solicitor acting on the conveyance for the ex-husband] advised that ... the amount of the settlement cheque would be \$87,389.44, payable to Slipper Lawyers Trust account. I informed Slippers that my understanding was that the cheque would be made payable to KL King & Assoc. and that I would have to get back to him. He responded that if you read the orders it is said that the chq is to be paid to the wife.

Next I spoke to Karen King who advised me to write immediately to Slippers and expressed dissatisfaction with the situation and that the cheque needed to be made out to this firm.

Before I could write anything, Robin Slipper telephoned and I said that Karen was unhappy about the situation and that the cheque should be made payable to us. Robin Slipper said that he was trying to get the cheque details changed and then said he did not appreciate Karen's position and that he was

³³ A factory at Burleigh Heads.

not happy about it and I replied that neither was Karen. RS then hung up on me.

While drafting/faxing our response, a phone message was received from Slippers stating that the settlement chq details had been changed to be payable to KL King & Associates Trust Account.”

Slippers gave an undertaking regarding the future payment of the balance of the \$106,720.22.

- [126] Ms Trueman seems to have returned to work on Tuesday 29 January, the day after the Australia Day holiday and in the succeeding days, both she and Ms King appear to have been working on the file, Ms Trueman dealing with the ongoing court matters and Ms King with Slippers. Part of a file note dated 1 February refers to a telephone attendance on Ms Martin:

“What are the costs – I say doing bill – she says Paid \$5000 to date and all medicals – I say \$ in trust – I'll ensure bill done + finalized”.

The author of the note does not appear to have been identified in the evidence.

- [127] The remainder of Ms Martin's payment, \$19,330.78, was paid into the practice's trust account after it was received from her ex-husband's solicitors on 6 February. Perhaps that stimulated work on the production of an invoice. A memo between two of the clerical staff dated 8 February reads, “Chris needs this invoice amended. You may need to speak with Chris to see what needs to be done as even I am a little uncertain.” Exactly what the amendment was is unclear; the matter was not raised with Ms Trueman in cross-examination.

- [128] On 11 February Ms Martin e-mailed Ms Trueman:

“I refer to our phone conversation in relation to costs & my funds held in trust with KL King, could you please inform me when i might be able to collect my cheque, also could i please remind you when sorting out bill, that i have made some direct payments ..., i have also provided some cash to KLKing, aprox \$5000.00 (i will have to check the exact amount). When looking at my file could you please keep mind that i provided a lot of photo copies myself Don't take this the wrong way as i know & appreciate the work that has been provided for me. Thanks Chris.”

- [129] That e-mail was obviously passed to Ms King, who responded to it on the following day:

“The \$5000 was paid by you – it was paid into general account to cover fees incurred at the start. It is taken into account.

I wasn't actually going to charge you anything at all for photocopying, given the assistance you have given, I thought that wasn't fair!”

Ms King did not suggest that a bill had already been sent to Ms Martin, nor did she seek to correct Ms Martin's apparent belief that Ms Trueman too (or someone in the firm) was “sorting out bill”. Neither did she tell Ms Martin of the withdrawal of \$87,000 from her trust funds.

[130] The invoice was still not ready on 12 February when Ms Trueman wrote to Ms Martin forwarding the trust account receipts, a copy of a progress query made by e-mail to the Federal Magistrates Court regarding the reserved decision on costs and an invoice from the accountant with a request for payment. Ms Trueman did not mention any bills in that letter, nor did she inform Ms Martin that \$87,000 had been taken from the money in trust about two weeks earlier. There is no evidence of whether she even knew of that withdrawal.

[131] Unsurprisingly Ms Martin was keen to get the money. She e-mailed the firm on 20 February, heading the e-mail “ATTENTION KAREN KING”:

"Hi Karen, how are you going? Karen i was wanting to collect a cheque for my funds that have been held in your trust account since 25th January 2008 on my behalf, i have called a number of times enquiring about these funds & also my bill, then i did e-mail you on the 11th Feb asking when i could collect it but i didn't get an answer in the e-mail you sent back, i am heading up your way tomorrow Thursday 21.02/08 [sic] & also on Friday 22/02/08, could i please collect a cheque on one of these days as i figure i could be earning interest on the \$106720.22 that is sitting in trust for me. I know you are busy Karen, so i am sorry to bother you, but as you have mentioned it is likely that we will be awarded costs & looks like a decision is going to be made very soon, hooray! Have you able to complete a bill for me as yet? Sorry Karen but i have waited a long time for this to all be finished, as you have also, thank you & i just really need to use some of this money to move forward. I also note that costs were awarded on our behalf on 11 January 2008 for the amount of \$2375.00, order was made by Magistrate Burnette, so hopefully you will receive this soon, i believe Christine has chased this up via an e-mail to Rider-Bell requesting this be paid on the 19/02/08.

Thanks Karen to you & your staff for your help in my matter."

Ms King did not reply.

- [132] Ms Martin followed up with a phone call on 21 February. The secretary to whom she spoke left a message for Ms Trueman:

“Kerri Martin phoned regarding picking up a cheque tomorrow (Friday). Kerri would like to know by today if she is able to pick up the cheque.”

There is no evidence that Ms Trueman responded to that request.

- [133] On Friday 22 February after 8.00pm, Ms Martin resumed the e-mail correspondence:

“Just chasing a response to my e-mails in regard to my settlement cheque etc i have called your office a few times but no one could update me on this matter, could you please let me know when i can collect this. Thanks Karen, regards from Kerri Martin.”

Next morning³⁴ Ms King did respond:

“Sorry – I assumed everyone else was handling it. I have a trial Monday and Tuesday, but still might be able to fit you in Tuesday if you want to see me. Otheriwise [*sic*] you could see Sue on Wednesday (she has been ill and I don't think she'll be in earlier in the week).”

That evening Ms Martin replied:

“i will call the office Tuesday to arrange somthing [*sic*], can you please just let the girls know what you want me to do & when & with who, thanks Karen.”

- [134] Matters came to a head on 26 February. Ms Martin telephoned the firm and left a message for Ms Beilby: “Kerrie would like to make an appointment to collect the cheque as stated in the e-mail received from Karen.” In the absence of an immediate response, Ms Martin sent an e-mail at about 1.30pm with the subject line “Att Sue & Karen King, Martin funds”:

"I would like to pick up my \$106,000 that you have in trust for me since January 2008, please, i seem to be getting ignored & palmed off when i try to contact you. Given i have never been given a bill, despite me asking for one on many occasions & the fact that i have paid for costs relating to any reports from doctors, land valuations etc directly to these professionals i trust i will be receiving all off or very close to all of my funds, as we await the costs order to be handed down, which Karen you are very confident we will receive in our

³⁴ The message is marked as sent on Sunday, February 24, but that must have been due to an incorrect computer setting. It is plainly part of the same sequence of messages. The incorrect setting persisted in e-mails for some time.

favour. Due to the delay in you releasing my funds, i have become quite concerned for my & my 3 children's money, Karen you wrote a letter for me just late last year which indicated that my out of pocket costs would be very minimal, given this matter settled July 2007 & i have never received a bill, i trust that this will be honoured. i have put many many hours in preparing what was asked of me, in relation to my matter of the past years so to save costs where i could, it has been a full time job for me while raising my 3 very young children whom also have had to make sacrifices & have done without as we await for this matter to be over, we simply want to move on & can't as we need these funds, part of these funds are made up of spousal maintenance, which should have been paid to me on a weekly basis after consent orders were made, the applicant ceased paying this \$150 per week & i continually requested that this be dealt with as he was in breach of the order which would have cost me to obtain from him in the first place, this was not taken back to court but now it has been included in the lump sum settlement, so this money shouldn't even be in this settlement, but it is so i find this delay in payment very wrong, unfare [*sic*] & extremely disappointing.

Could you please settle this matter."

- [135] In her evidence-in-chief Ms Trueman confirmed Ms Martin's claim that she had asked for a bill on many occasions:

"MS TRUEMAN: Well, Ms Martin continually asked me during the time that I had carriage of the file if she could have an interim bill, if I had any knowledge of what her particular costs would be at that particular point, at various points with me dealing with the file and she was quite keen to have me arrange to have a bill sent to her and an interim bill given to her. She repeatedly asked me. I made notes about that and I repeatedly discussed the matter with Ms King, both discussed it orally and emailed her and I recall at one time I also did type a memo and placed it on her desk or her chair, I can't remember, near her computer to ask her to deal with this issue because the client was repeatedly asking me."

- [136] After sending her e-mail, Ms Martin rang the practice. Again she spoke only to a secretary, Natasha, who subsequently made a file note addressed to "Karen/Sue":

"Kerri called RE: her bill and cheque.

Kerri advised she was just forwarded an email directed to both Karen and Sue. I was waiting for this to come up on my computer whilst she was on the phone.

I was handed a letter and 2 bills for Kerri to collect whilst I was on the phone. Sue told me to tell her the amounts and dates of the bills.

Kerri was ropeable and said the dates on the bills needed to be changed to today's date. She feels they are back dated so she would be unable to dispute any discrepancy within the prescribed 30-day period.

I was unable to assist Kerri with her enquiry and advised her of this. She said she could 'fucking hear her whispering in the background'. She was referring to Sue advising me what to tell her in relation to her bill.

She said she needed to speak with someone asap and if her cheque was not ready by 12.00 noon tomorrow (27.02.08) and if someone did not call her by close of business today to confirm this, she would be reporting this matter to the QLD Law Society.

Christine took the call from here."

