

**CITATION:** Legal Services Commissioner v Janes [2013] QCAT 551

**PARTIES:** Legal Services Commissioner  
(Applicant)  
v  
Rossline Agnes Fane Janes  
(Respondent)

**APPLICATION NUMBER:** OCR062-13

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** 18 September 2013

**HEARD AT:** Brisbane

**DECISION OF:** **Justice Alan Wilson, President**

Assisted by:

**Mr Ken Horsley**  
Practitioner Panel Member; and

**Ms Kathleen Keating**  
Lay Panel Member

**DELIVERED ON:** 16 October 2013

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The respondent is to be publicly reprimanded.**
- 2. The respondent is to pay a pecuniary penalty to the applicant in the sum of \$10,000, within 180 days.**
- 3. The respondent is to pay the applicant's costs, fixed at \$2,000, within 30 days.**

**CATCHWORDS:** PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where District Court Judge ordered parties in appeal proceedings to exchange outlines of argument – where respondent engaged counsel to prepare outline of argument for client – where counsel advised

respondent that appeal not ready to proceed due to procedural defects – where counsel provided submissions supporting application to have appeal adjourned – where respondent advised counsel that their services no longer required – where outline of argument not filed – where respondent, at appeal hearing, filed and read affidavit explaining failure to file outline of argument due to counsel’s conduct – where respondent submitted that counsel had prepared outline of argument but that it was ‘deficient’ – where respondent alleged counsel had advised they were not concerned about time limits imposed by the Court – where representations made by the respondent were false and misleading – where applicant charged respondent with misleading the Court – where respondent contested the charges but has been cooperative and responsive during proceedings – where there is no evidence of further offending – whether conduct amounts to professional misconduct or unsatisfactory professional conduct – where the applicant seeks public reprimand, a pecuniary penalty and an order that the applicant pay its costs – whether those orders are appropriate in the circumstances

*Legal Profession Act 2007 (Qld) ss 418, 419*

*Legal Services Commissioner v Hackett [2006] LPT 015, cited*

*Legal Services Commissioner v Lim [2011] QCAT 291, cited*

*Legal Services Commissioner v Puryer [2012] QCAT 48, cited*

**APPEARANCES and REPRESENTATION (if any):**

**APPLICANT:** Ms S Lane of counsel, instructed by the Legal Services Commission

**RESPONDENT:** Mr D Williams of counsel, instructed by McInnes Wilson Lawyers

## REASONS FOR DECISION

- [1] Ms Janes, a legal practitioner admitted as a solicitor in 1995, faces a disciplinary charge involving an allegation that on 26 November 2009 she misled a Judge of the District Court of Queensland sitting at Maroochydore.
- [2] When she appeared before the Judge on that day she was representing the body corporate for a home units scheme at Noosa, as the respondent in proceedings brought by a Mr Harris.
- [3] Mr Harris had appealed a decision of a special adjudicator appointed under the *Body Corporate and Community Management Act 1997* (Qld). The appeal had not progressed quickly and, on 22 September 2009, his Honour Judge Robertson gave directions for an exchange of outlines of argument under a timetable intended to lead, ultimately, to a hearing of the appeal itself on 26 November 2009.
- [4] On 1 October 2009, Ms Janes engaged Ms Moody of counsel to prepare the outline of argument for the body corporate. That outline was, however, never prepared by Ms Moody and never filed by Ms Janes.
- [5] Shortly before the hearing on 26 November, Ms Janes filed an affidavit purporting to cast the blame for non-compliance upon Ms Moody. Allegations made in that affidavit by Ms Janes, and in oral submissions she made to the Judge at the hearing on 26 November, were sufficiently serious for his Honour to direct the Registrar at Maroochydore to forward a copy of the affidavit to the then president of the Bar Association, together with a transcript of oral reasons his Honour gave at the end of the hearing '*... to enable the Bar Committee to seek an explanation from the barrister*' – i.e., Ms Moody.
- [6] His Honour then gave further directions for an exchange of outlines of submissions and, also, ordered that the body corporate pay Mr Harris's costs.
- [7] In the event it is Ms Janes, and not Ms Moody, who faces disciplinary proceedings brought by the Legal Services Commissioner. At the heart of the proceeding are allegations that Ms Janes misled the Judge by telling him in her affidavit, and in oral submissions, that Ms Moody '*... was not concerned about time limits imposed by the Court*'; that Ms Moody had, in fact, provided Ms Janes with an outline of argument for the appeal hearing but it was deficient and/or not in acceptable form for filing; that Ms Janes had told Ms Moody that the outline was deficient; and, that Ms Moody had undertaken to provide an amended outline, but could not do so in time, and her instructions had been withdrawn.
- [8] In fact, uncontested evidence shows that after receiving her brief (and a supplementary brief) in the first half of October, Ms Moody formed the view that the appeal was not ready to proceed and, on 29 October, sent Ms Janes an email informing her of Ms Moody's opinion that the appeal

