IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT ARBITRATION LIST

Not Restricted

No 4655 of 2011

CHRISTOPHER ANTONY DALE — Plaintiff

V

CLAYTON UTZ (a firm) — Defendant

JUDGE:	HOLLINGWORTH J
WHERE HELD:	Melbourne
DATE OF HEARING:	23 – 24 January 2013
DATE OF JUDGMENT:	26 March 2013
CASE MAY BE CITED AS:	Dale v Clayton Utz (No 2)
MEDIUM NEUTRAL CITATION:	[2013] VSC 54

LEGAL PRACTITIONER – Barrister – Application to restrain defendant from retaining senior counsel in this proceeding – Application brought under inherent jurisdiction and to enforce duties of confidence and loyalty – Application granted

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Ehrlich	O'Donnell Salzano Lawyers
For the Defendant	Mr P Riordan SC Mr N De Young	Minter Ellison

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HER HONOUR:

Introduction

1 Christopher Dale was, for many years, a litigation partner in the solicitors' firm of Clayton Utz. In October 2005, Clayton Utz terminated Mr Dale's partnership. One of the grounds now relied upon by the firm as justifying the termination was an alleged breach by Mr Dale of the firm's *pro bono* policy, in relation to some matters involving a Mr and Mrs Ebner.

2 In September 2011, Mr Dale issued this proceeding, in which he claims that, in deciding to expel him, his former partners acted unlawfully and in breach of the partnership agreement.

3 The defence, which Clayton Utz filed in January 2012, was signed by Allan Myers QC.

4 By summons dated 14 February 2012, Mr Dale seeks an order restraining Clayton Utz from continuing to retain Mr Myers as its counsel in this proceeding. In summary:

(a) Mr Dale says that in August 2004 and November 2005 he sought and obtained legal advice from Mr Myers, in relation to some of the matters the subject of this proceeding, being the Ebner matters and his expulsion from the firm; and

(b) Mr Myers says that he has no recollection of any such communications, and does not believe he was retained to provide advice to Mr Dale.

5 The injunction is sought on three bases:

(a) First, to ensure that counsel's duty of loyalty to a former client is respected;

(b) Secondly, to prevent the disclosure of confidential information; and

(c) Thirdly, under the court's inherent jurisdiction to restrain counsel from acting, in order to protect the proper administration of justice.

Preliminary matters

6 After Randall As J had determined some disputes about subpoenas, and the admissibility of the parties' affidavits, the injunction application was referred to me for hearing.

7 A preliminary issue then arose as to whether Clayton Utz should be permitted to cross-examine Mr Dale during the hearing of the injunction application. On 29 November 2012, I granted limited leave to cross-examine Mr Dale, and unlimited leave to cross-examine Mr Myers. I published detailed reasons, which explained the limits of permissible cross-examination in this interlocutory application.[1]

8 I ruled that Clayton Utz was not permitted to cross-examine in relation to the following matters:

(a) The substance of the confidential information which Mr Dale says he communicated to Mr Myers;

(b) The substance of any instructions which Mr Dale says he gave to Mr Myers, or any legal advice which he says Mr Myers provided to him;

(c) Mr Dale's uncontradicted account of his interactions with Clayton Utz partners, which he says led him to seek Mr Myers' advice on each occasion;

(d) The allegation that Mr Dale falsely recorded in the firm's trust account records that certain funds had been provided to the firm by Kerry Milte, when in fact they had been provided by Mr Dale; and

(e) The allegation that Mr Dale lied when he told the Clayton Utz partners that counsel in the Ebner matters were prepared to wait for payment of fees.[2]

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1 *Dale v Clayton Utz* [2012] VSC 577.

2 The matters in (d) and (e) went to credit only. Further, the matters in (c) to (e) were all likely to be the subject of contested evidence at trial. It would have been unfair to have allowed Clayton Utz the opportunity to use the injunction application as a practice run at cross-examining Mr Dale about such matters, in circumstances where none of its likely witnesses had gone on oath and exposed themselves to equivalent pre-trial cross-examination.

9 I ruled that Clayton Utz was permitted to cross-examine Mr Dale in relation to the following matters:

(a) Mr Dale's usual practices when briefing counsel, and why he did not adopt them in relation to Mr Myers;

(b) The nature and extent of all of Mr Dale's contact with Mr Myers, including in August 2004, late 2005, and subsequently (provided that such cross-examination did not enquire into privileged or confidential matters);

(c) Health problems which Mr Dale has suffered, which might have affected his memory; and

(d) Alleged differences between Mr Dale's affidavits and those of his solicitor, Francis O'Donnell, concerning Mr Dale's contact with Mr Myers.

10 I also said that I would hear further evidence and argument, if Clayton Utz wished to cross-examine Mr Dale in relation to past disciplinary matters,[3] or in relation to an allegation that Mr Dale had leaked documents to *The Sunday Age* newspaper but afterwards untruthfully denied doing so. Clayton Utz did not subsequently seek to cross-examine in relation to past disciplinary matters, but did do so in relation to *The Sunday Age* matter and one further matter also said to go to Mr Dale's credit.

Evidence relating to the issues

11 Mr Dale relies upon the following affidavits in support of the injunction application:

(a) His own affidavits, dated 23 April and 19 June 2012;

(b) The redacted affidavits of Mr O'Donnell, dated 14 February, 9 March and 21 June 2012;[4] and

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3 Provided such matters went to credit, not character.

4 Mr O'Donnell's affidavits had originally deposed to all the relevant events, including communications between Mr Dale and Mr Myers, on the basis of information provided to him by Mr Dale. Clayton Utz had objected to the use of that hearsay evidence, arguing that it was inadmissible, on what it said would be a final hearing. Mr Dale subsequently swore affidavits in which he directly deposed to the relevant matters, and Mr O'Donnell's affidavits were redacted to remove hearsay.