[137] Ms Beilby reported her version of events to Ms King by e-mail at 2:30pm:

"Tash has spoken to Kerri Martin on phone and informed her that her bills were ready to be picked up.

Kerri was not very happy about receiving bills or the amount and has demanded that either you or I call her back today. I believe that you should call her because Kerri has told Chris that she had had discussions with you about her bill and what her costs would roughly be, and as I am not privy to those conversations and certainly as the bill relates to charges since 2005 and I was not here then, it would be better for you to discuss all of the issues directly with her rather than try and do it secondhand through me.

Kerri has told Chris this afternoon that if you or me did not call her back by close of business today and a cheque for the full amount (some \$106K) is not ready for her to pick up by 12 noon tomorrow, she is going to the Qld Law Society by Friday to make a complaint."

[138] Ms Martin's version is set out in her e-mail addressed to "Karen or Sue" and sent at 2.51pm:

"I refer to my e-mail sent to you both today at 1.30pm 26/02/08 in relation to my funds & Bill, I further refer to my phone conversation with Natasha in your office at 2pm on the

same day, I asked for confirmation that my e-mail had been received & given to both Karen & Sue, an answer was avoided, I asked again to speak with Sue & had been received & given to both Karen & Sue, an answer was avoided, I asked again to speak with Sue & she was busy, I asked if Karen was in the office but she was not, I requested to speak with Chris Trueman & I asked her to please confirm that my e-mail was received, she confirmed that it was, I asked to please ensure that both Karen & Sue received this, she confirmed that she would do. I would like an **itemised** bill immediately please & a copy of the **trust account statement** where my funds are held. I don't believe it is your right to hold my funds for this long without a bill so therefore I would like to collect my money tomorrow at 12.30pm. Unfortunately I will have no choice but to inform the Law Society if my funds are not released to me, so please reply to this e-mail confirming that a cheque will be available for me to collect tomorrow. If you are intending on refusing to release my funds, then an itemised bill & copy of my trust account statement will need to be forwarded on to me immediately.
Regards Kerri Martin" (Emphasis in original)

[139] In the meantime Ms Beilby faxed the two invoices referred to in paras 14(iii) and 14(iv) of her affidavit. She initialled the invoices and covering letter beside the word "per", but nobody signed them. She must have known of Ms Martin's complaint about the dates, but she did not change them. I infer from the terms of the last e-mail that Ms Martin had not received the fax by the time she sent that e-mail.

[140] Ms Martin did not terminate the retainer until early April, and considerable e-mail correspondence between her and Ms King took place in late February and March. At no time did Ms King allege a belief that the invoices sent on 26 February had already been sent prior to 30 January.

The invoices in paras 14(iii) and 14(iv) of Ms Beilby's affidavit

[141] Ms King accepted that she was responsible for the final version of the invoice referred to in para 14(iii) of Ms Beilby's affidavit and also that referred to in para 14(iv):

"PRESIDING MEMBER: You did the bill of the 16th , didn't you?

MS KING: I think I might have done, yes. In fact actually, you're right.

PRESIDING MEMBER: And the style of that bill is quite different from the August one?

MS KING: Very much, yes.

PRESIDING MEMBER: Is that the style you usually adopted for bills?

MS KING: Just let me go back and have a look. I just prefer to be able to comment directly on it.

PRESIDING MEMBER: On some views it might be called a little old fashioned in style but I'm not being a critic in saying that

MS KING: I'm just having trouble turning that bill up.

PRESIDING MEMBER: Page 28 of Ms Martin's is what I'm looking at.

MS KING: Thank you.

...

MS KING: That's exactly how I do a bill.

PRESIDING MEMBER: Whose writing is that on the top by the way?

MS KING: I think Ms Martin's.

PRESIDING MEMBER: And then the next one, while it's a lot shorter, no doubt the professional costs are a lot less but the layout is the same?

MS KING: That's correct, so I would have done that as well."

[142] Two versions of the invoice dated 16 January appeared on Ms King's file. Save in one respect, the first (which no one suggested was ever sent to Ms Martin) was identical to the version of the August 2007 invoice sent for attachment to the submissions to the Federal Magistrates Court – even to the extent of including GST on the filing fee. Like the earlier invoice, it contained no reference to funds in trust.

[143] The one difference between it and the August 2007 invoice was that it contained a narrative of the work for which the professional costs were charged. The narrative was a page long; and it was composed as one sentence with no line breaks and was therefore difficult to read. It was admittedly dictated by Ms King. She insisted in cross-examination that she could not remember when she dictated it. It could not have been dictated before 25 January 2008, since the narrative includes reference to attendance at the settlement of the sale of the Burleigh Heads factory.

[144] The second and final version contained exactly the same narrative and charged the same amount, \$65,000 plus GST, for professional fees. Outlays were increased from a total of \$10,685.05 to \$13,102.61; most of the increase represented further fees owing to Mr McGregor.³⁵ This time trust funds were referred to:

“GST INCLUSIVE TOTAL AMOUNT \$84,602.61

³⁵ The draft also contains a draft table of outlays with notes apparently made by Ms Beilby of items yet to be ascertained. That is consistent with Ms Beilby's evidence that she checked and corrected a draft list of outlays provided to her by Ms Trueman.

Less held in Trust	\$84,602.61
TOTAL AMOUNT OWING	nil
Total amount held in Trust	\$22,117.61 ".

- [145] By contrast with the invoice dated 16 January, there is no draft of the invoice dated 17 January. It shows a sign of having been prepared in haste: The outlays section states only **"(to be supplied in a separate invoice)"**. The narrative section read:

"TO OUR PROFESSIONAL COSTS of and incidental to acting on your behalf in the matter of costs application, contesting the appeal and stay application and related matters, and any and all other sundry matters not herein mentioned, and general care and consideration in your case."

The professional costs charged were \$15,000 plus GST, a total of \$16,500.

- [146] After recording those fees the invoice tabulated the following:

"GST INCLUSIVE TOTAL AMOUNT	\$16,500.00
Less held in Trust	2,397.39
TOTAL AMOUNT OWING	\$14,102.61
Less Discount Allowed	\$14,102.61
Total Amount held in Trust	\$19,720.22."

- [147] Two matters are plain on the face of these two invoices. The first is that they must have been prepared after the receipt of the balance money on 6 February, because they identify the total of \$106,720.22 as being in trust. The second is that the amounts charged for professional fees total exactly \$87,000, the amount withdrawn from trust on 30 January. Given that they were created after 6 February, I infer that the amount of professional fees charged was deliberately aimed at justifying the amount withdrawn.

- [148] Ms Beilby did not suggest that these invoices were sent to Ms Martin before 30 January. Her evidence was that the outlays, the narrative and the details of the trust transactions were added about mid-February. That seems consistent with the chain of communications described above. But Ms Beilby's account of the sending of these invoices contains less than a half truth. She did not simply give the list of outlays back to one of the secretaries for inclusion in the accounts. The accounts in final form were given back to her and she initialled them on behalf of the firm. It was she who faxed them to Ms Martin. She did so with the conscious knowledge that they were wrongly dated and that Ms Martin vigorously objected to this. Her conduct was dishonest. Whether by the time of the hearing her memory was so affected by neurosurgery as to render her unable to remember, I cannot say. It does not matter. Either way, her evidence must be regarded as unreliable where not corroborated by the written record.

[149] Ms King effected an ignorance of the circumstances surrounding the sending of these bills:

"MR MCMILLAN: The following documents in Ms Beilby's affidavit at pages 8, 9 and 10, I would suggest to you, are further drafts of those bills but this time you have inserted the narrations on the 16 January 2008 bill or you have prepared those narrations. You have dictated them in accordance with your usual practice; is that right?

MS KING: I would have dictated them at some time. I don't recall when I dictated them.

MR MCMILLAN: And that would have been done in a matter of logic after Ms Bielby prepared this first version of the 16 January bill on page 6?

MS KING: No, I don't recall.

MR MCMILLAN: Do you accept that?

MS KING: No, I don't recall. I really have no specific recollection.

MR MCMILLAN: And you can see there on page 9 and on page 10 that by the time these versions of the document has come into existence the amounts held in trust have been included in the bills?

MS KING: I can see that.

MR MCMILLAN: So it's those bills that would have been sent to Ms Martin, isn't it?

MS KING: I don't know.

MR MCMILLAN: Well, it was your practice, Ms King. What would you have been directing your secretarial staff to do?

MS KING: I would have thought it would have been more Ms Trueman's directing than I but I don't recall what was sent.

MR MCMILLAN: You say that you prepared the 16 January bill?

MS KING: I prepared that narration but the rest of it I'm not sure of. I have no recollection of some of this.

MR MCMILLAN: Ms King, that's just not true is it?

MS KING: It is.

MR MCMILLAN: You know that these bills weren't sent to Ms Martin until February 2008 after you had taken the money from trust; that's right isn't it?

MS KING: I don't believe that's right.

MR MCMILLAN: And the reason that – they certainly weren't sent on 16 and 17 January 2008, were they?

MS KING: The might not have been, no.

MR MCMILLAN: And the reason that they weren't sent on those dates is because you didn't have the money in trust; that's right isn't it?

MS KING: That's right. Yes, I accept that absolutely."

[150] As noted above³⁶, the references to the money in trust meant that the invoices could not have been created before 6 February. Despite this obvious fact and her acceptance that they could not have been created on the date they bore, Ms King insisted that she had seen them in January:

“MR MCMILLAN: You would have directed Ms Bielby to attend to those matters [sending the invoices]?”

