QLS Senior Counsellors' Conference 2017

Legal Ethics – Recent Appellate Cases

Justice Philip McMurdo

[1] Thank you for asking me to speak at the beginning of your conference. On the subject of legal ethics and practice, this is an accomplished and knowledgeable audience. As senior counsellors, each of you performs a service to your profession, and indeed to the public, which is invaluable. Your contributions represent what is best about our profession.

[2] What then, which is new, can be said to this audience? I wish to talk about two cases from the Court of Appeal this year, each of which I believe has a general importance for legal practices and practitioners. One is a criminal case. Not all of you will be criminal lawyers but you may be asked to advise those who are, about their ethical responsibilities and in any event, the case is not irrelevant to civil litigation. The other case came from a disciplinary hearing of charges against a practitioner in QCAT. Its immediate importance comes from the majority opinion in the judgments about the content of the duty to disclose, or update the disclosure of relevant matters to the client, particularly information about the likely amount of costs of the legal service.

[3] I go first to the criminal case.

R v Pham [2017] QCA 43

[4] This was not, of course, a disciplinary proceeding. Nor was it a case between a lawyer and a client. It was an appeal against a criminal conviction, upon several grounds but relevantly one which complained that the appellant was deprived of a fair trial because he had the same firm acting for him that acted for his co-accused. That ground of appeal, like the other grounds, was not accepted. But in the course of the consideration of the argument, the then President, with the agreement of the other judges, explained the potential conflict of duties where co-accused have the same legal representation and urged practitioners to be very cautious before providing it.

[5] The judgment was not an endorsement of the course which was taken by the firm which represented all of the accused. Rather, it was a conclusion that notwithstanding the common legal representation, there had not been a miscarriage of justice in the conviction of Mr Pham.

[6] Originally in this case, Pham was charged with four other men. They were all represented by the same firm. One solicitor at that firm had the carriage of Mr Pham's case and also that of a Mr Dang. Another solicitor at the firm had the conduct of the cases of a Mr Tran and a Mr Nguyen. The charge against Mr Nguyen was withdrawn on the eve of the trial. And on the first day of the trial, Mr Dang pleaded guilty. That left Mr Pham and Mr Tran who, after an eight day trial, were each convicted of an offence of the attempted possession of a commercial quantity of an unlawfully imported border controlled drugs.

[7] In brief, the facts were these. The evidence established, and the accused admitted, that a shipping container was imported into Brisbane from Vietnam, in which there were two wooden objects which were described as altars. A few days later, and before the container was cleared by Customs, officers detected the presence of 78 packages of white powder in these altars, which when later analysed, were shown to have contained more than 33 kg of pure heroin valued at between $10 million and $20 million. The Customs officers substituted an inert white powder for the heroin and resealed the altars after inserting hidden listening and tracking devices. Three days later the container was delivered to a building at Robertson. The next day three men went there where they loaded the altars onto a trailer. Those men were Mr Pham, Mr Tran and Mr Nguyen. In two vehicles, one towing the trailer, the three men then drove to a shed near a house belonging to a relative of Mr Pham. The three men (together with Mr Dang) then moved another load of items from the Robertson premises to the shed. But this was simply furniture which was not relevant. Pham then stayed at the shed and was still there when he was apprehended by police. Nguyen left the property as did Tran who returned a few minutes later having fetched a hammer. The listening devices detected loud noises and conversation associated with the dismantling of the altars in the shed. Soon afterwards, police raided the shed where they found the appellant together with Mr Dang and Mr Tran, each covered in dust. The (substituted) white powder had been removed from the altars. Three pairs of used work gloves were located nearby. Pham's fingerprints were found on a vacuum sealer machine and plastic bags inside the shed.