was incompetent because it failed to name all parties who should properly be respondents and, also, contained three other procedural defects. Ms Moody sent Ms Janes, with that email, five pages of submissions in which the body corporate's failure to file its outline was explained, together with arguments purporting to show why the appeal needed to be regularised by having these preliminary points resolved before it could be finally determined.

- [9] Those submissions were the only document from counsel in Ms Janes' possession when she drew the affidavit read by his Honour on 26 November, and when she made oral submissions before him on that day. They were not, plainly, an outline of argument addressing the issues in the appeal itself.
- [10] As the matter unfolded in this Tribunal much turned upon what Ms Janes thought that document was, what she did with it, and what she said about it to the Judge.
- [11] Submissions filed on her behalf in the Tribunal after a hearing on 18 September 2013 say that:

This is a case about an outline of argument, whether there is any material difference between an outline of argument and written submissions, and the way in which that document, however so-called, was described by the respondent to his Honour Judge Robertson in an affidavit and oral submissions. The allegations in this case against the respondent as to misleading the court can only be properly understood in the context of the various exchanges between Ms Moody and the respondent in relation to the instructions to Ms Moody to draw and settle the respondents appeal submissions.

- [12] Both Ms Moody and Ms Janes gave evidence before the Tribunal. Both were cross-examined extensively about conversations they had in October and November 2009 concerning Ms Janes' instructions to Ms Moody, and what Ms Moody did.
- [13] Ms Janes' position is that all relevant communications between her and Ms Moody are recorded in emails and her own contemporaneous file notes which reveal, she asserts, that while she may have confused the terms '*outline of argument*' and '*written submissions*' in what she said to the Judge she had, in truth, instructed Ms Moody on 2 November 2009 that the barrister was to draw the outline of argument required to allow the appeal to proceed on 26 November, and Ms Moody undertook to do so, but then failed to meet that undertaking.
- [14] Ms Moody's recollection of these events is not supported by diary or file notes, but her evidence about conversations she had with Ms Janes is substantially different.

**Agreed facts**

- [15] The parties were able to agree on some matters and filed a statement of agreed facts in the Tribunal on 22 July 2013.
- [16] His Honour Judge Robertson had the matter before him on 22 September 2009 and adjourned the hearing to 26 November after making orders requiring the body corporate to file its outline of argument by 20 October.
- [17] Ms Janes engaged Ms Moody by telephone on 1 October to assist with filing an affidavit in the proceedings by 6 October and drawing an outline of argument to be filed by 20 October, and to appear at the hearing 26 November. Ms Janes sent a brief to Ms Moody on 2 October. There were some further conversations and emails between them on 6 October, and on 15 October Ms Janes sent Ms Moody a supplementary brief.
- [18] On 19 October Ms Janes sent Ms Moody a copy of an offer to settle which had been made by the applicant in the proceedings, Mr Harris. The next day Ms Janes asked Mr Harris for an extension of the filing date for the body corporate's submissions by one week. The next day, 21 October, Mr Harris agreed. There were then some communications between Ms Janes and Ms Moody about the need for an appeal book.
- [19] On 26 October Ms Janes told Ms Moody that the body corporate had rejected Mr Harris's offer to settle. On the same day Ms Moody queried by email the extended date for the submissions and suggested a request for an extension. The next day, 27 October, Ms Janes and Ms Moody spoke by telephone.
- [20] On 29 October Ms Moody sent to Ms Janes the email and the submissions mentioned earlier – i.e., submissions supporting an application to the Court to have the appeal listed for 26 November adjourned because of what Ms Moody saw as technical deficits in the appeal proceedings brought by Mr Harris.
- [21] Ms Moody and Ms Janes then had conversations on 2 and 17 November. On 18 November the District Court Registry sent correspondence to Ms Janes advising that the Judge would grant a request by Mr Harris to adjourn the hearing date (in the absence of an outline of submissions from the body corporate). On Friday 20 November Ms Janes sent an email to Ms Moody advising that her services were no longer required.
- [22] On 26 November Ms Janes appeared before his Honour Judge Robertson on behalf of the body corporate. As the transcript of the hearing that day makes clear, she was in effect being asked to explain why her client had failed to comply with the Judge's earlier order and file its outline by 20 October. She sought leave to read and file an affidavit in her own name sworn on that date. She also made oral submissions to the Court.