MS KING: No, I don’t know. I literally don’t know. Ms Bielby told me in January that Ms Martin had received the bills.

MR MCMILLAN: And that Ms Bielby told you that Ms Martin had received the bills of 16 and 17 January; is that right? That’s your evidence?

MS KING: She gave me bills which added up to the amount being transferred and I said to her at the time, 'Have these been sent to the client', and she said yes.

...

PRESIDING MEMBER: When did she tell you this? You said a moment ago she told you in the middle of January?

MS KING: I’m sorry, no. It would have been prior to 30 January.

PRESIDING MEMBER: Prior to 30 January she told you?

MS KING: At the time I signed the trust cheque she told me that the client had been sent the bill.”

[151] I reject that evidence. It is inconsistent with Ms Beilby's evidence as to the date of creation of the invoices and with the information contained in the invoices. It is also inconsistent with Ms King's involvement in dealings with Ms Martin, evident from the foregoing chain of communications.³⁷

The invoices in paras 14(i) and 14(ii) of Ms Beilby's affidavit

[152] I do not believe Ms Beilby’s evidence in her affidavit that she left these invoices to be sent to Ms Martin and that she remained “fairly certain” that she was told they were sent with other correspondence to Ms Martin. To do that would have been completely contrary to her normal practice of inserting outlays in invoices before they were sent. Nor do I believe that Ms King told her in mid-January that professional costs to be charged amounted to \$88,000. Had she done so, there was no reason why that amount should not have been charged in one invoice. By the end of her cross-examination Ms Beilby had accepted that these invoices were “just drafts for use for later” and that the completed ones were the ones which would have been sent.

³⁶ Paragraph [147].

³⁷ Paragraphs [129], [131], [133]-[140]. It would also be surprising if Ms King were unaware of Natasha's file note referred to in para [136] and the incorrect dates on the invoices.

- [153] Ms King herself did not suggest she had told Ms Beilby in mid-January that professional costs amounted to \$88,000. That is unsurprising. They were subsequently reduced to \$73,897.39 by reason of the discount, so could hardly have justified the withdrawal. Moreover as the subsequent narrative disclosed, some of the work was not done by mid-January 2008.
- [154] On the contrary, Ms King deposed that in January 2008 she instructed Ms Beilby that \$87,000 was to be billed for costs and disbursements. That did not happen until late February.

The invoices dated January 2008 – conclusion

- [155] I am satisfied that none of the invoices dated January 2008 was sent to Ms Martin before the withdrawal of \$87,000 from trust on 30 January. I note that in her final submissions, Ms King did not submit that a different finding should be made.
- [156] Having regard to that conclusion it is unnecessary to consider whether any or all of those invoices was a bill within the meaning of the legislation.

Conclusion on s 58 of the Regulation

- [157] For the foregoing reasons I find that Ms King did not comply with s 58 of the Regulation before withdrawing the money from the trust account. Consequently she is not entitled to rely upon s 258(1)(b) of the *Legal Profession Act 2007* to justify non-compliance with s 249(1)(b) of that Act.

Honest claim of right and/or honest and reasonable mistake of fact

- [158] In the alternative Ms King relied upon her state of mind as a defence. She submitted:

"32. If the Tribunal were to hold that the accounts had not been received by Ms Martin, the respondent's evidence that she believed they had been sent is relevant. The conduct alleged, if proved, constitutes an offence. The respondent's evidence is sufficient to give rise to common law defences of honest claim of right and/or honest and reasonable mistake of fact."

The relevant law

- [159] It is correct that the conduct alleged against Ms King in this charge constitutes an offence under s 249 of the *Legal Profession Act 2007*. It is a summary offence³⁸ and if she were charged with it she could rely on ss 22

³⁸ *Legal Profession Act 2007*, s 708.

and 24 of the *Criminal Code*.³⁹ She could not rely on the common law defences referred to in the submission. Common law offences have been abolished in Queensland⁴⁰ and save to the extent that they apply in respect of imperial (if any remain) or Commonwealth offences, so have common law defences.

- [160] The proceedings to which Ms King is a respondent are constituted by an application to the Tribunal under s 452 of the *Legal Profession Act 2007*. The application makes allegations which the Tribunal must hear and decide⁴¹, but the Act does not describe those allegations as charges. Indeed it uses the word “charge” in the relevant sense only once, and then in relation to a charge that in certain specified circumstances a practitioner has committed professional misconduct.⁴² The primary task of the Tribunal in hearing an application is to determine whether the practitioner is guilty of professional misconduct or unprofessional conduct. If it finds that she is, it may make orders against her.⁴³
- [161] It is true that in the present case the particulars of the allegations made against Ms King have been grouped under the headings of numbered charges. That is conventional in Queensland, but that convention cannot convert an allegation in a disciplinary application into a charge of an offence.
- [162] It follows that Ms King's belief as to the sending of the invoices is irrelevant, except perhaps to the issue of whether her conduct amounts to unprofessional conduct or professional misconduct.

Ms King's belief

- [163] In any event, I am satisfied that Ms King did not believe that the invoices were sent as she claimed she believed, and that any such belief would have been unreasonable.
- [164] As to the August 2007 invoice, Ms King pleaded that she believed the invoice had been given to Ms Martin on the basis of information provided by Ms Beilby. The latter did not mention providing any such information to Ms King in either her 2008 letter or her 2010 statement. In her affidavit she indirectly alleged the provision of such information in para 17, but I do not accept that paragraph as accurate.

³⁹ *Criminal Code 1899*, s 36.

⁴⁰ *Criminal Code Act 1899*, s 5.

⁴¹ *Legal Profession Act 2007*, s 453.

⁴² *Legal Profession Act 2007*, s 443.

⁴³ *Legal Profession Act 2007*, s 456.

[165] Ms King deposed that when she withdrew the money from trust Ms Beilby had told her that the August 2007 invoice had been sent to Ms Martin. She elaborated on this in cross-examination:

“I did look at the file. I believe it was early January when I instructed in relation to a stay application that had been brought by the husband. He appealed and it was a stay application and I read the file at that time. I saw what was on the file. I saw bills. I saw what had happened in relation to the costs. ... I spoke to Ms Bielby. She told me that she had discussed the bill with the client.”

Shortly after giving that answer she corrected her reference to “bills” to “bill”, and identified the bill which she had seen as the August 2007 invoice.

[166] I do not believe that answer. Ms King herself said that the August 2007 invoice was not a proper bill. She knew it had been prepared for the purpose of attachment to the cost submission. She knew that in August 2007 Ms Martin had no money to pay such a bill. I have already found that Ms Beilby did not discuss the bill with Ms Martin in 2007 and there is no reason to think that she would falsely tell Ms King that she did. In early 2008 Ms King caused the preparation of a new invoice the first draft of which was in identical terms to the August 2007 invoice. Some of her responses in February 2008 to Ms Martin were not consistent with a belief that Ms Martin had received a bill in September or October 2007.

[167] On 5 February 2008, the Law Society appointed an auditor to carry out a trust account investigation of Ms King's firm pursuant to s 264 of the *Legal Profession Act 2007*. There is no suggestion that this was the result of anything untoward. Between 20 February and 13 March the auditor inspected 12 files, one of which was that of Ms Martin. The auditor became aware of the withdrawal from trust made on 30 January. Unfortunately the final correspondence file was temporarily missing and was not produced to him. In so much of the file as was produced there was no evidence of any bills being rendered to Ms Martin. He reported to the Law Society on 26 March advising that the transfer appeared to be contrary to the legislation and requesting that Ms King locate the missing file and advise the Society when it had been located. The Society sent her a copy of the report on 28 March and required her to (among other things) provide the complete file and also a statement from Ms Martin that detailed whether bills of costs had been received and that she did not object to the quantum of those bills by 4 April 2008.

[168] Ms King responded in a lengthy statement enclosed with her letter to the Society dated 7 April 2008. She had evidently recovered the missing file, for she was able to attach the corrected August invoice in the sum of \$73,445.05. Referring to that invoice, she wrote:

“I understood that it was filed with the Court along with submissions in support of an application for indemnity costs. The bill included costs of \$65,000, disbursements and GST. I assumed that it could not, and should not, have been filed without Ms Martin seeing it. I was aware that Ms Martin was extensively involved in the preparation of the cost submission.”

She did not suggest to the Law Society that she believed that the bill had been prepared for any other purpose than the costs application, nor that she believed it had been sent to Ms Martin as an account.

[169] I find that Ms King did not on 30 January 2008 believe that the August 2007 invoice had been sent to Ms Martin.

[170] I have already found that the two invoices which Ms King claimed were sent in January 2008 were not sent until 26 February 2008. Ms Beilby did not say otherwise and it was Ms King who did those bills. She could not on 30 January 2008 have believed that they had been sent to Ms Martin.

Conclusion on charge 1

[171] I am satisfied that on 30 January 2008 Ms King withdrew \$87,000 from her trust account in breach of s 249 of the *Legal Profession Act 2007*.

[172] Charge 1 is proved.

Conclusion on charge 4

[173] It follows from my finding in para [98] that charge 4 is not proved.

Charge 2 – Ms Martin

[174] Charge 2 was:

"Charge Two – Failure to provide itemized account

2. Subsequent to a written request on 28 February 2008, the respondent failed to provide Kerri Anne Martin with an itemised bill of costs within 28 days.

Particulars

- 2.1. The applicant repeats and relies upon particular 1.1 above.
- 2.2. On 26 February 2008, Kerri Anne Martin delivered to the respondent a written request for an itemised account of costs in the matrimonial matter.