[8] At the trial, Tran gave evidence. He said that he believed he was simply helping a friend move furniture, which he had agreed to do for $100. He did not know what was in the altars and he did not know that when imported, they had contained heroin. He said that he hadn't met Pham until that day. He said that at the shed, Dang had said that there was tobacco in the altars and was giving orders about dismantling them to remove their contents. For that reason, he had left the shed and returned with a hammer. He said he was outside the shed for most of the dismantling.

[9] Pham and Tran had the same firm of lawyers but different trial counsel. Pham's counsel did not cross-examine Tran. When cross-examined by the prosecutor, Tran said that he had seen Pham using tools and trying to remove the packages from the altar.

[10] The appellant (Pham) did not give or call evidence. His counsel argued to the jury that upon the basis of Tran's evidence, Dang had told them both that the altars contained tobacco and that the appellant had been duped by Dang and had unknowingly involved himself in an attempt to possess the heroin.

[11] In the Court of Appeal, Pham sought to adduce evidence in support of his case that he was deprived of a fair trial by the same firm acting for both accused. Pham's evidence was as follows. The firm did not explain to him that a solicitor has a duty to disclose all relevant information and that therefore any instructions he gave would have to be disclosed to the co-defendants. He was not asked to consent to that disclosure. He said that he knew that the solicitor at the firm who was acting for him was also acting for Dang. When he first spoke to his barrister, in the week preceding the trial, he was told that Dang would plead guilty. Pham became anxious about the state of preparation of his case because he knew that Tran had received several visits in jail from his barrister and solicitor during which they had discussed Tran's evidence with him in detail. Pham's representation was funded by Legal Aid. Tran's representation was funded privately.

[12] On the eve of the trial, he told his counsel and the solicitor's clerk that he had lost confidence in them and did not think that his case had been properly prepared. On the following day, he was advised by them that it was a simple case, in which the only question was whether the jury would accept Tran's evidence. But he was never given a proof of Tran's evidence or asked to comment upon it. He did not know, for example,

that Tran's evidence would be that he and Tran met for the first time at the Robertson premises, that Tran denied involvement in the dismantling of the altars and removal of the contents and claimed that his involvement was limited to fetching a hammer. He did not know that Tran claimed that he had waited outside the shed. This would prejudice Pham's defence, by representing that the several voices which were heard on the listening device, in the course of the dismantling of the altars, were those of Dang and Pham.

[13] In correspondence after the trial with Pham's new solicitor, the (trial) solicitor said that both Pham and Dang specifically wanted him to act for the two of them, so that was sufficient.

[14] The appellant's argument was as follows. It was conceded that there was no absolute prohibition upon a solicitor acting for co-defendants in a criminal proceeding. But if a conflict arose, the solicitor was obliged to withdraw from the matter entirely. According to the *Australian's Solicitors' Conduct Rules* 2012, the solicitor had been bound to act in the appellant's best interests,[1] to avoid any compromise to his professional independence,[2] to not engage in conduct which was likely to materially prejudice or diminish public confidence in the administration of justice,[3] to provide clear and timely advice to assist the appellant in understanding the relevant issues and to make informed choices about actions to be taken during the course of the trial,[4] and to not disclose any information confidential to the appellant except as authorised by him or by law.[5] The judgment records that the argument emphasised particularly Rule 11, headed "Conflicts of duties concerning current clients," to which I will return.

[15] It was argued that because the strategy was for the appellant to rely on Tran's evidence, it followed that Pham's lawyers had to be informed of the evidence which Tran was to give. The apparent complaint was not that Tran's instructions should have been kept from Pham's lawyer, but that they should have been disclosed.[6] Most importantly, the

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1 Rule 4.1.1.
2 Rule 4.1.4.
3 Rule 5.1.1.
4 Rule 7.1.1.
5 Rules 9.1, 9.2.1 and 9.2.2.
6 [2017] QCA 43 at [54].

argument complained, Tran's evidence in some ways assisted the prosecution case against the appellant.[7]

[16] As I have said, the appeal was dismissed. This and the other arguments by the appellant were rejected. That was because in the Court's view, there had not been a miscarriage of justice. The Court's perspective was one of looking back at what had occurred at the trial, to see whether the common legal representation of the two accused had deprived Pham of the prospect of an acquittal. That retrospective view, of course, is different from that of the prospective view of the lawyer who proposes to act, or continue to act, for co-accused. The lawyer must anticipate what subject comes next, and how the clients' respective interests might diverge or conflict.