(c) The affidavit of his brother, Michael Dale, dated 15 June 2012.

12 Mr Dale was cross-examined, and various additional documents were tendered through him. Michael Dale and Mr O'Donnell were not cross-examined.[5]

13 Clayton Utz relies upon three affidavits of Mr Myers, dated 2 March and 4 June 2012, and 14 January 2013. Mr Myers was not cross-examined.

14 Clayton Utz did not file any affidavit from David Fagan (its chief executive partner at the relevant times), or any other partner, to contradict Mr Dale's account of their communications, or the circumstances of the termination of his partnership. While it is clear from the pleadings that many of those matters will be in dispute at trial, Mr Dale's account stands uncontradicted for the purposes of this application.

Dealings between Dale and Myers before the August 2004 meeting

15 There is no dispute that Mr Dale has known Mr Myers for many years, in their professional capacities, when Mr Myers was a junior and then senior counsel.

16 Whilst a partner at Clayton Utz, Mr Dale had retained or worked with Mr Myers on a number of occasions in respect of litigation matters, the details of which are not relevant here.

17 Clayton Utz acted for British American Tobacco Australia Services Pty Ltd ("BATAS"), the defendant to a tobacco-related proceeding brought in this court by Rolah McCabe ("the McCabe proceeding"). In March 2002, Eames J struck out BATAS's defence, on the basis that BATAS had denied Mrs McCabe a fair trial by deliberately destroying internal documents on the health effects of smoking.

18 Mr Dale was not involved in the conduct of BATAS's defence; that was primarily the responsibility of two other Clayton Utz partners, Richard Travers and Glenn Eggleton. However, in mid 2002, Mr Dale conducted an internal review of the firm's conduct of the BATAS defence.

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5 Although Clayton Utz had served a subpoena, requiring Mr O'Donnell to attend for cross-examination, it was not called upon.

19 Eames J's decision was overturned by the Court of Appeal in December 2002. The High Court refused special leave in October 2003.

20 Clayton Utz ceased acting for BATAS in the McCabe proceeding, after Eames J's decision, because of a potential conflict of interest. Mr Myers acted for BATAS in the Court of Appeal and High Court, briefed by another firm. After the special leave application, Mr Dale rang Mr Myers, to discuss the outcome in general terms. Mr Dale described it as a private conversation, "to note and praise him for taking on what I considered to be an extremely unpopular case as a barrister." Even though Mr Myers was not being briefed by Clayton Utz at the time, Mr Dale agreed that he had felt able to just telephone Mr Myers and have such a discussion.

21 During the 2004 calendar year, Mr Dale was President of the Law Institute of Victoria. In that capacity, he arranged to have lunch with Mr Myers on 1 June 2004, upon hearing a rumour that Mr Myers was intending to retire from practice. At the lunch, Mr Myers informed Mr Dale he was not giving up practice, he was just going to be more selective in the work he did. Mr Myers insisted on paying for the lunch.

The August 2004 meeting

Mr Dale's affidavit evidence

22 In his April affidavit, Mr Dale says the following things.

23 In mid 2000, Clayton Utz started acting on a *pro bono* basis for the Ebners, in respect of various legal matters. Over time, some Clayton Utz partners, including Mr Fagan, became concerned about the level of counsel fees and other disbursements which the firm had incurred on behalf of the Ebners. These issues were raised a number of times with the Ebners. In early April 2004, the firm informed the Ebners that they could no longer continue to act for them.

24 During 2004, Mr Dale had a number of meetings with Mr Fagan about the Ebner matters, including the outstanding disbursements. In particular, Mr Dale met with Mr Fagan and some other partners on 19 August 2004. During the meeting, Mr Fagan informed Mr Dale that he had acted outside his authority in incurring the

disbursements, and demanded that Mr Dale reimburse the firm in respect of them. Mr Dale describes Mr Fagan's demeanour as "extremely menacing and angry", and says he felt intimidated by what he took to be implied threats about his partnership. Mr Dale exhibits the email from Mr Fagan, which scheduled the meeting on 19 August, and referred to the Ebner disbursements and Mr Dale's role as a partner as topics to be discussed at the meeting.

25 Mr Dale says that he was very disturbed by the allegations made against him by Mr Fagan, which he did not believe were justified and, shortly after the meeting, Mr Dale decided he should seek legal advice from senior counsel as to his legal position. He contacted Mr Myers' secretary, and made an appointment to see Mr Myers at 11.00am on 23 August 2004. He exhibits his contemporaneous diary note, which supports the fact that he made and attended the appointment.

26 Mr Dale says he has a "very good memory" of the meeting at Mr Myers' chambers, which lasted for about an hour; these matters were very important to him, and he had never before had to see counsel about a serious legal issue concerning him personally. In particular, he says:

> 16 I do not wish to waive my privilege in respect of the content of my conference with Mr Myers. However, whilst I cannot remember the exact words I spoke, I clearly remember that I gave detailed instructions to Mr Myers in respect of the history of the Ebner matters; my conduct of that matter including the circumstances concerning the incurring of counsel fees and disbursements on behalf of Mr and Mrs Ebner on my authority; [Clayton Utz's] pro bono policy; Mr Fagan's assertion that I had acted outside my authority in incurring counsel fees and disbursements on behalf of Mr and Mrs Ebner; my explanation as to why I did not accept that assertion; and Mr Fagan's demand that I reimburse [Clayton Utz].
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> 17 After I had given my instructions, Mr Myers told me that it looked to him that I was *"being set up"* and then gave me his opinion as to the validity of the allegation that I had acted outside my authority as a partner in incurring the said counsel fees and disbursement. Mr Myers also gave me legal advice as to the question of whether or not I could lawfully be required to make the reimbursement and whether or not I should in any event accede to the demand made by Mr Fagan that I so reimburse the firm and, if I did so agree, the basis upon which I should so agree. I decline to waive my privilege in the content of that legal advice.