- 2.3. Contrary to rule 19.21 of the *Family Law Rules 2004* and s.322(2) of the *Legal Profession Act 2007*, the respondent failed to provide Kerri Anne Martin with an itemised account as requested within 28 days, or at all."

[175] Ms King's response was:

"I deny charge 2.

I admit that I received a written request from Ms Martin on 26 February 2008 for an itemised account. I spoke to Ms Martin a couple of days later. I advised her that I was due to be admitted to hospital for surgery on 2 or 3 March 2008 and expected to be off work for six weeks. I told her that I could prepare an itemised account after I recovered from surgery, but suggested to her that it would be preferable to wait until an order was obtained against her husband in respect of the costs and that I then retain a costs assessor to prepare a costs statement because the costs assessor was likely to produce a higher assessment than I would produce and that would maximise the recovery of fees from her husband. Ms Martin agreed to that recommendation and accordingly, did not require an itemised account at that time."

[176] Both parties approached this charge on the basis that at all material times Ms King was a person entitled to costs and Ms Martin was a person liable to pay the costs.

[177] At the relevant time, rule 19.21 of the *Family Law Rules 2004* provided:

"19.21 Service of lawyer's itemised costs account

- (1) A person entitled to costs must serve an itemised costs account on the person liable to pay the costs within 28 days after:
- (a) for lawyer and client costs — receiving a request for an itemised costs account; ...".

[178] Section 332 of the *Legal Profession Act 2007* relevantly provided:

"332 Request for itemised bill

- (1) If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.
- (2) The law practice must comply with the request within 28 days after the date on which the request is made."

[179] I have set out above Ms Martin's e-mail to Ms King of 26 February containing the request for an itemised account.⁴⁴ Later that day Ms Martin wrote a letter to Ms King in which she repeated her request for an itemised bill. She delivered that letter the following day. There is some confusion about which of the two is the written request referred to in para 2.2 of the particulars of the charge. Given the terms of the particulars and having regard to the submissions of counsel for the Commissioner, I shall deal with the charge on the basis that it refers to the letter dated 26 February but delivered on 27 February.

[180] The only question to be decided is whether, as Ms King alleged, Ms Martin subsequently abandoned (to use the word of Ms King's counsel) the request.

E-mails from late February to early April 2008

[181] It will be recalled that Ms Beilby had urged Ms King to contact Ms Martin and discuss the accounts sent to her on 26 February.⁴⁵ Ms King did so at 7:44pm on 28 February, perhaps intending to allow time for Ms Martin to cool down. She e-mailed Ms Martin, "When is a good time to talk to you tomorrow?"⁴⁶ Ms Martin received the e-mail the following morning and responded at 9:02am, suggesting some times. Ms King did not respond to those suggestions. At 10:28am Ms Martin again e-mailed Ms King:

"... Could you please inform me as to when i might recieve [sic] this Statement of account & an itemised bill. I am also open to discussing this bill with you, in the hope that this bill be changed to a more realistic amount in accordance [sic] to the work done & fees that should be applied, so to settle this matter without further delay or complaints, i am not prepared to delay this matter any longer."

[182] This time Ms King did respond:

"I assumed that we were going to deal with those matters when (as promised) I spoke to you today. I have asked when would be a convenient time to speak with and/or meet with you.

Our position is that we were entitled to take funds from trust on the basis of the conditions set out in the retainer agreement and the September bill. I do, however, wish to discuss that with you."

[183] Ms Martin replied at 4:17 pm:

⁴⁴ Paragraph [138].

⁴⁵ Paragraph [137].

⁴⁶ The e-mail is incorrectly dated – see fn 34.

“Karen i did reply to your e-mail at 9am today, about convenient times to speak today but did not hear from you, i am not home tonight but can be home tomorrow (Saturday 01/03/08) at 4pm if you would like to call then on my home number I have never ever recieved a bill from you or anyone else from your firm, so I don't know where you get this September bill from!!”

At 8:26pm Ms King responded, “Sorry, I didn't see your reply. I will give you a call tomorrow.” She did not explain how it happened that she saw the second e-mail but not the first.

- [184] Eventually arrangements were made for Ms King to ring Ms Martin and she did so at about 5:15pm on Sunday 2 March. Ms Martin made brief handwritten notes of the conversation:

“Karen called on Sunday 2/3/08 5.15 – 5.40 pm. Suggested us talking about Bill, said she would reduce it she would Budge. She will talk to me at end of week she said or get tax assessor for Bill. Shave [sic] Cost of assessor.”

- [185] The next contact between the two women was on the following Thursday, when Ms Martin e-mailed Ms King, “i refer to our phone conversation on Sunday & note that we were to go through my bill this week.” Ms King had been in hospital and did not feel well enough for a meeting. Eventually the meeting was scheduled for 13 March but Ms King cancelled at the last minute. The meeting was rescheduled for Monday 17 March. Again Ms King cancelled and rescheduled the meeting for Wednesday 19 March. Whether it then took place is unclear. It was not again referred to in e-mails.

- [186] Further e-mail correspondence took place regarding the pending custody litigation and the appeal by Ms Martin's ex-husband against the property order. It seems that both matters were likely to come to court in April. A meeting took place regarding the custody matter, apparently on Monday 31 March. It seems to have been agreed that Ms King would prepare an affidavit for Ms Martin for use in those proceedings. Apparently the question of costs was also discussed. On Tuesday 1 April Ms Martin e-mailed Ms King:

“Hi Karen, could you please inform me as to whether you are preparing an affidavit for me in relation to children's matters, which is set down for interim hearing next Thursday, the 10th April 2008, you suggested on Monday that you were considering not acting for me after this hearing was over, due to my not agreeing with the bill i recieved on 26/2/08 from you, as time is of the essence i would appreciate it if you could confirm that you are acting for me in this matter by e-mailing me the affidavit you mentioned you were going to

prepare. If you are not going to act for me could you please inform me by end of today so i can seek other legal representation to prepare for this matter”

[187] Ms King responded in high dudgeon:

“I said no such thing. I in fact stated to you that there was no way that I would not act for you at the forthcoming hearing. I did not say that I would complete the affidavit that day – you might be surprised to learn that I do have other clients.

I said that I was not prepared to say to the Court that a bill was a reasonable one where you were of the view that it was not. I find your apparent intention to try to make a profit from the costs application of considerable concern. Please refrain from deliberately misrepresenting what I say. I would have thought that given all of the effort I have put in on your behalf over the last two years a modicum of respect would have been appropriate. I do not adopt a policy of leaving people unprepared and have never been anything but fully prepared in your matter.”

[188] Unsurprisingly that led to a further deterioration in relations. Ms Martin replied:

“Read my e-mail properly Karen & you will read that I said AFTER THE INTERIM HEARING you were considering not acting for me, which you did say. Where in my e-mail did i say i thought you were going to prepare & finish my affidavit that day, however you did inform me that you felt it needed to be done by Wednesday (your words not mine). i have no idea what you mean in relation to profits, re costs, other than, things you have advised me of, you are the lawyer Karen not me. I find your accusation & efforts to intimidate me offensive! All i asked for was an itemised account & a copy of the trust fund account as i do not agree with the bill. In relation to the costs, from my view, really can't get much worse, as you have retained my money. ... The costs order is of absolutely no concern to me, why would it be, in fact i don't know why you even mentioned it, it is your bill that i would like itemised please, i met with you to talk about defending my daughter as she is my priority!”

[189] On the following morning, 2 April 2008, Ms Martin terminated the retainer, writing that she was “greatly concerned about your comments & the ongoing bill dispute & have now lost all trust & faith in you”.

The evidence of the protagonists

[190] Ms Martin made an affidavit which, remarkably, was undated, but which was apparently filed on behalf of the Commissioner on 25 February 2011. She dealt with this charge in two sentences:

- “20. I did not enter into any agreement with the respondent to delay the production of an itemised account.
21. I confirm that at the time of affirming this affidavit I have not received and [*sic*] itemised account of the tax invoices from the Respondent.”

She did not deal with any of the detail of the conversation alleged in Ms King's Response⁴⁷. Even when she testified she was not asked about whether she had spoken to Ms King in late February, nor about the actual conversation which Ms King had pleaded. Indeed it seems that she did not seriously turn her mind to that conversation prior to her cross-examination.

[191] Her cross-examination proceeded:

“MR DAVIS: And I suggest you then [26 February] had a conversation with Ms King around about that time, perhaps a couple of days afterwards?

MS MARTIN: There was a conversation.

MR DAVIS: And she told you that she was due to be admitted to hospital for surgery?

MS MARTIN: I don't remember that.

MR DAVIS: And that she told you that she could prepare an itemized account after she recovered from the surgery; remember her telling you that?

MS MARTIN: No.

MR DAVIS: And suggested to you that it would be preferable to wait until an order was obtained against your husband?

MS MARTIN: I remember she – her office, I went into her to actually discuss children's matters because we were due to go to court in about a week's time and I went in there to meet with her in relation to an affidavit that she was supposed to be preparing for children's matters and she gave me a choice of she could prepare an itemized account or she could have the file assessed but it would be at my expense and it would hold things up in relation to the costs order and getting money back or we could wait and I just said, 'No, I just want my costs order and pretty much I'm here to discuss about my daughter.'

MR DAVIS: I suggest you're wrong about that. I suggest that she said to you that it would be preferable to wait until an order was obtained against your husband in respect of the

⁴⁷

Paragraph [175].

costs and then she would retain a costs assessor to prepare a costs statement; that was said wasn't it?