[17] The President reasoned that there was no miscarriage of justice, in circumstances where the appellant gave instructions that he did not wish to give evidence in his trial, apparently because Tran was to give evidence which would help them both. That is what transpired at the trial. That then gave the appellant's counsel the advantage of addressing the jury after the prosecutor had done so. Importantly, the appellant did not contend that any of the evidence led from Tran, especially that which implicated the appellant in the physical element of the offence, was untrue. Nor had the appellant given evidence on the appeal that, had he known the details of Tran's evidence in advance, he would have had his case conducted differently.

[18] What is of general importance is what was said by the President on the pitfalls of common legal representation in this context. The President said this:

> "[58] This ground of appeal raises the very real danger of a conflict of duties where a firm of solicitors or a legal practitioner acts for two or more clients in the same or related criminal matters. It has been a longstanding, reasonably common practice for a solicitor's firm or a legal practitioner to act for one or more co-defendants in criminal matters. As the appellant submits and the ASCR recognise, it is a practice fraught with danger.

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7 Ibid.

> [59] Even if there is no immediately apparent conflict of duties concerning the co-defendants, conflicts can easily arise during trials, which are notoriously unpredictable. They can also arise in sentence proceedings. Unanticipated evidence or submissions can result in a conflict of the duties owed to co-defendants, with a risk of real prejudice to one or all co-defendants. Substantial costs to parties and the community result where lawyers withdraw because of an arising conflict, causing adjournments or even mis-trials.
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> One or a number of defendants may be more culpable than others. By having the same legal practitioner acting for all, more dominant co-defendants may manipulate those less dominant to give instructions to their detriment and to the advantage of the dominant co-defendants. Where co-defendants are faced with a strong prosecution case, their lawyers should advise them of the value of a guilty plea and co-operation with the authorities in mitigation of penalty. That course may be against the interests of other co-defendants. This list of potential conflicts of duties when acting for co-defendants is far from exhaustive.
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> [60] The practice is apt to undermine public confidence in the legal profession and should be discouraged. Unless there is no possibility of a conflict existing or emerging, and such cases will be rare, co-defendants should have separate legal representation. These observations apply equally to solicitors and barristers. If legal practitioners persist in acting for co-defendants, they must be assiduous in meeting their arising ethical responsibilities."

[19] The other judges relevantly agreed with the President.[8]

[20] Within these paragraphs, there are several important propositions. The first is that the practice of one legal practitioner acting for one or more co-defendants in a criminal matter is "a practice fraught with danger". Next, it should be permitted only in a case where there is *no* possibility of a conflict existing or emerging, and "such cases will be rare." Further, the same principles apply equally to solicitors and barristers. Consequently, the prevalent practice of one solicitor briefing different counsel for the

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[8] [2017] QCA 43 at [67] (Morrison JA) and [80] (Philippides JA).

solicitor's several clients is not an answer. And it follows from this judgment, that it is no answer to have different solicitors but from the same firm, act for the different clients.

[21] The President made particular comments about the potential for a conflict to arise from the nature of a criminal proceeding, both in a trial or in a sentence. In general the course of a criminal trial is less predictable than that of a civil case. Defendants do not have to plead their cases or disclose their documents or evidence. The different standard of proof which applies to criminal trials can provide opportunities which arise only during the trial, but which can then affect the course of the defence case. Similarly, the course of the evidence in the prosecution case, or rulings by the judge during the trial, can affect during the trial the relative strength of the cases against different defendants, warranting a re-consideration by one, but not the other, of his plea of not guilty.