> 18 I refer to paragraph 3 of the affidavit made in this proceeding by Mr Myers. At no time during my conference with Mr Myers on 23 August 2004 did Mr Myers require or ask me to appoint instructing solicitors so that a brief or back sheet could be provided to him or tell me that he would not continue the conference or provide me with advice unless a brief and back sheet was first provided to him. Neither did he ever tell me that he was seeing me in any capacity other than as a member of counsel. The question of fees were not discussed and Mr Myers never rendered an account to me.
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> 19 ... I consulted Mr Myers because I wanted legal advice about the matters ... and at no time during my conference with Mr Myers did he tell me that he was not seeing me in any capacity other than as a member of counsel. That is the basis that I believed I was consulting him on. I was not there to seek his advice on any other basis.
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> 20 After considering Mr Myers' advice I had another meeting with Mr Fagan on 2 September 2004 in which I, amongst other things, agreed to reimburse [Clayton Utz] for the said counsel fees and disbursements. During that meeting I told Mr Fagan that my agreement to reimburse the firm was made without any admission of wrongdoing on my part and on the basis that the reimbursement would finally conclude the matter. I expressly said each of those things because of the advice I had received from Mr Myers.

27 Mr Dale says that Mr Myers was "privy to confidential and privileged instructions and information concerning the allegations now made against [Mr Dale] in paragraphs 93 to 100 of the defence." He is concerned that the matters discussed will directly or indirectly assist Mr Myers, particularly in his cross-examination of Mr Dale. He is particularly concerned that Mr Myers has signed a defence which alleges that Mr Dale admitted his wrongdoing in relation to the Ebner disbursements, when Mr Dale expressly made no admission as to wrongdoing, based on advice which Mr Myers gave to him.

Mr Dale's oral evidence

28 The meeting on the 23rd had been arranged in advance by telephone. Mr Dale could not specifically recall when he made the appointment, save that it was made at least one day in advance.

29 At the meeting, Mr Dale did not give Mr Myers a brief, a backsheet or any documents. Fees were not mentioned. Mr Dale kept no note of the meeting.

30 Mr Dale's experience with Mr Myers was that if you deliver a brief to him and go and see him in conference, he asks you what the matter is about rather than reading the brief. Because there was a sense of urgency in getting the advice on this occasion, Mr Dale thought they should "cut to the question" of what it was about, rather than delivering documents.

31 Mr Dale agrees that he did not say to Mr Myers that he wanted him to act for him in a dispute against Clayton Utz. At that time, he did not foresee any proceeding he might want to bring against Clayton Utz.

Mr Myers' evidence

32 Mr Myers says in his March affidavit:

> 3(a) I have no recollection or [sic] any meeting with Mr Dale on or about 23 August 2004;
>
> (b) prior to that date, in his capacity as a partner of Clayton Utz, Mr Dale instructed me on several matters for clients of Clayton Utz;
>
> (c) I recall one discussion with Mr Dale in around 2004 or 2005 in which he volunteered to me a comment about a matter personal to him, being that his wife, a musician, was recording some musical works in Ireland. I do not recall Mr Dale discussing any other personal matter with me at any time. Specifically, I do not recall him ever discussing with me any issues between himself and Clayton Utz, whether relating to Mr and Mrs Ebner or otherwise;
>
> (d) I was not retained by Mr Dale to act for him or advise him personally in conference on or about 23 August 2004 or, I believe, at any other time. I say this because it is my universal practice, if someone seeks my advice as counsel, to insist upon the provision of a brief at least comprising a backsheet. Sometimes I mark backsheets "fee declined", but my practice, without exception, is not to give legal advice without establishing a professional relationship, and provision of a brief is an essential component of any such relationship;
>
> (e) I record in my fee book all briefs on which I charge a fee. There is no reference in my fee book to any brief in respect of advice to Mr Dale on or about 23 August 2004 and I have not found any reference to any brief to advise Mr Dale at any other time. Further, I believe with a high level of confidence that I did not accept a brief to advise Mr Dale in respect of which I declined a fee.

33 In so far as Mr Myers states in paragraph 3(d) that he "was not retained" by Mr Dale, I read that as no more than a statement of his personal belief that he was not

retained. Mr Myers cannot give evidence as to whether he was in fact retained. Whether or not there was a retainer is a legal matter for the court to determine, from the objective facts, and not from the subjective beliefs of the lawyer or the party alleging to have retained the lawyer.[6]

34 In his January affidavit, Mr Myers elaborates on the references in his March affidavit to his "universal practice" in relation to insisting on the provision of a brief. He says that the universal practice would extend to a situation in which he was personally consulted by a professional colleague who asks for legal advice in a personal capacity.

35 Mr Myers has no diaries from 2004 or 2005.

Subsequent dealings between Dale and Myers

36 Mr Dale had a friend, Geraldine de Malet, who was involved in some litigation against her former *de facto* partner. Mr Dale arranged and attended a meeting on 24 September 2004, between Ms de Malet and Mr Myers, with a view to encouraging Mr Myers to take her on as a client. Mr Myers did agree to act for her. From time to time thereafter, Mr Dale would chat to Mr Myers about how her case was going. In these discussions, Mr Dale was only acting in his capacity as a friend; Ms de Malet had other solicitors acting for her, who formally briefed Mr Myers in due course.

The lead up to Mr Dale's termination

37 On 6 July 2005, the police executed a search warrant at Clayton Utz, looking for documents relating to a proceeding in which Mr Dale had been acting for a Ms Schmidt. The police were investigating an allegation that Mr Milte, a former federal police officer, had improperly obtained and provided information to benefit Ms Schmidt in the litigation.