[23] In the affidavit she said that she had prepared a detailed history of the events that took place between 22 September and 25 November, involving her preparation for the hearing and her brief to Ms Moody, which was attached as an exhibit to her affidavit.

[24] In that affidavit she said that:

On or about 2 November 2009 I had cause to discuss the matter with Counsel. Counsel did not appear to be concerned about the time limits imposed under the orders of 22 September 2009. During the discussion, I expressed concern regarding the time limits imposed in the orders of 22 September 2009. Counsel did not appear to share my concern for observing the order.

[25] Later in the affidavit she said:

I received a telephone call from the District Court Registry on 16 November 2009 following up the outline of argument. On or about 17 November 2009, I discussed with Counsel the deficiencies in the outline of argument and informed Counsel that it could not be filed in its present form. Counsel subsequently informed me that an amended outline could not be produced until approximately 23 November 2009. At this point I formed the view that alternate Counsel was required and I took steps to recover the brief from Counsel and arrange alternate Counsel. It took almost a week to arrange alternate Counsel. In conclusion I say that attempts have been made to progress this matter expeditiously, however *circumstances that by and large have been out of my control have prevented this and in particular have prevented me from complying with the order.* (emphasis added)

[26] In the exhibit to her affidavit Ms Janes purported to present a chronology of her communications with Ms Moody. Some of these entries are central to the charge brought by the Commissioner and to the different recollections of Ms Janes, and Ms Moody.

[27] In the exhibit Ms Janes refers to a telephone conversation with Ms Moody on 27 October 2009 in these terms:

Telephone call with Counsel – confirming I need outline of argument today – to be finalised overnight – asked for extension – seemed very casual about dates and not concerned about compliance with order – still insisted on preparing an appeal book when advice was that both the Appellant and Respondent did not want to go to that expense and it seemed unnecessary given that the District Court Registry now has the file of the specialist adjudicator.

[28] The next entry is dated 2 November 2009:

Telephone call with Counsel – following up matter, Counsel wants further directions on 26 November 2009 stating matter not ready for hearing – advised that it had been set down for hearing on 26 November 2009 and that parties required it to be heard on that day.

[29] There is then an entry of a telephone call from the District Court on 16 November 2009 '*chasing up outline of argument*'. Then, Ms Janes' exhibited schedule shows what purports to be a diary note of a telephone conversation she had with Ms Moody, the following day 17 November 2009:

Reviewing outline of argument received from Counsel. Telephone call to District Court – confirmed have received outline of argument from Counsel. Telephone calls with Counsel – outline of argument is deficient. Counsel advised not able to

finalise new submissions until the following week. Reminded Counsel that matter set down for hearing on 26 November 2009.

- [30] There is then a diary note of another telephone conversation on the same day, 17 November 2009:

Telephone call to District Court – advising that *outline of argument not in acceptable form and cannot be filed ...* (emphasis added)

- [31] There is a transcript of the proceedings before his Honour Judge Robertson on 26 November. In the course of the transcript the Judge asked Ms Janes for the name of her counsel.<sup>1</sup> Ms Janes gave his Honour Ms Moody's name. The Judge said: '*So, you've effectively blamed her?*'

- [32] Ms Janes replied: '*No, no. Not at all. But there was part of it – her outline of argument simply wasn't in an acceptable form and so I've...*'

- [33] The Judge then said: '*But you said she said don't worry about the Court order. Are you honestly telling me – well you've told me in a sworn affidavit that she said that*'.