MS MARTIN: I don't agree. I told her what I wanted and that was an itemized account because I didn't trust her. I'd lost all trust in her."

[192] Counsel for Ms King did not suggest that the conversation he was putting occurred by telephone, and I am satisfied that Ms Martin was not here referring to any conversation in late February. The reference to being in Ms King's office to discuss children's matters which were due to go to court in about a week's time strongly suggests she was thinking of the meeting which apparently took place on 31 March.

[193] Later in the cross-examination the following exchange occurred:

"MR DAVIS: But as at 6 March, I suggest to you, you agreed that there would be no itemized bill and you agreed to sit----

MS MARTIN: No.

MR DAVIS: And you'd agreed to sit down and go through the bill that you'd already gotten?

MS MARTIN: Not once did I agree not to have an itemized account.

...

MR DAVIS: That agreement occurred on the telephone, I suggest to you, after a discussion where Ms King said to you that it might be best to wait until the proceedings were brought against your husband to recover the indemnity costs; that's what happened wasn't it?

MS MARTIN: I've already said no."

[194] Ms King too was less than expansive about charge two in her affidavit:

"30. I accept that on 26 February 2008, the firm received a written request from Ms Martin for an itemised account. My recollection is that I saw the request a day or two later and then telephoned Ms Martin and spoke to her. I advised her that I was due to be admitted to hospital for surgery on 2 or 3 March 2008 and had been advised by my doctor that I would need to take six weeks off (though I was, in fact, unable to leave the practice for the whole of that time).

31. I told Ms Martin that I could prepare an itemised account after I recovered from my surgery, but suggested to her that it would be preferable to wait until an order was obtained against her former husband in respect of the costs and that I would then retain a costs assessor to prepare a costs statement because the costs assessor was likely to produce a

higher assessment than I would and that that would maximise the recovery of fees from her former husband. Ms Martin agreed to that recommendation and accordingly, did not require an itemised account at that time.

32. I also offered to meet with Ms Martin to discuss the account when I was able to do so, but as matters turned out, that discussion did not take place. So far as I am aware, there were no further requests made by Ms Martin for an itemised account after 26 February 2008."

[195] That wording closely follows the form of her Response. It will be observed that Ms King does not specifically allege that Ms Martin abandoned her request. She says that Ms Martin agreed to the recommendation to wait until an order was obtained against her former husband. Her conclusion was that "accordingly, [Ms King] did not require an itemised account at that time". Those words are not attributed to either party to the conversation.

[196] As the foregoing passage shows, that firmed up by the time of the trial. Counsel put it to Ms Martin that she agreed that there would be no itemised bill and that she would sit down with Ms King and go through the bill she had already received. Ms Martin denied the former suggestion. The question was no mere mistake by the cross-examiner, as Ms King's cross-examination made clear. In answer to the question "You didn't enter into any agreement with her to not produce an itemised bill, did you?", she testified:

"I absolutely did and had I thought that she still required an itemised bill I would have sent it to Hartwells or somewhere like that. I absolutely entered into that agreement with her. She was happy for me to just go through it with her."

The Law Society audit

[197] I have referred above to the audit conducted on behalf of the Law Society between 20 February and 13 March 2008. Ms King must have been aware of that audit and also of the auditor's request for copies of accounts sent to Ms Martin to justify the withdrawal of \$87,000. By the time relations between her and Ms Martin deteriorated towards the end of February, she must have been conscious of the sensitivity of this issue.

Findings

[198] Ms King knew when she telephoned Ms Martin on 2 March that she was dealing with a very disgruntled client. Solicitors with far less experience than Ms King would be aware of the need to record such an important agreement in writing in such circumstances. Moreover at that very time the

audit was in progress and the auditor was seeking documentation to justify the withdrawal. Despite all this she wrote no confirmation letter and (as I find) made no file note of the alleged agreement.

- [199] There is no corroboration of Ms King's testimony in the correspondence. On the contrary Ms Martin's second e-mail on 1 April is inconsistent with her having abandoned her request.
- [200] Ms King agreed in cross-examination that she was also aware that she had 28 days to produce an itemised bill of costs. She testified that had Ms Martin not agreed she would have sent the file to a costs assessor. She must have known that she would have had to pay for the assessment herself.⁴⁸ The firm had no system for time costing and the number of file notes was limited⁴⁹, so the exercise would not have been easy or cheap. Her original intention had been to share the cost of the assessment with the other side.⁵⁰
- [201] I make no finding as to the precise content of the telephone conversation of 2 March 2008. Possibly Ms King said something to Ms Martin about having the bill assessed after a costs order was obtained against her ex-husband. It would certainly have been in Ms King's interests to have done so. Whatever was said was not enough to convey to Ms Martin the idea that she was to abandon her request. Such an important matter would have to be spelt out very clearly by a solicitor to a client, particularly one like Ms Martin who was not a good listener.
- [202] I find that Ms Martin did not abandon her request for an itemised bill.

Conclusion

- [203] Charge two is proved.

Charge 3 – Ms Martin and the Queensland Law Society

- [204] Charge 3 as amended was:

"Charge Three – Failure to fulfil representation to QLS

3. On 7 April 2008 and thereafter, the respondent failed without reasonable excuse to fulfil a statement of her intention made to the Queensland Law Society in the course of the investigation of a complaint pursuant to the *Legal Profession Act 2007*.

⁴⁸ *Legal Profession Act 2007*, s 332(6).

⁴⁹ Paragraphs [88]-[89].

⁵⁰ Paragraph [79].

Particulars

- 3.1. The applicant repeats and relies upon particulars 1.1 to 1.3 above.
- 3.2. On 4 April 2008, Kerri Anne Martin made a complaint to the Legal Services Commissioner about the conduct of the respondent.
- 3.3. In the course of the investigation of that complaint pursuant to the *Legal Profession Act 2007* the Queensland Law Society required a response from the respondent in relation to matters including those referred to in Charge 1 above.
- 3.4. In correspondence dated 7 April 2008, sent to the Queensland Law Society in the course of the investigation, the respondent stated[:]
 'Given the fact that she (Ms Martin) says she did not see the bill, I will return the costs (i.e. not disbursements) component of the funds transfer from general back to trust in the next three days pending the provision of the account and consequent taxation.'
- 3.5. The costs component of the funds transfer, namely \$87,000.00, was \$71,500.00.
- 3.6. On 7 April 2008, the respondent deposited the sum of \$45,000 to a trust account kept for Kerri Anne Martin.
- 3.7. The respondent did not over the following three days or at all return any further monies to trust to be held for Kerri Anne Martin." (Emphasis in original)

It was not alleged that the statement of intention amounted to an undertaking or promise and the Commissioner expressly disclaimed any allegation of dishonesty.

[205] To that charge Ms King responded:

"I admit that I did not transfer the amount of the costs charged to Ms Martin into my trust account within three days in accordance with my intention as stated in the letter dated 7 April 2008, but transferred only the sum of \$45,000.00."

She did not submit that as particularised, the charge was incapable of amounting to even unprofessional conduct, and the Tribunal does not need to consider that question.

[206] The terms of Ms King's letter to the Society are, as far as is relevant, set out in the charge, and are not disputed. Indeed none of the particulars of the charge was in dispute, save for the element comprised in the words "without reasonable excuse".

[207] In her first affidavit, Ms King deposed:

- "33 Ms Martin made complaint to the applicant on 4 April 2008 and shortly thereafter, my complete file was provided to the Queensland Law Society as its request.
- 34 At the time Ms Martin made her complaint about my accounts, I formed the view that it would be advisable to reverse the transfer of her funds from trust insofar as that transfer related to my professional costs (an amount of \$71,500.00). I therefore wrote to the Society and advised that I intended to do so. The Society did not require the re-transfer, I volunteered to do so.
- 35 It was my intention at the time of writing to the Society to transfer the amount of \$71,500.00 back to trust. I did, in fact, transfer the sum of \$45,000.00 back to trust the same day.
- 36 However, I had expected to be able to borrow the balance (\$26,500.00) from Impact Funding on the security of my assets, but was unable to do so because Impact was not prepared to make the advance.
37. I did not thereafter make any further transfer back to trust because I was very confident that I had already re-transferred a sum well in excess of any amount I could possibly be thought to have overcharged."

[208] In her third affidavit, she deposed:

- "2 Prior to my writing to the Society on 7 April 2008, I had discussed with my brother, Keith King, borrowing from him the shortfall between the funds I had available to make the payment (\$45,000.00) and the amount charged for my professional fees (\$71,500.00).
- 3 Keith had turned 60 on 29 February 2008. He told me that he was willing to lend me the shortfall of \$26,500.00 and that he was able to obtain that sum by accessing the funds held in his superannuation account. It was on that basis that I wrote to the Society.
- 4 However, a short time later, Keith told me that in fact he was unable to access the superannuation funds and that he was therefore unable to make the loan."

[209] On 16 April 2008 Ms King e-mailed an officer of the Society:

“I have transferred the sum of \$45,000 to my trust account today and will transfer the remainder as soon as possible. I did not have the funds in my general account to transfer and needed to have personal funds released to enable me to do this. Unfortunately, this took longer than I would have contemplated. (My husband's estate is going through probate and I did not realise the implications of that.)”

She in effect repeated this in her letter to the Society on 21 May 2008. She deposed without contradiction that the Society did not object to that course or require that she pay any further amount into trust.

[210] Ms King never did transfer the \$26,500. It should be emphasised that this occasioned no loss to Ms Martin, as the amount owing by her to Ms King for professional costs well and truly exceeded that amount.