38 Within a day or so after that, Mr Dale went to see Andrew Joseph, a solicitor at Strongman & Crouch, to seek advice as to his personal position regarding the Schmidt matter. Mr Joseph subsequently briefed Paul Holdenson QC, to give Mr

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6 See for example: *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at [227].

Dale some specialist criminal advice.

39 Mr Dale was interviewed by the police about the Schmidt matter on Friday 12 and Monday 15 August 2005. Over the course of the intervening weekend, Mr Joseph briefed another criminal barrister, Phillip Dunn QC, to advise Mr Dale in conference in relation to the police interviews. Mr Dunn was engaged in something of a hurry, without any backsheet or formal retainer being provided prior to or at the conference. A backsheet was provided later.

40 On 15 August 2005, Mr Fagan wrote to Mr Dale, informing him he was being placed on administrative (or what Mr Dale referred to as "gardening") leave.

41 On 17 August 2005, Mr Joseph wrote to Mr Fagan, informing the firm that he was acting for Mr Dale in relation to both the police matter and Mr Dale's relationship with his partners.

42 Also on 17 August 2005, Mr Dale went back to his office at Clayton Utz to collect some personal effects, including his briefcase, wallet and documents.

43 Further correspondence flowed in late August between Messrs Fagan and Joseph, regarding Mr Dale's partnership, including whether Clayton Utz had a right to place him on administrative leave.

44 On 26 August 2005, Mr Fagan circulated a memorandum to the members of the Clayton Utz board. The Fagan memorandum advised that Mr Fagan proposed to move the board, at its meeting on 1 September 2005, for a decision requiring Mr Dale to leave the partnership. The Fagan memorandum made a number of serious allegations against Mr Dale, particularly in relation to his handling of the Schmidt matter, which Mr Fagan asserted justified terminating Mr Dale's partnership. The memorandum said that Mr Dale's handling of the Schmidt matter should be evaluated against the background of the Ebner matter (the details of which were briefly recorded).

45 By the time of the Fagan memorandum, Mr Joseph had retained two further barristers, Clifford Pannam QC and Peter Fox, to advise Mr Dale in relation to partnership matters.

46 Mr Dale was admitted to the Albert Clinic Psychiatric Hospital on 31 August 2005, and remained there for several days. He was diagnosed as suffering from a deep psychiatric depression.

47 On 1 September 2005, Strongman & Crouch responded to the Fagan memorandum with a written submission, attached to which were lengthy written advices from Dr Pannam and Mr Fox. Strongman & Crouch protested about the short time frame for responding to the board's allegations, particularly given that Mr Dale had been too unwell to provide proper instructions for several weeks.

48 On 6 September 2005, shortly after Mr Dale's discharge from hospital, Strongman & Crouch provided a further submission to Clayton Utz.

49 On 7 September 2005, the Clayton Utz board resolved to terminate Mr Dale's partnership, with effect from 8 October 2005.

The 2005 phone call

Mr Dale's affidavit evidence

50 Mr Dale's April affidavit says:

> 34 In late 2005 I also had a telephone conversation with Mr Myers concerning my dismissal from Clayton Utz. This was a candid conversation about the alleged basis for my dismissal and I sought advice from Mr Myers about whether or not I had a claim against Clayton Utz. I sought Mr Myers' advice as to whether or not the [Clayton Utz] board had an obligation to accord me procedural fairness in coming to its decision and whether an action for bad faith could be maintained in respect of the decision. Although short as I had become upset about relating what had happened to me, Mr Myers provided me with his opinion in relation to both matters. I have a very good recollection of that conversation because it gave me great comfort at the time about my legal position. I decline to waive privilege in the content of that legal advice.

Mr Dale's oral evidence

51 A letter from Mr O'Donnell to Clayton Utz's current solicitors, Minter Ellison, dated 20 December 2011, had asserted that the telephone conversation took place in late October or early November 2005.

52 In oral evidence, Mr Dale said that he had subsequently seen an email, which led him to believe that the telephone conversation in fact took place in late November 2005. Mr Dale knew that Mr Myers had been seriously unwell during 2005 and was undergoing medical treatment. An email from Peter O'Callaghan QC, dated 15 November 2005, responded to Mr Dale's query as to when Mr Myers' medical treatment would be finishing. Mr Dale did not contact Mr Myers until after he understood the treatment to have finished.

53 Mr Dale rang Mr Myers' chambers and left a message with his secretary. Eventually, Mr Myers returned his call.

54 The purpose of the call was to talk about Mr Dale's termination from the Clayton Utz partnership.

55 Mr Dale spoke to Mr Myers about "broad partnership issues", including general discussions about natural justice and procedural fairness. The issues were not discussed by reference to the particular partnership agreement, just as a matter of general legal principles. Mr Dale wanted to know whether he had a claim against Clayton Utz.

56 Mr Dale did not provide any backsheet, brief or other documents to Mr Myers in relation to this phone call, nor did he make any note of it. No fee was ever discussed or charged.

57 At the time of the telephone call, Mr Joseph and Dr Pannam were still acting for Mr Dale in relation to his dispute with Clayton Utz.

Mr Myers' evidence

58 In relation to the 2005 phone call, in his March affidavit Mr Myers says:

> 4(a) I have no recollection of any telephone conversation with Mr Dale in late 2005 or any other time concerning his "dismissal" from Clayton Utz or anything of that nature;
>
> (b) my only recollection of a personal discussion with Mr Dale is as set out in paragraph 3(c) above;
>
> (c) Mr Dale did not seek legal advice from me in or around late 2005 and I did not provide it. The basis for me saying this is that there was no brief in relation to any discussion with Mr Dale in or around late 2005 and, as indicated in paragraph 3(d) above, it is my universal practice to insist on the provision of a brief if I provide legal advice in a professional context, even where I decline a fee. There is no reference in my fee book to any brief in respect of advice to Mr Dale in or around late 2005 and I have not found any reference to any brief to advise Mr Dale at any other time.