- [34] Ms Janes said: '*Yes. She said don't worry about those dates that she did. I was quite concerned when she said that*'.

- [35] Later, Ms Janes said to his Honour:

But – it did – did with me. I did encounter a problem with the outline of argument, which raised a number of technical issues. I also raised those issues with Mr Harris to try to avoid those issues, so that we don't delay and complicate the matter.<sup>2</sup>

- [36] Later in the same exchange Ms Janes said: '*And I've – the outline of argument that I had, I felt, wasn't able to be filed in the Court because it did not address the issues raised by Mr Harris*'.

- [37] In his reasons his Honour Judge Robertson said:

An affidavit has been filed today by leave under the hand of (the respondent), which sets out to give an explanation for the failure of the respondent to comply with the orders. As I have told her, it is a completely unacceptable explanation. The affidavit contains references to '*without prejudice*' negotiations between the parties, and it appears, despite (the respondents) rebuttal, to directly blame for delay and failure to comply with a court order to a barrister, a Ms Shannon Moody, who apparently had been retained by (the respondent) to represent the respondent in this appeal. The affidavit, in its terms, suggests that the barrister was not concerned about her client's failure to comply with the court order. I have not heard from the barrister against whom a number of allegations are made. It is a serious thing, indeed, if a barrister is, in effect, telling a solicitor that she does not have to worry about complying with a court order, despite the solicitors concern.

- [38] The discipline application alleges that Ms Janes mislead the Court when she represented to his Honour that the chronology annexed to the affidavit was an accurate record of events; and, when she said that Ms Moody was not concerned about time limits imposed by the Court; and, that Ms Moody

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<sup>1</sup> T 3.3.

<sup>2</sup> T 12.35.

had provided the respondent with an outline of argument for the appeal hearing; that the outline of argument was deficient and/or not in acceptable form for filing in the matter; and, that Ms Janes had advised Ms Moody that the outline of argument was deficient; and, that Ms Moody had advised that she would provide an amended outline of argument; and, that Ms Moody had advised she could not provide the amended outline until 23 November 2009.

- [39] It is alleged that, in making those submissions, Ms Janes knew them to be misleading in that an email from Ms Moody of 26 October 2009 had asked, for the second time, about an extension of time for the submissions and advised that if one had not been sought, Ms Janes should do so; that during a telephone conversation on 27 October Ms Moody again requested that Ms Janes ask for a further extension of time; that on 29 October Ms Moody sent Ms Janes the email mentioned earlier to the effect that, in her opinion, the appeal was incompetent and should not proceed, and to which she attached a five page submission for Ms Janes to rely upon in making an application to delist the hearing on 26 November 2009; that Ms Moody did not provide the respondent with an outline of argument to be filed for the hearing on 26 November 2009 and it was not, therefore, the case that the outline was '*deficient*' or '*not in acceptable form*' or could '*not be filed in its present form*'; that it was, therefore, not the case that Ms Moody had advised that she would provide an amended outline of argument; and, that on 17 November 2009 Ms Moody sent Ms Janes an email in which she said that she might be able to move some things around and get the outline to the respondent by 20 November.
- [40] None of these matters, the Commissioner alleges, were referred to by Ms Janes either in her affidavit or in her oral submissions to Judge Robertson.
- [41] Ms Janes and Ms Moody were extensively cross-examined before the Tribunal.
- [42] Shortly after the hearing on 26 November Ms Janes told Ms Moody that the Judge had referred the matter to the Bar Association. On any view that is a serious and troubling matter for any barrister. Ms Moody said that when she came to make her statement on 13 April 2010, the events of October and November 2009 remained vivid to her.
- [43] Although she did not have the benefit of diary notes, Ms Moody was an impressive and convincing witness. When cross-examined about that previous statement and her affidavit in these proceedings she said that, in drafting those documents, she had taken care to say when she was unsure about particular dates or events and she willingly conceded that she could not recall the exact dates of certain conversations. That care permeated her evidence before the Tribunal.
- [44] In particular, her recitation of events was inherently plausible. When she turned her mind to Ms Janes' brief to draw an outline in the appeal proper, she came to the view that an outline of argument addressed to the issues

in the appeal was not appropriate, and that an application should be made to the Court to adjourn the appeal hearing date on 26 November and, rather, to address the preliminary issues raised in her advice of 29 October – almost a month before the date for which the appeal was listed.