[211] In her third affidavit Ms King described a number of options available to her to raise the money and the attempts which she made to do so. One was:

"5 At that time, I was expecting the imminent settlement of a de facto property matter from which I would receive payment in respect of my costs in excess of \$26,000.00 and accordingly, when the loan from Keith was not available, I proposed to use those funds. However, the matter did not settle at that time."

In cross-examination she testified that she could not remember the name of the client, nor did she have a specific recollection of the figure of \$26,000.

[212] Confronted in cross-examination with the glaring improbability that she might have received more than \$26,000 in fees within three days of settlement of a property matter, Ms King resiled from what she had sworn:

“MR MCMILLAN: At paragraph 5 of the affidavit you say you’re expecting the imminent settlement of de facto property matters?”

MS KING: A de facto property matter.

MR MCMILLAN: Sorry, of a de facto property matter. That was as at 7 April 2008 that you were expecting that imminent settlement were you?

MS KING: Yes.

MR MCMILLAN: So is your evidence that you were expecting that to settle between 7 April and 10 April 2008?

MS KING: I think I was hoping that it would or that the client would get funds. Settlement is probably an incorrect word to use. I think I was hoping that the client would have funds, whether from impact or directly from her, but I really expected to get it from her brother.”

If the issue were whether Ms King honestly held the intention which she asserted in her letter, that would be damaging evidence. That is not the issue raised by the charge as framed. Apart from damaging Ms King's credibility, both para 5 of her affidavit and the cross-examination were probably irrelevant.

- [213] The Commissioner submitted that none of them raised a reasonable excuse for her failure to fulfil her statement of intention. I disagree. Whatever her evasions and fudging it is perfectly plain that Ms King did not have the money to carry out her stated intention. Even supposing she was under some sort of professional duty to implement her stated intention in the absence of some reasonable excuse not to do so, not having the money is a reasonable excuse.

Conclusion

- [214] Charge 3 is not proved.

Charge 6 – Legal Services Commissioner

- [215] Charge 6 was:

"Charge Six – Failure to comply with s. 443(3) Notice

6. The respondent, without reasonable excuse, failed to comply with a written notice issued by the Legal Services Commissioner ('the Commissioner') pursuant to s.443(3) of the *Legal Profession Act 2007* ('the Act').

Particulars

- 6.1. At all material times, the respondent:
- (a) was an Australian Legal Practitioner;
 - (b) engaged in legal practice as a sole practitioner under the name of K.L. King & Associates.
- 6.2. On or about 28 May 2008, Jason Reid, a client of the respondent, complained to the Legal Services Commissioner about the conduct of the respondent.
- 6.3. By letter dated 19 June 2008 the Legal Services Commissioner requested the respondent's written response to the complaint by 4 July 2008.
- 6.4. The respondent did not respond to that letter by 4 July 2008 or at all.
- 6.5. By letter dated 21 July 2008 the Legal Services Commissioner required the respondent pursuant to s.443(1) of the *Legal Profession Act 2007* to give an

explanation of matters arising from the complaint by 1 August 2008.

- 6.6. The respondent did not respond to that letter by 1 August 2008 or at all.
- 6.7. By letter dated 21 August 2008, the Commissioner gave the respondent written notice pursuant to s.443(1) of the *Legal Profession Act 2007* that she may be dealt with for professional misconduct if her failure to provide the explanation as required continued for a further 14 days, namely beyond 4 September 2008.
- 6.8. The respondent failed, within the 14 day period specified in the Notice, to comply with the requirement to give to the Commissioner the requested explanation and failed to provide the Commissioner with a reasonable excuse for not complying with the requirement within that period."

[216] Ms King's response was terse:

"I deny charge 6 because I responded to the letter dated 19 June 2008 by letter dated 2 July 2008."

That was an unhelpful pleading. It did not reflect well on those involved in creating it. It should not be necessary for this Tribunal to have elaborate rules or directions as to pleadings in order to enable the true issues to be identified, particularly in cases involving professional discipline of lawyers. In the event, it emerged that Ms King had not yet decided what her response to charge 6 should be. Asked at the beginning of the trial what Ms King's response was, her counsel responded, "I need to take further instructions on that matter and I can do that quickly." However after conferring with Ms King, counsel informed the court, "Your Honour, it seems that I need a longer time than I originally thought in order to get my instructions on this charge and I can do that over the luncheon adjournment."

[217] In the event, Ms King tendered an amended Response immediately before the evening adjournment. It represented a distinct improvement, but could hardly be called satisfactory:

- "6.1 - 6.3 Admitted.
- 6.4 Denied because I responded by letter dated 2 July 2008.
- 6.5 I do not know whether or not I received the letter dated 21 July 2008 and therefore do not admit the allegation.

- 6.7 I do not know whether or not I received the letter dated 21 August 2008 and therefore do not admit the allegation.
- 6.6 - 6.8 I admit that I did not write to the LSC about Mr Reid subsequent to 21 July 2008."

At that stage there was no suggestion that any further evidence would be led.

[218] By a formal complaint dated 28 May 2007 Mr Reid listed the aspects of Ms King's conduct about which he was complaining:

"The bill is huge for the work undertaken, which was to write one letter. Included in this are fees for a barrister. I never gave permission for Ms King to instruct. Ms King lead me to believe (deliberately in my opinion) that her services on this occasion would be at no cost as have some of her services on previous occasions. Then a few weeks later, I receive the bill, which Ms King has refused to discuss. She is now suing me for this account."

He had been charged \$3,865, comprised of \$2,200 for Ms King's fees and \$1,650 for counsel's fees for:

"acting on your behalf in this matter, including attendance on you to obtain instructions drafting statement and e-mails with your instructions to counsel receipt and perusal of statement from yourself and counsel and preparation of final draft with counsel's assistance and your assistance forwarding final draft to centrelink all due care and consideration exceeding but say [\$3865]."

Correspondence between the parties

[219] By letter dated 19 June 2008, written under s 437 of the *Legal Profession Act 2007*, Ms King was asked for a response to the following by 4 July:

- "1. What were your firm's instructions from Mr Reid? Please provide copies of any relevant documents or correspondence.
2. Was a cost agreement entered into with Mr Reid? If so please provide a copy or in the absence of an agreement please provide the basis of your charges.
3. On what basis did your firm retain counsel? Please provide a copy of any instructions in that regard."

[220] In her first affidavit Ms King deposed:

"45 I deny that I failed to respond to the letter dated 19 June 2008 from the Applicant because I replied by

letter dated 2 July 2008, a copy of which is at page 33-34 of the bundle.

46 I believe that the letter was sent in the normal course and am not aware of any reason why it would not have been received by the Applicant."

It is unnecessary to quote the contents of the letter dated 2 July 2008 which was exhibited to the affidavit. It suffices to say that if true, the explanation exonerates Ms King. At that stage that was the totality of her evidence on charge 6.

[221] Ms Campbell, an investigator with the Commission, deposed that she had caused searches of the Commission's physical and electronic files to be conducted and that no letter dated 2 July 2008 concerning the Reid complaint was received from Ms King. As noted above⁵¹, Ms Campbell was not required for cross-examination.

[222] The Commissioner not having received any response from Ms King, an employee telephoned her office on 11 July. Ms King's receptionist told her that Ms King was away; that she could not tell her when Ms King would return; and that no one was handling her matters in her absence. Ten days later, with still no response received, the Commissioner wrote again to Ms King:

"... I **enclose** a copy of my previous letter for your ease of reference.

I note that to date you have not responded.

Accordingly I now require you, pursuant to section 443(1)(a)(i) of the *Legal Profession Act 2007* (the Act), to provide me with the explanation I am seeking and to do so at your earliest convenience or by Friday, 1 August 2008.

...

Please note that the Act obliges you at section 443(2) to comply with my requirement and provides at section 443(3) that you may be dealt with for professional misconduct if you fail to do so within the stated time frame." (Emphasis in original)

[223] Again the Commissioner did not receive a response. Again he wrote to Ms King:

"...

⁵¹

Paragraph [89].

I note that you have failed to comply with the direction I gave you in the second of those letters to provide me with a full explanation of the matters subject to my investigation.

Accordingly, I hereby give you written notice pursuant to section 443(4) of the *Legal Profession Act 2007* that you may be dealt with for professional misconduct if your failure to comply with that direction continues for a further 14 days – that is to say beyond 4 September 2008.

Please note that the Act provides at section 443(4) that you will be taken to have committed professional misconduct if you fail without reasonable excuse to provide me with the explanation by that date.” (Emphasis in original)

[224] Yet again no response was received. On Ms King's instructions, a paralegal employed by her wrote to the Commissioner on 27 October advising that Ms King had been ill, that she was currently in a trial but that she would respond to the correspondence “next week”.

[225] There was no such response. However on 5 December 2008 Mr Bartley, Ms King's solicitor, sent the Commission an e-mail enquiring if it had Ms King's letter to LSC dated 2 July 2008. As the Commissioner promptly informed Mr Bartley, it did not. His request for a copy of the letter went unanswered. I infer that this was because Mr Bartley did not have a copy.

[226] There the matters stood at the close of the Commissioner's case part way through the afternoon on the second day of the hearing. At that point counsel for Ms King sought leave to read and file Ms King's third affidavit, sworn that day. The inference that this affidavit was sworn in order to provide some evidentiary foundation for the amended Response is irresistible. Ms King deposed:

"14 I am unable to say with any certainty whether or not I received that notice or the earlier letter dated 21 July 2008 from the applicant.