59 In so far as Mr Myers states in paragraph 4(c) that he was not asked to and did not provide legal advice to Mr Dale, given that he has no memory of this conversation at all, I read that as no more than a statement of his personal belief (based on his "universal practice") that he was not retained to provide legal advice.

60 In his June affidavit, Mr Myers repeats that he had no recollection of any conversation with Mr Dale in which he said that he had been "dismissed" from Clayton Utz, or in which he sought advice about whether he had a claim against Clayton Utz. He believes the first time he heard of Mr Dale's dismissal was in or about October 2006, in the context of the BATAS proceeding discussed below.

61 As mentioned earlier, whilst he was a partner of Clayton Utz, Mr Dale had conducted an internal review of the firm's conduct of BATAS's defence of the McCabe proceeding. Some of the internal review documents were subsequently leaked to the media. In a later proceeding ("the BATAS proceeding"), BATAS sought to protect its information and to restrain the further use of the leaked documents. One of the issues in the BATAS proceeding was: who leaked the documents? Mr Dale was joined as one of the defendants to the BATAS proceeding.

62 In his June affidavit, Mr Myers says that he believes he first learned of Mr Dale's dismissal in the course of acting for BATAS in the BATAS proceeding. Mr Myers says that "at no stage during the course of those proceedings was any recollection triggered of the circumstances of his dismissal or of any other discussion between me and Mr Dale concerning his dismissal."

63 Mr Myers also says that Mr Dale did not raise any objection to his acting for BATAS in the BATAS proceeding.

64 But in his June affidavit, Mr Dale responds that Mr Myers did not announce an appearance in the BATAS proceeding, and he was unaware that Mr Myers was retained in the proceeding, until around 23 May 2007, one day before the proceeding was settled against him.

65 Mr O'Donnell acted for Mr Dale in the BATAS proceeding, and says in his June affidavit that neither he nor his firm were aware that Mr Myers was acting against Mr Dale in that proceeding until the day before the proceeding settled against Mr Dale.

The email to Mr Dale's brother

66 In order to support his evidence of the August 2004 meeting and the 2005 phone call, Mr Dale exhibits an email which he sent to his brother, Michael Dale, in June 2006. In that email, he says:

> I have briefed another QC to give me a second opinion on the police matter. I have a conference next Wednesday. I have told him I have PDQC [a reference to Phillip Dunn QC] in it but he has done nothing and despite the work I have done is likely to do nothing. He is content to give advice as a second opinion. ...
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> ...
>
> I also intend to speak to Allan Myers QC again to see if he can take over the dispute with CU.
>
> [privileged material about advice from Dr Pannam deleted]
>
> This might cause you concern as the last thing we can do is incur further legal costs. However, I do not intend to sack anyone, just not involve some of the old team going forward. New ones will have to act on a conditional fee

basis, so they get paid if we have an outcome.

The good thing about Allan is that he is not motivated by money. He has made a fortune from his investments outside the law the principal of which was a polish brewery. He is semi retired (at about 57) and only takes on the cases he chooses to. If I bare my sole and tell him my financial circumstances I am sure he will not charge unless there is an outcome.

I did speak to Allan in 2004 when I was being forced to pay the Ebner disbursements. I wanted to get in first. He is the one barrister Frankie and the Board would actually fear. The fact is that he is fearless. I have briefly spoken to him late last year and we were going to catch up but have not. I can explain that there has been a bit to do. Another friend who is a barrister has been acting as a go between and has been updating him. He tells me Allan is keen to hear from me. I propose to make an appointment next week to see him when he can spare the time to have a long chat about the case. Apart from anything else he is a good general adviser and would be good to talk to.

67 Michael Dale's affidavit confirms that he received the June 2006 email at the time.

68 The barrister friend referred to in the email as a "go between" is Marc Bevan-John. On 19 April 2006, Mr Bevan-John had sent an email to Mr Dale about "ajm" (being Mr Myers' initials), informing him that "I have talked with him and he would be delighted to meet with you".

69 Mr Myer's June affidavit accepts that Mr Bevan-John spoke with him at some stage, to ask whether he would be prepared to meet with Mr Dale. He told Mr Bevan-John he would be prepared to meet with Mr Dale. Mr Myers has only "a vague recollection" of the call with Mr Bevan-John.

70 Mr Dale says that at the time of the email, he was intending to "not go forward" with Dr Pannam and Mr Fox as his legal team. He was intending to ask Mr Myers to take over the dispute with Clayton Utz. However, Mr Dale did not subsequently follow up with Mr Myers, to see if he would take it over.

71 In cross-examination, Mr Dale was asked to explain why he had used the word "briefed", when referring to a criminal QC, but had only said "I did speak to Allan in 2004", when referring to his 2004 meeting with Mr Myers. He could not really explain it, simply saying that he had used a different expression in what was just an

email to his brother.

72 Mr Dale was cross-examined about his statement to his brother that "I wanted to get in first. He is the one barrister Frankie and the Board would actually fear." Mr Dale says he went to see Mr Myers in 2004, because he regarded him as the best adviser for him. Although he said he had no idea that things would escalate the way they did, he eventually conceded that he knew at the relevant time that if things did escalate with Clayton Utz, they would want to brief Mr Myers. However, he resisted the suggestion that he had gone to see Mr Myers to try to conflict him out of acting for Clayton Utz.

Objections to Mr Myers acting in this proceeding

73 On 20 December 2011, Mr O'Donnell wrote to Minter Ellison, who act for Clayton Utz in this proceeding. The letter referred to a phone call on 8 December 2011, between Mr O'Donnell and Richard Murphy, the partner handling the matter at Minter Ellison. During the call, Mr Murphy informed Mr O'Donnell that Mr Myers had been retained on behalf of Clayton Utz, to which Mr O'Donnell "expressed surprise" (as Mr Dale had already informed him of his earlier conversations with Mr Myers).