- [45] The only advice she ever gave, and the only documents she ever drew – the email and the draft submission of 29 October – were directed to that end.
- [46] Unsurprisingly Ms Janes relied heavily upon her written and typed diary notes as contemporaneous records supporting her version of events, and as corroboration. The first difficulty she struck was the revelation, in cross-examination, that the typewritten diary notes did not, on a number of occasions, accurately reflect a hand written note she claimed she had made at the time of a conversation with Ms Moody.
- [47] There were, too, other inconsistencies in her evidence which left the Tribunal with doubt about her credit. Ultimately, these elements lead the Tribunal to prefer Ms Moody's version of events where differences or conflict arise
- [48] Ms Janes' version of conversations she allegedly had with Ms Moody at various times and, in particular, late in the last week before the appeal was listed for hearing are also, for reasons which will be explored, inherently implausible or inconsistent or conflicting.
- [49] The first is that, in cross-examination, Ms Janes admitted that Ms Moody had raised with her a question about a possible extension of time for the body corporate's outline of argument on four occasions referred to in Ms Moody's affidavit. Ms Janes also admitted that when she drew her affidavit she was aware of those occasions but, nevertheless, proceeded to give evidence and submissions to the Judge to the effect that Ms Moody was not, in truth, concerned about time limits imposed by the Court.
- [50] In this evidence Ms Janes effectively admitted two of the particulars alleged to support the charge that her representation to the Judge to that effect was misleading, in that she did know that in Ms Moody's email of 26 October Ms Moody had asked, for a second time, about the extension, and advised that if one had not yet been sought then Ms Janes should do so; and, that during a telephone conversation between them on 27 October Ms Moody again requested that Ms Janes ask for a further extension.
- [51] Secondly, Ms Janes was cross-examined at length about the email and draft submission Ms Moody sent her on 29 October. At paragraph 27 of an affidavit she filed before the Tribunal Ms Janes deposed that those submissions did not address the substance of the appeal. At paragraph 48 she says, however:

At (26 November 2009) I did not believe there was any difference between an outline of argument and a document that might otherwise be called '*submissions*'. This distinction was not an attempt by me to take advantage of any confusion in the similarity of the meaning between the terms '*submissions*' and '*outline of argument*'. I sincerely believe that they meant the same thing.

- [52] In cross-examination Ms Janes was asked whether she became aware, after reading Ms Moody's email of 29 October and the attached submissions, that the submissions provided by counsel were *not* intended to address the substance of the appeal. Ms Janes replied that she did not know. She was then directed to parts of Ms Moody's email and the submissions themselves which, on their face, make it clear that Ms Moody was advising Ms Janes that the matter needed to be brought on for directions and a submission had been prepared to assist for that purpose. Ms Moody's draft submission actually contained the words: '*1.4 The Respondent has yet to file its submission in reply, but respectfully submits that it should not do so until the four (4) preliminary issues identified below have been dealt with*'.
- [53] When it was put to Ms Janes that she must have known, upon reading those parts of the email and the submissions, that they were not an outline of argument for the substantive hearing of the appeal itself, Ms Janes said words to the effect that she was inexperienced in litigation, and really did not know what the submissions were for.
- [54] She was then directed to parts of her affidavit filed before the Tribunal in which she said that she did not agree with Ms Moody's advice; that in subsequent conversations she '*reiterated*' that she needed the submissions and the matter was '*... now past the preliminary issues Ms Moody wished to raised*' and that, later, she '*... re-read Ms Moody's submissions which she had send (sic) through on the 29 October 2009 and came to the conclusion that I could not file it*'.
- [55] When cross-examined about these parts of her affidavit and when it was put to her that they plainly imply an understanding, on her part, that the submissions provided by Ms Moody on 29 October were not an outline of argument she replied, again, that she did not know what the submissions were for.
- [56] Her answers suggest, at best for her, that she was confused about what she had received from Ms Moody and may have believed that she had received an actual outline of argument for the appeal itself; but, they directly contradict the evidence contained in her affidavit filed in the Tribunal, and the statements in them to the effect that she promptly understood that what Ms Moody had sent her was not what she wanted, and that she had instructed Ms Moody that counsel should simply proceed and comply with her instructions, and prepare the outline of argument for the appeal itself.
- [57] Both things cannot be true. It beggars belief that even an inexperienced litigation lawyer could ever have believed that Ms Moody's email of 29 October and the attached five page document of submissions