[22] This judgment of the Court of Appeal thereby signals the need for a substantial change to a long standing and common practice in Queensland. I am informed that it has changed the way in which many cases are now conducted. That is to be expected, given the strong statements by the Court.

[23] It is not an answer, of course, for a practitioner to say that if a conflict does arise, the practitioner could then withdraw. As was said by the President, the cost of adjournments or mistrials is great. And there is also the effect on the timely disposition of criminal cases, in which others, victims of crime in particular, have an interest. More generally, the delays that can arise from adjournments and mistrials, or successful appeals against conviction with consequent re-trials, undermine confidence in the profession and in the administration of justice.

[24] In this context, a lawyer not only serves, or should serve, the interests of the client. There is the further role of the lawyer in administration of the criminal law, for as the High Court has held,[9] in most cases in which an accused is charged with a serious offence, it is essential that he or she be legally represented in order for the trial to be fair. The proper discharge of the lawyer's duty to the client thereby promotes the discharge of a lawyer's duty to the Court.

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9 *Dietrich v R* (1992) 177 CLR 292.

[25] Although Pham's appeal was unsuccessful, success on this ground of appeal, at least outside Queensland, is not unprecedented. For example, an argument was accepted by the Court of Criminal Appeal in New South Wales in the 1999 case of *R v Hunter and Sara.*[10] In that case there were two appellants, each of whom had been convicted in the one trial, at which they were represented by the same counsel on a "direct brief" basis. The jury found them guilty of aggravated robbery of a man whom they had met had an establishment in Coffs Harbour called the Penguins Nightclub. The appellants and the victim drank together until the bar closed. Shortly before then, the victim offered to bet Sara $20 that he would be able to purchase another drink. Sara accepted. The barman refused to serve the victim. Instead he and Sara were escorted out of the nightclub by the security officer. Things then turned for the worse. Sara was insisting that he was owed $20. The victim resisted but eventually pulled out his wallet and went to hand over the $20. The wallet was full of cash (because the victim had won a deal of money on poker machines earlier in the evening). Sara knocked the wallet from his hand and struck the victim on his head, after which Hunter, the victim said, hit him to the head from behind. When the victim went to the ground he was again hit but could not say by whom. In cross-examination the victim said he had "sensed" Hunter's participation. There was other evidence implicating both, but no eye witness to the assault.

[26] The principal judgment was given by Wood CJ at CL, who said that there was a real difference between the cases of the two appellants. On his case, Hunter had not been a party to the bet or to any demand for its payment and, at the highest, had only become involved after the victim's wallet had been knocked from his hand, having been struck by Sara. There was no direct evidence to suggest that he did anything to assist Sara in taking the money or that he was there to assist him in that activity. Hunter gave evidence at the trial that he did no more than break up a struggle between Sara and the victim.[11] Further, there was a question, for which Hunter was entitled to independent advice, concerning whether or not evidence of his good character should have been raised. Wood CJ at CL said that it was "difficult to see how counsel acting for both accused could have delivered impartial advice on that question" because "raising the character of one of two accused alone inevitably invites speculation, by the jury, as to the position of the other

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[10] (1999) 105 A Crim R 223.
[11] (1999) 105 A Crim R 223 at 237 [57].

accused, who in this case was the one against whom the prosecution case was a good deal stronger.[12]

[27] Further, his Honour said, there were respects in which it would have been to Hunter's advantage to distance himself from Sara. He concluded that it was clear that the appellants should have been separately represented and that counsel had made a serious error in not ensuring Hunter at least independent advice on that question.[13] The other judges (Meagher JA and Dunford J) agreed.

[28] In *Pham*, extensive reference was made to the *Australian Solicitors' Conduct Rules*. These Rules are relevant. But as the QLS makes clear, on its website and elsewhere, the Rules do not create a code: instead they are a framework which must be read in conjunction with the common law and equity. I would like to mention here some of those rules to explain, as all of you would counsel practitioners, that compliance with the Rules is not sufficient in all cases.