74 The letter objected to Mr Myers acting, on the ground that he had a conflict of interest, due to having advised Mr Dale at the August 2004 meeting and in the 2005 phone call. The letter referred briefly to the circumstances of the two discussions, before asserting that Mr Myers was precluded from acting on the principles set out in *Sent and Primelife Corporation Ltd v John Fairfax Publications Pty Ltd*.[7] The letter warned that an injunction would be sought if Mr Myers went ahead and continued to act for the firm.

75 Over the next month, there was further correspondence, as Minter Ellison sought further information about Mr Dale's objections. On 25 January 2012, Minter Ellison advised that Clayton Utz proposed to continue to retain Mr Myers.

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7 [2002] VSC 429 ("*Sent*").

Mr Dale's health problems

76 In cross-examination, Mr Dale gave the following evidence about his mental health. He suffered extensive stress due to his roles as President of the Law Institute of Victoria and a partner at Clayton Utz.

77 As mentioned earlier, on 31 August 2005, Mr Dale was admitted to the Albert Clinic for psychiatric care. Mr Dale said he was incapable of giving proper instructions to the legal practitioners he retained at the time, and the quality of those instructions were inferior and unreliable. Once he had been discharged from the Albert Clinic, he had continuing treatment from Professor Tiller and Dr Nick Ingram. Their preliminary views were that Mr Dale was suffering from a deep psychiatric depression.

78 It was not put to Mr Dale in cross-examination that his memory of the August 2004 meeting and the 2005 phone call might have been affected by any mental health problems.

79 Furthermore, Mr Dale said in re-examination that he has not noticed any defects in his memory as a result of his depression.

Evidence relating to credibility

80 Clayton Utz sought to cross-examine Mr Dale in relation to two matters, which were said to demonstrate his untruthfulness. First, it was alleged that Mr Dale had lied to Clayton Utz about whether he had leaked documents to *The Sunday Age*. Secondly, it was alleged that Mr Dale had lied to the media and the court about why he had leaked the documents.

81 These issues go directly towards Mr Dale's credibility. "Credibility evidence" is defined in s 101A of the *Evidence Act 2008* as evidence which is relevant only because it affects the assessment of the credibility of the witness. Matters bearing upon the credibility of a witness include truthfulness or veracity, bias or motive to be untruthful, prior statements consistent or inconsistent with testimony, internal inconsistencies and ambiguities in testimony and direct contradiction of testimony.

Previous lies by the witness may substantially affect the credibility of the witness. whether or not they are made "under an obligation to tell the truth" for the purposes of s 103 (2)(a).

82 The "credibility rule" in s 102 of the *Evidence Act* provides that credibility evidence is not admissible. Section 103 provides the following exception:

> (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
>
> (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to –
>
> (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
>
> (b) the period that has elapsed since the acts or events to which the evidence related were done or occurred.

83 I allowed Clayton Utz to cross-examine Mr Dale on a *voir dire*, in order to determine admissibility under s 103.

84 In terms of s 103(2)(a) of the *Evidence Act*, I am not persuaded that Mr Dale, through Mr O'Donnell, "knowingly or recklessly made a false representation" to Mr Dale in the 3 November letter which will be discussed shortly (even assuming, which may be doubted, that he was "under an obligation to tell the truth" to Mr Fagan). Far less am I persuaded that he knowingly or recklessly made a false representation to the media. But, s 103(2)(a) is not the only route by which a person's credibility may be "substantially affected".

85 Having considered the matter carefully, I have determined that the evidence received on the *voir dire*, including the documents sought to be tendered during the course of it, should be admitted into evidence, as the evidence "could" substantially affect the assessment of the credibility of Mr Dale. Whether or not the evidence has in fact harmed Mr Dale's credit is a matter I will consider later in these reasons.

Mr Dale removes documents from Clayton Utz

86 In or around August 2005, Mr Dale removed certain documents relating to the Clayton Utz internal review of its handling of the McCabe proceeding. He removed some of the documents on 18 August, when he went back to his office to collect his personal effects, after he had been placed on administrative leave; others, he had removed during the preceding month.

87 Mr Dale gave a number of explanations for why he removed the documents. He said he took the documents "because I regarded them as documents relevant to me and a continuing concern that I had ... concerning the McCabe matter".[8] He also said that because he had received some or all of the documents in his capacity as a partner, and/or had authored them, he was entitled to take them with him.

88 He conceded that one of the reasons he removed the documents was because of a concern that Clayton Utz might otherwise come and take the documents from him.

89 He denied that he took them deliberately for the purpose of future use and disclosure. He also denied that, when he removed the documents, he foresaw the likelihood that his partnership would be terminated, but did acknowledge that he took the documents because he was seeking to defend himself.

90 He said that when he came back on 18 August, he was really unwell, "revolted by the fact of being in my office", and not turning his mind to future intentions at all.[9] Some of the BATAS documents were in the briefcase which he removed that day.

91 After he removed the documents, he stored them until he could get to them later, until he was in "a position to sit down and quietly re-read them."[10] He had "a fair bit on [his] plate after the expulsion",[11] including dealing with his health and selling his house.

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8 T44.
9 T44.
10 T73.
11 T73.

92 He stored the BATAS documents at his mother's house. His mother had assisted him with financial matters, and also had quite a lot of his documents at her house. He denied the suggestion that he stored the documents at his mother's house "because they'd be less likely to be found there than they'd be found if they were at [his] home or left at the office."[12]

Mr Dale leaks the information in the documents

93 In August 2006, Mr Dale went and saw Jack Rush QC, who had acted for Mrs McCabe in the McCabe proceeding. He went to see him because of serious concerns about Clayton Utz's handling of the McCabe proceeding.