supporting an application to have other steps taken in the matter before the appeal proceeded was, in truth, an outline of argument intended for use in the appeal itself.

- [58] It is compelling that when Ms Janes drafted the affidavit she filed before his Honour Judge Robertson on 26 November 2009 she knew that the '*outline*' she referred to in her affidavit and in oral submissions to the Judge was, in truth, nothing of the kind – it was a submission for an interlocutory application.
- [59] The next matter concerns alleged conversations in the week before 26 November in which, Ms Janes claims, Ms Moody emailed her on 17 November and told her that she could provide her the outline by the Friday of that week, i.e., 20 November 2009. Ms Janes admitted that she knew she had received this email when she drafted her affidavit of 26 November in which she said, at paragraph 14, that Ms Moody had told her that she could not produce the outline until 23 November 2009. That is not what the email said. What Ms Janes said in the affidavit was, as she must have known, untrue.
- [60] There are additional aspects of Ms Janes' oral evidence before the Tribunal which also cast doubt upon her credit.
- [61] She claimed that she had not advised Ms Moody to withhold preparing the outline while her client considered the offer from Mr Harris, despite the fact that in her letters to the Registry and to Mr Harris she advised that she sought an extension of time to file the outline in order to save costs because the outline would be pointless if the parties could reach an agreement.
- [62] She admitted that, in respect of a conversation on 27 October 2009, her typed file notes did not accurately reflect her hand written file notes. When directed to her file note dated 17 November 2009 she admitted that they did not record any conversation between herself and Ms Moody to the effect that the '*outline*' was '*deficient*', or to the effect that an '*amended*' outline would be provided by Ms Moody. By that concession Ms Janes was admitting that paragraph 14 of the affidavit she filed before his Honour Judge Robertson on 26 November 2009 was not an accurate reflection of the conversations recorded in her file notes of 17 November. That admission occurs, too, in the context that she admitted she had access to those file notes when she drafted the affidavit of 26 November.
- [63] She also claimed that on 2 November 2009 she had advised Ms Moody that she needed the outline urgently, but then conceded that she did not contact Ms Moody to obtain or chase up the outline for a further period of two weeks. In light of that conduct, her version of the alleged conversation on 2 November seems improbable.
- [64] Finally, on being shown some of her own file notes she also admitted that she had not actually obtained her client's instructions not to proceed with the preliminary issues suggested by Ms Moody in her email and

submissions of 29 October. In doing so she was, in effect, conceding that paragraphs 28 and 29 of the affidavit she filed in these proceedings were incorrect.