[29] So Rule 11.3, which applies when a practitioner seeks to act for two or more clients in the same or related matters in which there is a conflict or potential conflict of duties, provides that the solicitor or law practice can only act if each client is aware of the other client and has given informed consent to the solicitor or law practice so acting. But as was said in *Pham*, it will be a rare case where there is not a potential conflict between the duties which would be owed by the one firm to co-defendants in a criminal trial. Rule 11.3 is in terms which reflect the duty of the lawyer as a fiduciary to his or her client. But as I have said, in the context of a criminal trial, the lawyer's duty is broader; it has a particular content from the lawyer's role in the provision of a fair trial. Therefore, it is no necessary answer for the lawyer to say that the lawyer could represent both of the clients because the lawyer had their informed consent.

[30] Similarly, Rules 11.3, 11.4 and 11.5 must be observed, but that may well be sufficient.

[31] The likely predicament of a firm, acting for co-defendants in the criminal trial, cannot be overcome by the device of the Chinese wall. That could be effective where the discharge

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[12] (1999) 105 A Crim R 223 at 237 [60].
[13] (1999) 105 A Crim R 223 at 228 [62].

of the several duties of the firm to their clients could be compromised by information confidential to one client, coming into the hands of the other. But that of itself is not an answer to the problems that arise in this context. Essentially the problem remains that the firm, not just an individual lawyer, owes a fiduciary duty to its clients.[14] So to take the example of the New South Wales case which I have discussed, no Chinese wall would have solved the problems of common legal representation which the Court identified.

***Leneham v Legal Services Commissioner* [2017] QCA 137**

[32] This was an appeal by a practitioner against a decision of QCAT in a proceeding brought by the Commissioner under s 452 of the *Legal Professional Act* 2007 (Qld) ("the Act"). The grounds for the exercise of the disciplinary powers are stated in s 456(1) of the Act: they are that a practitioner, to the Tribunal's satisfaction, has engaged in unsatisfactory professional conduct or professional misconduct.

[33] Section 420 gives examples of conduct capable of constituting unsatisfactory professional conduct or professional misconduct. One example is conduct in contravention of a "relevant law", which is defined to include the Act itself.

[34] There were many charges brought against Mr Leneham in this particular proceeding in QCAT. Only one of them was established to the Tribunal's satisfaction. Mr Leneham appealed against that finding. The Court unanimously allowed the appeal and set aside the finding of unsatisfactory professional misconduct. The reasons were not unanimous. But there was majority view upon a question of general importance, which involves the proper interpretation of s 315 of the Act. To explain the judgments and that outcome, it is necessary to say something of the factual background and of the charge which was brought in QCAT.

[35] Mr Leneham was a solicitor employed by the firm of Quinn & Scattini. Mr Leneham was held out to be a partner but he was not. The client retained the firm for a claim by her under Part 4 of the *Succession Act* 1981 (Qld). The client largely dealt with another employed solicitor, Mr Seymour. She dealt with Mr Leneham as the apparent

[14] See eg. *Mallesons Stephen Jacques v KPMG Peat Marwick* (1990) 4 WAR 357 at 374-5.

supervising partner. Within the firm, Mr Leneham supervised Mr Seymour's work on this file, as he did on other matters.

[36] In May 2010, the firm gave the client an estimate of fees. As you would all know, a law practice must disclose to a client, amongst other things, the basis upon which legal costs will be calculated, and an estimate of the total legal costs if reasonably practicable.[15] The firm disclosed an estimate of $25,000 to $30,000, if the case was settled at a mediation. Mr Leneham was involved in that disclosure: indeed he signed the document and an accompanying costs agreement.

[37] Mr Seymour then worked on the matter as the year progressed. A mediation conference occurred in December 2010. On the day of the mediation, the client was given an updated estimate of costs. By s 315, a law practice must disclose any substantial change to anything included in a disclosure as soon as the law practice becomes aware of that change.