94 On 22 September 2006, Mr Dale met with Mr Rush and Peter Gordon, the solicitor at Slater & Gordon who had acted for Mrs McCabe. Mr Dale told them that he had a large number of documents relating to the internal review of Clayton Utz's conduct in the McCabe proceeding, which demonstrated a number of serious iniquities.

95 On 27 September 2006, Mr Dale repeated that information in a meeting with Mr Gordon and William Birnbauer, a journalist who had previously written about the McCabe proceeding. Mr Dale subsequently gave Mr Gordon the documents which he had, and Mr Gordon provided a copy of those documents to Mr Birnbauer.

96 Mr Dale did not regard the documents which he handed over to contain privileged information, because of the crime-fraud exception to the doctrine of legal professional privilege. He believed that the documents disclosed the following iniquities: the warehousing and destruction of documents over many years; and the way in which the laws of discovery had been abused.

97 On 29 October 2006, *The Sunday Age* published articles by Mr Birnbauer headed "Cheated by the law. EXCLUSIVE – Exposed: dirty tricks behind top lawyers' plot to deny justice to cancer victims" and "Justice denied: how lawyers set out to defeat a dying woman." The articles dealt in a very critical way with the handling by the two Clayton Utz partners, Travers and Eggleton, of the McCabe proceeding.

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12 T113.

Solicitors' correspondence about the leaks

98 On 31 October 2006, Mr Fagan wrote to Mr O'Donnell (for whose firm Mr Dale had commenced working as a consultant in June 2006) in the following terms:

> I refer to various articles which appeared in this week's Sunday Age concerning this firm. ...
>
> It is apparent that the Sunday Age has been provided with confidential information belonging to this firm and/or its former client.
>
> The confidential information referred to in the articles would only have been distributed to board members or members of the senior management team of the firm. I have spoken to all other board members and members of the senior management team at the relevant time and have been informed by each of them that they did not disclose the confidential information to the Sunday Age or anyone else.
>
> To the extent that Mr Dale has any confidential information belonging to this firm and/or its current and former clients, Mr Dale is under an obligation to keep such information confidential.
>
> In the circumstances, could you please:
>
> 1. confirm that Mr Dale was not responsible for disclosing the confidential information to the Sunday Age or any other third party;
>
> 2. ensure that Mr Dale returns to us all copies of all confidential information belonging to this firm and/or its current and former clients which Mr Dale has retained.

99 On 3 November 2006, Mr O'Donnell responded:

> We are instructed that Mr Dale denies the allegations in your letter [of 31 October 2006]. On your own admission, you do not know to whom this confidential information was distributed but you infer that it was our client who provided the information to The Sunday Age. This inference is based on the premise that you have spoken to everyone who has ever come into contact with those documents which cannot possibly be the case. He also instructs us to inform you that he is well aware of his duties and obligations at law. He will, as he always has, comply with those duties and obligations.
>
> We do not understand the legal basis of the request in your letter that Mr Dale return to the firm "all confidential information belonging to this firm and/or its current and former clients which Mr Dale has retained".
>
> ... Mr Dale retains in his possession some documents pertaining to the firm and its clients which he lawfully and properly obtained as and whilst a partner.

100 The letter went on to give examples of some of the documents which Mr Dale had retained. It did not mention that he had any documents relating to BATAS, the McCabe proceeding or the firm's internal review.

101 In January 2007, Mr Dale publicly revealed himself to have been the source of the leak of internal documents to *The Sunday Age* in the previous year. He did so via the same journalist, Mr Birnbauer, who published an article on 28 January 2007 under the heading "Lawyer revealed as smoking source." The article included the following:

> Mr Dale said he leaked hundreds of pages of a secret Clayton Utz investigation because he believed there had been a miscarriage of justice in the 2002 case involving lung cancer victim Rolah McCabe.
>
> "I believed there may have been a fraud committed on the Supreme Court of Victoria and that a full investigation was required," he said.
>
> ...
>
> He was expelled from Clayton Utz in August last year, after more than 19 years with the firm, but denied this was behind his decision to leak the documents to *The Sunday Age*.
>
> "It's quite plain there's a great sense of miscarriage of justice in the McCabe camp and I might say some basis to reopen the matter. So what do you do? Do you just sit on that? Do you just ignore it all? It would have been a lot easier for me if I'd just remained quiet about this. It's moved way beyond any sense of payback or revenge. I was motivated by my conscience – I could not sit idly by."
>
> Mr Dale said Clayton Utz staff went through every document in his office following his dismissal last year.
>
> "It's my view they were checking it for one thing, these documents. I had managed to get them out months before. They were stored in a secret place."

102 Similar remarks were made in a second article by Mr Birnbauer, published on the same day under the heading "The Insider".

103 On 30 January 2007, Clayton Utz wrote to Mr O'Donnell. After referring to the Fagan letter of 31 October, Mr O'Donnell's response of 3 November, and the most recent articles, the letter said:

> It is clear that your client has falsely denied his involvement in the leaking of the documents to The Sunday Age and Slater & Gordon.
>
> We demand that your client immediately return to us all copies of the confidential information belonging to this firm and/or its current and former clients which Mr Dale improperly removed from our office.

104 The response from Mr O'Donnell, dated 1 February 2007, was in the following terms:

> We note that your client alleges that our client falsely denied his involvement as the source of the documents. Our client has not done this as is evident from the fact that our letter contained a denial of the allegations, which included allegations that The Sunday Age had been provided with confidential information that belonged to the firm and that to the extent that our client had any confidential information belonging to the firm and/or its current or former clients, he was under an obligation to keep that information confidential. It is clear that these matters were premised upon the alleged fact that the information was confidential and that there was no lawful defence to the disclosure of the information. As neither of those matters was correct, the allegations were denied.
>
> It is also noted that it was not alleged in your letter of 31 October 2006 that our client was the source of the disclosure. Indeed, what is clear from both your letter of 31 October 2006 and repeated in your letter of 30 January 2007 is that you sought to confirm that our client was not responsible for disclosing the documents. That confirmation was not given.