- [65] In light of the pall of doubt cast over Ms Janes' evidence by the admissions, inaccuracies and inconsistencies identified above the Tribunal has no hesitation in preferring, when differences arise, Ms Moody's version to Ms Janes'.
- [66] Ms Moody's version of events was that she was briefed to provide an outline of argument; that she asked on a number of occasions about extensions of time; that she was told by Ms Janes to withhold drafting the outline while the offer from Mr Harris was being considered; that then, upon considering the matter, she came to the view that the appeal should not go ahead before the preliminary issues she identified had been addressed; that she told Ms Janes that, and that the appeal should be delisted; that she repeated that advice in a telephone conversation with Ms Janes and was therefore very surprised to find, two weeks later, that her advice had been ignored and that the appeal hearing was still listed for 26 November and an outline was required urgently.
- [67] Rather than explain this series of events to the Judge, Ms Janes chose to put forward the version set out in her affidavit: that Ms Moody had not been concerned about extensions; had provided an outline of argument that was deficient; and, that it was Ms Moody's fault that the respondent was forced to appear before the Court without having filed an outline, and accept the consequences. The evidence points compellingly to the conclusion that this explanation was both unjustified and wrong.
- [68] Ms Janes' evidence before this Tribunal is also troubling. At the very least, it is clear that she has been prepared to swear an affidavit in this disciplinary proceeding which is inconsistent with her own file notes, leading to the compelling inference that she did not consult them before drawing or swearing that affidavit. That, with respect, desultory approach to the drawing of affidavits is consistent with a similar want of care, attention to detail and, importantly, accuracy revealed in what is now seemed to be the incorrect and misleading affidavit she presented to the Judge on 26 November, and the submission she made then.
- [69] In her evidence, and submissions made on her behalf, an attempt is made to argue that Ms Janes did not wilfully mislead Judge Robertson but, because of a combination of inexperience, some lack of care in drafting the affidavit, and inappropriate responses in oral submissions to a Judge who was, plainly, angry at the conduct of the body corporate in the appeal, she fell into error by confusing an '*outline of argument*' on the one hand and '*submissions*' on the other. She says this in a statutory declaration filed in this Tribunal on 6 August 2013 – i.e., that when she made her oral submissions before his Honour Judge Robertson and referred to an outline of argument she was in fact referring to the submissions Ms Moody had sent her on 29 October and that '*... when I made this statement to his Honour I didn't believe there to be any difference between an outline of an*

*argument and a document that might otherwise be called “submissions”* (at paragraph 5 of her statutory declaration).

- [70] The claim is, on any view, implausible. Again, even the most inexperienced litigation lawyer could be expected to readily understand that Ms Moody’s email of 29 October and the attached submissions were not, could not be, and were never intended to be an outline of argument of the kind sought by the body corporate in the Judge’s earlier order.
- [71] That is what Ms Janes had originally briefed Ms Moody to draft. It is not what she got, or what she had when she appeared before the Judge.
- [72] In her response in these disciplinary proceedings Ms Janes refers to ‘*the 29 October advice from Ms Moody*’ and claims that she told Ms Moody that she did not agree with the advice and that she ‘... *required submissions that complied with Judge Robertson’s earlier directions*’. This alleged statement can mean nothing except that Ms Janes knew, *before* the hearing on 26 November, that she did *not* have an outline for the appeal proper.
- [73] Again, any other conclusion is inherently improbable. Once that is acknowledged, it is inescapable that she misled the Court as to the true circumstances relevant to the Court’s enquiry. The Tribunal (acknowledging the seriousness of the charge, and that the *Briginshaw* test applies) is satisfied that the disciplinary charge is, with its particulars, made out.
- [74] For the purpose of this proceeding it is, in any event, essentially immaterial whether that misleading of the Court was deliberate, or unintentional.
- [75] In *Legal Services Commissioner v Hackett*<sup>3</sup> a barrister filed an affidavit in his own name in body corporate proceedings in the District Court in which he appeared, personally, as chair of the body corporate management committee. That affidavit was misleading: it suggested that the opposing party to the proceeding should not have voted at a particular annual general meeting because he was not validly authorised to do so, and exhibited documents received by the barrister from the management company. It failed, however, to exhibit the totality of the documents and, by presenting them selectively, supported the barrister’s submission that the vote was not valid. In total, however, the documents made it clear that the vote was indeed valid. The Tribunal did not rely on the misrepresentation in deciding the matter. Rather, the Chief Justice said:

Turning to the characterisation of this misconduct, it is plainly professional misconduct though not characterised by dishonesty. It was a case of gross carelessness or sloppiness, dereliction which has no place in the preparation of

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<sup>3</sup>

[2006] LPT 015.

any affidavit, but especially one to be sworn by an officer the Court. That it was prepared in haste is in the end irrelevant.<sup>4</sup>