15 I had, at that time, retained my current solicitor, Mr Bartley, to act on my behalf in relation to various matters which had been raised by the Queensland Law Society and by the applicant. I would expect that, had I received such correspondence from the applicant, then I would have referred it immediately to my solicitor. I have checked with Mr Bartley and been advised that he did not receive either of those letters from me (or direct from the applicant.)

16 Further, there were a number of matters being investigated by the Society and the applicant at about that time and I was always conscious of the need to

respond to correspondence within time limits and either did so or requested extensions. I therefore believe that it would have been out of character and inconsistent with my practice to ignore this particular correspondence.

- 17 For those reasons (and also because I do not remember receiving that correspondence, nor do I have it on my files), I think it is likely that I did not receive that correspondence."

She went on to depose that she was depressed and sleepwalking during 2008, and asserted that she "was not working at an efficient level during the relevant period and it is possible that I overlooked the correspondence, though it is not my belief that that was the case."

- [227] In making that affidavit Ms King was obviously adopting a low-profile strategy. The evidence against her raised a number of questions about the events which preceded and followed those constituting the elements of the charge. Ms King's explanations had to be extracted during cross-examination.

Cross-examination

- [228] The first question arose from the telephone call on 11 July. Ms King's receptionist had said that she was away. Was she? Ms King did not know. She had overlooked the file note when she made her affidavits. She read the note for the first time the evening before her case in this hearing had opened. The message had not been passed on to her. Nonetheless, she had not looked in her diary to determine where she was on 11 July.

- [229] Ms King said she was definitely ill in July 2008. Asked the details she said she was still having difficulties arising out of the birth of her baby in September 2007. She "was quite ill off and on". She did not take planned time off but nonetheless would have been off for "perhaps a week, two weeks, something like that". A little later, somewhat contradictorily, she said that she would not have left her office for a week without a qualified person there because she would come and go and was always contactable by telephone. She lived upstairs from the office and her clients were given her mobile telephone number to contact her if necessary:

"PRESIDING MEMBER: And no one was appointed to look after your matters while you were away?

MS KING: No, they would contact me and ask me. As I say, I'd reduced my workload quite substantially.

PRESIDING MEMBER: Did you tell them before you left how long you would be away?

MS KING: No, I didn't.

PRESIDING MEMBER: So you just left the office without saying how long you'd be and without appointing anyone to run your affairs?

MS KING: No, because I was still very contactable at all times."

The receptionist, "Melanie", who took the message would have known this.

[230] Why then, one wondered, was she not contacted?

"PRESIDING MEMBER: That seems a little improbable in that she would not attempt to contact you?

MS KING: Not with that particular member of staff.

PRESIDING MEMBER: Well, if you knew that that was a person that couldn't be relied upon, surely you would have put arrangements in place to ensure you would be contacted; not much use saying you're contactable if you know that the person is not reliable?

MS KING: I didn't know at the time that she wasn't reliable. Her employment was terminated a short time later."

Unfortunately Ms King could not remember Melanie's surname, although she conceded that her office records would contain it.

[231] Ms King could not remember if she was still ill around 21 or 22 July and she had made no effort to find out. Her testimony regarding her illness in July 2008 was completely uncorroborated, despite the assertion in the letter to the Commissioner dated 27 October 2008 that she had medical documentation to support it.

[232] The next undisputed contact was the Commissioner's letter of 21 July 2008. In her affidavit Ms King deposed that she was "unable to say with any certainty whether or not" she received it. That evidence changed somewhat in cross-examination:

"MR MCMILLAN: So it's possible is it that you did receive it and you just don't recall that now?

MS KING: It's not possible that I received it before because I would have acted on it because of course – and moreover would have passed it on to Mr Bartley and he just told me he doesn't have it, but it's still possible that it came into the firm and I didn't see it, that's correct."

Her staff would not open mail marked "Private and Confidential" (as this letter was). The letter should have been passed to her but it was not. Counsel for the Commissioner asked about the situation:

"MR MCMILLAN: Ms King, can I ask you this; there were no problems or were there any problems with mail delivery at your office in July and August 2008?

MS KING: There was with that particular staff member, yes. What she would do with mail and also sending mail out there were issues.

MR MCMILLAN: And have you put that in your affidavit that one of the reasons that you didn't respond might have been that this unreliable secretary didn't give you mail?

MS KING: I think I did put that in.

MR MCMILLAN: Can you take us to that paragraph?

MS KING: Well probably but I don't know that it's here. I don't know that it's in my affidavit but I think it may be in correspondence.

PRESIDING MEMBER: I thought that was what you were asked if you put it in your affidavit?

MS KING: No, I'm sorry; it's not in my affidavit. I think it is in other correspondence though.

PRESIDING MEMBER: Why didn't you put it in your affidavit?

MS KING: I don't know, your Honour.

PRESIDING MEMBER: What correspondence is it?

MS KING: I would need to find it. It's in my record but I would have imagined I would have done."

[233] Nothing in any of the materials put before the Tribunal by the Commissioner suggested that Ms King had informed him or his offices of a problem with her office mail. The Tribunal therefore adjourned to allow Ms King the opportunity to search for the missing correspondence.

[234] Upon the resumption things took a new turn:

"PRESIDING MEMBER: Well, Ms King, how did you go?

MS KING: Your Honour, I asked Mr Bartley to see if he had it – I can't find it on my records. I actually believe that I did receive the letter of 21 August because I think that's when I became aware that the Law Society hadn't received the earlier letter, the earlier time I'd sent it, and I think it was in my correspondence to them around that time because, your Honour, I initially said that I thought that I had given it to a member of staff to send.

PRESIDING MEMBER: Well you haven't found anything in your file?

MS KING: No, but I've asked Mr Bartley. I'm fairly sure Mr Bartley has something.

MR DAVIS: Your Honour, that's why Mr Bartley is not here.

...

MR MCMILLAN: Thank you, your Honour. So just to be clear it's now your evidence that you did receive the 21 August 2008 letter?

MS KING: I think I must have and I apologise, Mr McMillan, because it was the way I found out they hadn't received the earlier letter, so I must have received that letter. I can't see how else I would know and I certainly became aware that they hadn't received the 2 July letter at some stage later that year, so it seems to me that that must have been the way I found out because I then did write back and send a letter. Logically, that sounds correct and it was in that response along with the letter that I believe that I would have said, "Look, I think it was a staff member that I gave it to and that really wasn't good enough and she probably didn't send it as requested."

...

MR MCMILLAN: It's all right; I'll ask you to clarify it. Are you saying that there is another letter in existence where you acknowledged that you received the 21 August letter; is that right?

MS KING: I don't specifically recall but what I'm saying is that I did become aware later that they hadn't received my 2 July letter and I wrote and I actually said when I re-sent the letter saying, 'Look, I think this is my fault. I gave it to member of staff to send and perhaps she hadn't sent it after all', so I clearly remember that letter. I've asked Mr Barley to find it.

...

PRESIDING MEMBER: When you say when you re-sent that when did you re-send it?

MS KING: Later that year and that's why I'm saying I think I just received that letter of 23 August. I must have found out---

PRESIDING MEMBER: When you say later that year do you mean you re-sent before you got the letter of 21 August or after?

MS KING: No after, your Honour.

PRESIDING MEMBER: After?

MS KING: It would have been after, yes.

PRESIDING MEMBER: And I presume by then you would have also shown him [Mr Bartley] the letter of 21 August?

MS KING: I must have done."

[235] By the end of Ms King's re-examination, Mr Bartley had returned to the hearing room, but nothing further had been said about the searches he had carried out. I enquired of counsel:

"PRESIDING MEMBER: Now, I don't know whether you're proposing to put any evidence in through Mr Bartley but I don't think it would be necessary for him to be called if there are any documents that he's found as a result of his search. It would more quickly be done by putting it through this witness.

MR DAVIS: There's nothing we wish to tender through this witness."

Ms King was then stood down.

Section 443 of the Legal Profession Act 2007

[236] Section 443 of the Legal Profession Act 2007 relevantly provides:

"443 Powers for investigations

- (1) The entity carrying out an investigation as mentioned in section 435 or 436 may, for the investigation—
 - (a) require an Australian legal practitioner who is the subject of the investigation—
 - (i) to give the entity, in writing or personally, within a stated reasonable time a full explanation of the matter being investigated; or

...
- (2) Subject to subsection (6), the Australian legal practitioner must comply with a requirement under subsection (1)(a).
Maximum penalty—50 penalty units.
- (3) If the practitioner fails to comply with the requirement, the entity may give the practitioner written notice that, if the failure continues for a further 14 days after the notice is given, the practitioner may be dealt with for professional misconduct.
- (4) If notice under subsection (3) is given and the failure continues for the 14 day period—
 - (a) the Australian legal practitioner is taken to have committed professional misconduct, unless the practitioner has a reasonable excuse for not complying with the requirement within the period; and
 - (b) the commissioner may apply to the tribunal for an order in relation to the charge that the practitioner has committed professional misconduct as stated in paragraph (a) as if the application were an application in relation to a complaint against the practitioner."

[237] Ms King did not challenge the validity of the notice given by the Commissioner in his letter of 21 August 2008 as a notice under s 443(3), nor did she submit that she complied with the requirement in it in the time specified. Her case seemed to be that she had a reasonable excuse for non-compliance in that she had asked a member of staff to resend her letter of 2 July 2008 once she received the notice. Her physical and mental state contributed to her lack of oversight.