[38] The new estimate was $62,123.88. On any view, that was a substantial change from the previous estimate.

[39] The terms of the relevant charge were as follows:

> "**Charge 2 – Failure to Update Costs Disclosure**
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> That between 27 May 2010 and 16 December 2010, the [appellant] failed to disclose in writing to the complainant as soon as reasonably practicable a substantial change in the range of fees to be charged for work performed in bringing an action under Part 4 of the *Succession Act*, contrary to s 315 of the Act."

[40] Particulars were given of that charge as follows:

> "2.1 The particular in 1.1 to 1.4 above are repeated and relied upon.

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[15] s 308(1) of the Act.

2.2 Two invoices were sent by Quinn & Scattini to Sherry Jewell for work performed for estate litigation in the action. Those invoices were sent on 15 December and 16 December 2010. The two invoices totalled $62,123.88.

2.3 The upper range of the cost estimate made on 27 May 2010 was $30,000.00.

2.4 As the [appellant] did not make further disclosure in writing as soon as reasonably practicable, the [appellant] failed to disclose a substantial change in the fees to be charged."

[41] The charge alleged that Mr Leneham had failed to advise that a substantial change in the fees, contrary to s 315 of the Act. The problem was that s 315 imposes an obligation of "a law practice". Section 315 is as follows:

"**315 Ongoing obligation to disclose**

A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this division as soon as is reasonably practicable after the law practice becomes aware of that change."

[42] A legal practitioner may constitute a law practice where he or she is a sole practitioner. Here the law practice was constituted by a firm. Mr Leneham was not that firm nor was he a member of it. How then could he have been guilty of the charge?

[43] Section 316(7) provides as follows:

"(7) Failure by a law practice to comply with this division is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any Australian legal practitioner, or Australian-registered foreign lawyer, involved in the failure."

[44] If there had been a contravention by the law practice of s 315, and if Mr Leneham (an Australian legal practitioner) had been "involved in the failure", that conduct was capable of constituting unsatisfactory professional conduct or professional misconduct on his part.

[45] The charge itself made no reference to s 316. It did not explicitly charge Mr Leneham with being involved in the failure of the law practice to comply with the obligation in s 315. The other members of the Court (Philippides JA and Boddice J) held that this was fatal to the Commissioner's case. The charge, as formulated, could not be made out, once it was seen that Mr Leneham was not the law practice.

[46] I reached a different view on that question. I said that a legal practitioner, who is not a sole practitioner, could be a party to a contravention of s 315 only by the operation of another provision of the Act. One such provision was s 701 which is as follows:

> "701 Liability of principals
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> (1) If a law practice contravenes, whether by act or omission, any provision of this Act or a regulation imposing an obligation on the practice, each principal of the practice is taken to have contravened the same provision, unless the principal establishes that—
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> (a) the practice contravened the provision without the knowledge actual, imputed or constructive of the principal; or
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> (b) the principal was not in a position to influence the conduct of the law practice in relation to its contravention of the provision; or
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> (c) the principal, if in that position, used all due diligence to prevent the contravention by the practice.
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> (2) Subsection (1) does not affect the liability of the law practice for the contravention.
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> (3) A contravention of a requirement imposed on a law practice by this Act is capable of constituting unsatisfactory professional conduct or professional misconduct by a principal of the practice."

By that provision, each principal of a practice is taken to have contravened a relevant law in the same way that the practice has done so. That did not apply to Mr Leneham because he was not a principal of the practice.

[47] The only way in which Mr Leneham could be disciplined for a contravention of s 315 was by the operation of s 316(7). I held that this is the way in which the charge should have been understood and that this was the case which Mr Leneham had to meet. It was therefore necessary for me to go further in considering whether the charge was proved against him. The difference between my view and that of the other judges is of little general importance, except to say that all of the judgments make it clear that the framing of charges under these provisions requires particular attention and an understanding of the legal basis or bases of professional responsibility.