- [76] As the Commissioner's submissions to this Tribunal put it, neither haste nor inexperience nor the perils of appearing before an irritated Judge can excuse the misleading statements made by Ms Janes.
- [77] In light of the critical nature of the trust and confidence that Courts must be able to repose in legal practitioners, the proper characterisation of a charge involving misleading the Court must be as the more serious *professional misconduct* under s 419 of the *Legal Profession Act 2007* (Qld) (and not the lesser charge, *unsatisfactory professional conduct*, under s 418).
- [78] That conclusion is reached more readily here where Ms Janes' omissions or misdescriptions of the true circumstances leading up to the adjournment hearing on 26 November cannot be construed as anything other than an attempt, by her, to put the explanation for the body corporate's failure to file an outline of argument in a way which shifted blame to Ms Moody, and lifted it from herself.
- [79] No other motive, on Ms Janes' part, is apparent. It is compelling: the recitation of the events between 2 October and 26 November 2009, explored in detail earlier, points strongly to the conclusion that Ms Janes had dithered after she received Ms Moody's email of 29 October. If she disagreed with Ms Moody's advice or did not wish to act upon it, or was loathe to approach her client for instructions about it, her plain obligation was to instruct Ms Moody immediately to prepare the outline. She claims she did so on 2 November but that allegation (in light of the subsequent delay between that date and 17 November) is, again, inherently implausible.
- [80] In combination these circumstances are persuasive that her conduct in drawing the affidavit, and making her oral submissions to his Honour Judge Robertson, involved either deliberate dishonesty or, as in *Hackett*, was the product of such gross carelessness or sloppiness that, as in that case, the distinction becomes irrelevant.
- [81] As to penalty, Ms Janes has no previous adverse disciplinary findings. She has vigorously contested the charges against her and, in the course of doing so, been prepared to swear an affidavit in this Tribunal which, also, has been shown to contain what are either untruths or the product of a similarly high level of carelessness. That said, the Commissioner fairly points out that she has been generally cooperative and responsive throughout the original investigation and the present proceedings and has made some admissions of fact.
- [82] It is also clear, however, that she yet fails to appreciate the seriousness of her conduct, and continues to blame Ms Moody. That conduct has the

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<sup>4</sup> See, also, *Legal Services Commissioner v Lim* [2011] QCAT 291; and *Legal Services Commissioner v Puryer* [2012] QCAT 48.

potential to have a serious effect upon Ms Moody's professional reputation and she has also, of course, had to spend time and money answering Ms Janes' original complaint against her to the Commissioner.

- [83] The Commissioner contends for a public reprimand, a fine in the order of \$7,000 - \$10,000 and an order that Ms Janes pays costs of \$2,000.
- [84] The Tribunal accepts that a public reprimand is appropriate. The misconduct is serious, but the respondent has an otherwise unblemished record and there is no evidence of further offending. This a case in which a practitioner, foolishly attempting to deflect blame for non-compliance with a court-ordered timetable, stepped beyond the bounds of propriety and good conduct for a lawyer but not to a degree which would warrant removing her from the roll.
- [85] The fine in *Lim*<sup>5</sup> was \$7,000, in circumstances where the practitioner, who was young and inexperienced, swore an affidavit in proceedings in another state on behalf of a client in which she sought to explain why her client's defence to a cross-claim had not been filed in time. In truth, the explanation was that she had failed to obtain her client's instructions for that defence but she falsely swore in her affidavit that the delay was due to an administrative error and the defence had been posted but lost in transit. The practitioner there, however, admitted her conduct, had filed an affidavit showing that she understood the nature of her wrongdoing, and produced medical evidence which showed that both personal and work pressures contributed to her misconduct.
- [86] None of those elements apply here. Ms Janes still appears to lack insight into the nature of her misconduct and wrongly persists in an attempt to blame another. In light of those factors, the case is more serious than *Lim* and a pecuniary penalty of \$10,000 is appropriate. Ms Janes ought to be allowed a reasonable time to pay and the Tribunal is prepared to allow 180 days.
- [87] The Commissioner also seeks costs, fixed at \$2,000. The amount claimed is remarkably low. The Commissioner has been compelled to prepare extensive evidence after a detailed investigation, to attend at a hearing and to file two sets of submissions. It will be ordered that Ms Janes pay the Commissioner's costs, fixed at \$2,000, within 30 days.

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<sup>5</sup> [2011] QCAT 291.