Findings

- [238] I have no doubt that the letter of 2 July 2008 is a concoction. There are multiple reasons for that. Until the first day of the hearing, when she was required to concentrate her mind on giving proper particulars in her Response, her defence, the only one which she put forward, was that she had not failed to comply with the requirement in the letter of 19 June 2008 and therefore s 443(3) was not engaged. The suggestion contained in her third affidavit, sworn on the second day of the hearing, that she had not received the letters of 21 July and 21 August was a fabrication. It is incredible that she did not raise this possibility in her first affidavit in June 2011, or by correspondence when she was served with the particulars of the charge in October 2010, if it were true. Indeed, one would expect that it would have been raised in Mr Bartley's e-mail of 5 December 2008, for the substance of the charge was known by then.
- [239] I do not believe her testimony that she was absent from her practice for up to a week or two at a time during the relevant period. Had she been on sick leave during that time it could have been proved from her office records. She did not even produce the medical documentation which she claimed existed in the letter of 27 October 2008.
- [240] Ms King originally deposed that she believed the letter of 2 July 2008 was sent in the normal course and that she was not aware of any reason why it would not have been received by the Commissioner. Her suggestion in the witness box that a semi-remembered unreliable member of her staff twice failed to send the letter is a novelty, is inconsistent with her first affidavit and is incredible. Her claim that she told Mr Bartley about the unreliable Melanie was not corroborated, despite Mr Bartley's search.
- [241] She did not explain from where she obtained a copy of the letter dated 2 July 2008 and exhibited to her first affidavit, and she offered no explanation for why that letter was not on the file acquired by Ms Campbell. The copy which she exhibited to her affidavit was presumably printed from some computer. Untypically, it was not on firm letterhead. She proffered no forensic evidence regarding the creation of the file comprising the letter on that computer. Her testimony that she believed the issue between her and the Commissioner was only as to when the letter was sent, not whether it was sent at all cannot stand with the Commissioner's letter to her solicitor of 8 December 2008, which she agreed she saw.
- [242] Ms King's recovered memory of resending the letter, mentioned for the first time while she was under cross-examination, is also unbelievable. How could such a matter have been overlooked?
- [243] In the end it was unclear whether Ms King maintained her claim not to have received the Commissioner's letter of 21 July 2008. If, as she claimed in

cross-examination, she received the letter of 21 August, she must have received that of 21 July also, for a copy was enclosed in the later letter. In the end it is impossible to sort the precise truth from the fantasy.

[244] I am satisfied that Ms King had no reasonable excuse for failing to comply with the notice issued by the Commissioner under s 443(3) of the Act.

Conclusion

[245] Charge 6 is proved.

Nature of the misconduct and orders to be made

[246] Charges 1, 2, 6 and 7 have been proved. The Commissioner has alleged that in relation to each of them Ms King engaged in either unsatisfactory professional conduct or professional misconduct. The parties made submissions on that question but in my judgment fairness requires that the Tribunal allow further submissions in the light of the foregoing findings. Those submissions can be made at the same time as submissions on the question of disciplinary orders. They should be in writing.

**ANNEXURE TO REASONS FOR JUDGMENT
IN LEGAL SERVICES COMMISSIONER v KING**

TAX INVOICE
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16 January 2008

Ms. K A Martin
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recieve by fax 26/2/08

RE: MATRIMONIAL MATTERS

TO OUR PROFESSIONAL COSTS of and incidental to acting on your behalf in this matter from 1 February 2005 to date including initial instructions on you, correspondences to and from Whitehead Payne Lawyers, perusal of correspondence from Turnbull & Company Solicitors, Whitehead Payne Lawyers, telephone attendances on you, perusal of correspondence from Robyn Watson Solicitors, correspondence to WP Lawyers, correspondence to the Federal Magistrates Court, telephone attendances on you, attendance on JG Settlements, telephone attendance and correspondence to Family Court of Australia, correspondence and Subpoena to the ANZ Bank, correspondence and Subpoena to Suncorp Metway, correspondence and Subpoena to Neumanns Contractors, Leading Services authorities, attendance to file to draft, settle and serve Subpoenas to GE Money and American Express, attendance to American Express, telephone attendance and correspondence to American Express, perusal of Subpoenaed material and correspondence from ANZ Bank, Newmann Contractors, perusal of correspondence from Houston Investigations, appearances in the Federal Magistrates Court, perusal of Psychologist's report, perusal of correspondence from Lifeline, attendance to file to arrange property valuations, draft and settle Caveats, instructing valuers regarding your property and business, draft offer to settle, review file and prepare and attend to Conciliation conference, correspondence to Herron Todd White Valuers, correspondence to Taylor Byrne Valuers, perusal of email correspondence from you, correspondence to Grant Thornton, perusal of correspondence and terms of engagement from Joe Box, attend file to conduct ABN search and perusal of correspondence regarding valuation of Limestone Constructions from Joe Box, correspondence to Helensvale Family Health Care Centre, drafting and settling Subpoena to Department of Child Safety, provide advice regarding Domestic Violence Order, attendance to file regarding correspondence to Federal Magistrates Court regarding family report, telephone attendance to Federal Magistrates Court, perusal of correspondence received from the Legal Aid Commission regarding appointment of child representative, perusal of correspondence from Britton Psychological Services, attendance to draft, settle and file a Response and Application in a Case, prepare Affidavit of Christine Elizabeth Trueman, redraft Submissions regarding Application for Costs, obtain instructions, draft, settle and file Affidavit of Anthony Samy, Dr Hale, Dr Sally Kervison, Dr Glenn Hart, Dr Jfpiekarski, Julie Forcett, Trial Affidavit and further Affidavit, Affidavit of Matthew Link, Affidavit of KL King 14.03.06, Affidavit of Andrew Davidson, Affidavit of Lawrence Hamilton of Taylor Byrne, Affidavit of Matthew Link, Affidavit of Michael Walsh of Herron Todd White, Affidavit of Susan Mellor, attend file to prepare Amended Response, prepare Application for Divorce, attendance to file to prepare Case Outline, attendance to file to prepare financial

statements dated 16.8.05, 14.11.06, attendance to file to prepare Notice of Address for Service, Form 60 Offer to Settlement, attend file to prepare brief to Counsel regarding Trial, appearance and attendance at the Federal Magistrates Court regarding Trial, attendance to file to draft Minutes of Consent Orders, conduct Queensland Land Titles Search, draft and settle Statement of Evidence, prepare correspondence to Mr Michael Maloney of Legal Aid Queensland, peruse correspondences from the Federal Magistrates Court, peruse correspondence from Challenger Financial Services Group, attendance on file to brief Counsel, perusal of correspondence and telephone attendance to Lyn Clarke, perusal of report from Lyn Clarke, correspondence to Neil McGregor, attend to file to draft Minutes of Consent Orders regarding property settlement, perusal of correspondence from Rider-Bell Attorneys, attendance to file to draft Consent Memorandum, peruse application and affidavit of husband re: leave to Appeal and Appeal, attendance to draft and settle affidavit re: caveat and sale proceeds of factory, attend file to draft and settle response, emails to FM Associate, re: costs application, telephone attendance on you re sale proceeds, attendance at settlement of Burleigh factory, and any and all other sundry matters not herein mentioned, and general care and consideration in your case. This invoice can be itemised if required.

	COSTS	GST	AMOUNT
OUR FEES	65,000.00	6,500.00	71,500.00
COSTS (expenses paid for you)			
Wordwise Online - photocopying	80.45	8.05	88.50
Officeworks - photocopying / binding	252.51	25.25	277.76
Family Court - photocopying	63.64	6.36	70.00
JG Settlements filing fees	468.50	46.85	515.35
Dept Child Safety -subpoena	57.00		57.00
Taylor Byrne valuation	250.00	25.00	275.00
ANZ Bank - photocopy fee	64.40	6.44	70.84
ANZ Bank- subpoena fee	20.00		20.00
Citec - search fees	160.25	16.06	176.31
Suncorp subpoena fee	70.00	7.00	77.00
DNR - filing fees	318.40		318.40
Endeavour Couriers	30.50	3.05	33.55
Sub 60 Couriers	95.35	9.64	106.00
Whithead Payne Lawyers	58.64	5.86	64.50
Travel and parking	146.55	14.65	161.20
Bank charges - special clearance	16.20		16.20
Neil McGregor, Barrister	9,795.45	979.55	10,775.00
TOTAL COSTS			\$13,102.61
GST INCLUSIVE TOTAL AMOUNT			\$84,602.61
<i>Less held in Trust</i>			\$84,602.61
TOTAL AMOUNT OWING			nil
<i>Total amount held in Trust</i>			\$22,117.61

E. & O.E

Yours faithfully
K L KING & ASSOCIATES

Per



TAX INVOICE
 ABN: 71 596 361 267

17 January 2008

Ms K A Martin
 6 Cajeput Court
 REEDY CREEK QLD 4228

RE: MATRIMONIAL MATTERS

TO OUR PROFESSIONAL COSTS of and incidental to acting on your behalf in the matter of costs application, contesting the appeal and stay application and related matters, and any and all other sundry matters not herein mentioned, and general care and consideration in your case. This invoice can be itemised if required.

	COSTS	GST	AMOUNT
OUR FEES	15000.00	1500.00	16,500.00
COSTS (to be supplied in a separate invoice)			
GST INCLUSIVE TOTAL AMOUNT			\$16,500.00
<i>Less held in Trust</i>			2,397.39
TOTAL AMOUNT OWING			\$14,102.61
<i>Less Discount Allowed</i>			\$14,102.61
<i>Total amount held in Trust</i>			\$19,720.22

E. & O.E

Yours faithfully
K L KING & ASSOCIATES

Per 