[48] It was then necessary for me to consider whether the Commissioner had first proved the alleged contravention by the law practice of s 315. That required the proof of a substantial change in the estimate of the legal costs from that which had been disclosed earlier in the year. About that there was no issue: the costs had more than doubled. But it also required proof that the law practice had *become aware* of that change. And it required proof of the time at which, or by which, that awareness had commenced, because it was only from that point in time that there was an obligation to make a further disclosure.

[49] The Commissioner's case, I said, was that the awareness of the law practice was constituted by Mr Leneham's awareness. On my understanding of the case brought by the Commissioner, there was no claim that Mr Seymour's state of mind mattered.

[50] The Tribunal found that the law practice contravened s 315 by failing to make any disclosure regarding changes in the costs estimate until the mediation. That finding was challenged in our Court, because it said nothing about the time at which the practice became aware of the change.

[51] Mr Leneham had the oversight of the conduct of the client's case. If Mr Leneham had "become aware" that the original estimate was no longer accurate, his awareness could have been attributed to the law practice. In other words, in principle, the law practice

could have contravened s 315 because through its employee, Mr Leneham, it had become aware of the relevant change and not disclosed it to the client.

[52] But what did "aware" mean in this context? My view was that it was synonymous with "actually knows", as distinct from meaning "should be aware". I said that s 315 imposes an obligation to make further disclosure from the time of the actual awareness and that s 315 does not require the disclosure of something which is unknown.

[53] On that interpretation, had the evidence proved that Mr Leneham was aware of the inaccuracy of the original estimate? I said that the Tribunal had made no finding that he had been. Rather, it had found that he had not looked at the question of the client's costs until he had been preparing for the mediation. An updated estimate was then given at once. That finding accorded with the unchallenged evidence of Mr Leneham. I said that the Tribunal had concluded that there was a contravention of s 315 upon the basis of an awareness which the appellant *should have* had, but did not have, at an earlier time. That was a legal error. A contravention of s 315 was therefore not proved, in my judgment. Section 316(7) was not engaged, because its operation required the proof of a contravention of s 315. For that reason I agreed with the other judges that the charge should not have been found to have been proved.

[54] Boddice J agreed with my interpretation of the word "aware" in s 315. Philippides JA considered the question and was not persuaded to agree with us. However, her Honour found it unnecessary to reach a concluded view.[16]

[55] The decision is important because in the view of two members of the Court, the word "aware" in s 315 is synonymous with "actually knows". Of course that is an awareness by the law practice. A practitioner whose conduct is in question will not, in every case, be the person whose mind matters, in assessing the awareness of the law practice. So in this case, what would have been the position if it was proved that the law practice, through Mr Seymour, was aware of the change in the fees? In that event, it would have been necessary for the Commissioner (if the charge had been drawn correctly) to prove that Mr Leneham was "involved in [that] failure." The Court received substantial submissions on behalf of Mr Leneham as to what proof of that "involvement" would have

[16] [2017] QCA 137 at [41].

required. In particular, it was submitted it would have required proof of Mr Leneham's own awareness of the failure of the law practice, upon the basis that he could not be involved in a contravention without knowing of the facts constituting that contravention. That argument had considerable support, for example from cases in the criminal law involving the responsibility of accessories to the commission of a crime,[17] and cases on the liability of parties involved in a contravention of the (former) *Trade Practices Act* 1974 (Cth).[18] That is a subject which would require more time than is available this morning. In any case it is likely to come before our Court so that I should say no more about it.

[56] What can be said is that the framing of a case like this must be more precisely undertaken. It must now be framed by reference to the Court's interpretation of "becomes aware" in s 315. And it will have to be framed with an interpretation, or alternative interpretations, of s 316(7) in mind.

[17] See eg *Giogianni v The Queen* (1985) 156 CLR 473.
[18] *York v Lucas* (1985) 158 CLR 661.