Whether the solicitors' correspondence adversely affects Mr Dale's credibility

105 There is no dispute that Mr O'Donnell's letters were both written with the prior knowledge and consent of Mr Dale. If they involve any dishonesty or misleading conduct, I would regard them as affecting Mr Dale's own credibility.

106 Considerable time was spent cross-examining Mr Dale about his solicitor's letters. The cross-examiner wanted Mr Dale to concede that the 3 November letter was dishonest, in so far as it said that the allegations in Mr Fagan's letter of 31 October were "denied."

107 Mr Dale kept repeating that Mr Fagan had not alleged that Mr Dale was the source of the leak, rather he had asked for confirmation that Mr Dale was *not* the source of the leak. Because Mr Dale had not given the confirmation which had been sought, he did not think the denial was a false one. He eventually conceded that he believed that, in an indirect way, he thought Mr Fagan was trying to get him to admit that he was the source, but denied that the letter was constructed to communicate to Clayton

Utz that he was confirming that he was not the source of the leak.

108 Asked what it was that the 3 November letter was denying, he said that it was the following allegations: that the information relied upon for the article was confidential; that only people relating to the board and senior management would have seen the relevant documents; and that Mr Fagan had spoken to everybody who had ever come in contact with the documents. Although the 3 November letter did not directly challenge the assertion that the information was confidential, the later O'Donnell letter of 1 February did. But, the 3 November letter did expressly challenge the other two allegations in the Fagan letter.

109 Well aware that this correspondence would be a fertile area for cross-examination, I have no doubt that Mr Dale had given careful thought to how he would answer questions about the Fagan letter and the 3 November response. He was only prepared to make concessions in respect of completely unambiguous questions. Sometimes, he debated with the cross-examiner the meaning of a question or an answer. At times, this made him seem defensive, or even argumentative, in the way in which he responded to questions. His sensitivity about the matter was understandable, given the following context.

110 After a long working relationship, Clayton Utz and Mr Dale had parted company in late 2005, in very unpleasant circumstances. Clayton Utz had been the subject of considerable adverse media (both around the time of the McCabe proceeding and in late 2006), and undoubtedly wanted to prevent or minimise any further adverse coverage. I have no doubt that both the Fagan letter and the 3 November letter had been carefully drafted by clever lawyers, in order to try to achieve the respective author's desired goal. Although the Fagan letter did not ask Mr Dale whether he was the source of the leak, I infer that it was Mr Fagan's intention to ask that question indirectly. The 3 November response was drafted in such a way as to make no possible admission of wrongdoing, unless one was clearly required; as Mr Dale said "my intention was to respond to the letter and only the letter."

111 At the end of a no-doubt mutually frustrating exchange between Mr Dale and the cross-examiner, Mr Dale agreed with my characterisation of the correspondence as follows: "to put it colloquially, they had written a cute lawyer's letter and you were responding with a cute lawyer's letter, if I can call it that?" The 3 November response would probably not satisfy the overarching obligation requirements of the *Civil Procedure Act 2010*, were it written in the course of current litigation. But in the context in which it was written, the approach taken by Mr O'Donnell and Mr Dale in that letter is understandable.

112 At the end of the day, neither the solicitors' correspondence, nor the way Mr Dale behaved when cross-examined about it, causes me to doubt Mr Dale's credibility in relation to his evidence concerning his dealings with Mr Myers.

Whether Mr Dale's explanation as to why he leaked documents affects his credibility

113 In the January 2007 articles, Mr Dale is quoted as having said that the reason why he leaked the documents was because he believed there had been a miscarriage of justice in relation to the McCabe proceeding, and his conscience would not let him remain silent. He repeated the substance of that in his evidence.

114 Clayton Utz alleges that Mr Dale's "sole motivation" for leaking the documents was to damage the firm; therefore, what he told the media and the court was not true.

115 Mr Dale agreed that he had not always believed that Mrs McCabe had suffered an injustice. For several years after the Court of Appeal's decision, he had believed that the Court of Appeal decision was just, and had told people that. He said he started to become concerned and changed his mind around mid 2005, as a result of several developments.

116 In early July 2005, SBS had shown a documentary called "The Big Lie", about the McCabe proceeding. Mr Dale said it caused him to be concerned about the truth of what one of his partners, Brian Wilson, had said. Mr Wilson had always denied giving certain advice to BATAS about the destruction of documents. In the

documentary, a former BATAS employee, Fred Gulson, was said to have denied Mr Wilson's account. Soon after the documentary was shown, Mr Dale obtained a copy of Mr Gulson's deposition in some US court proceedings against BATAS. Mr Dale said he was concerned about the direct factual contest between Mr Wilson and Mr Gulson, as to the advice given by Clayton Utz to BATAS.

117 Then, by August or September 2006, the US court published its judgment, which was very critical of BATAS's document destruction practices. Mr Dale read the judgment and that caused him to be very concerned.

118 I accept that, by the time he leaked the documents to the media in late 2006, Mr Dale's conscience was genuinely troubled by what had happened in relation to the McCabe proceeding, and he went to the media because he thought it was the morally right thing to do. No doubt Mr Dale was not having favourable feelings about Clayton Utz by this stage, given the circumstances of his dismissal the previous year. But I am not persuaded that his sole motive for leaking the documents was to damage the firm. It follows that I am not persuaded that he misled the media or the court when he said he leaked the documents because he felt that an injustice had been done to Mrs McCabe.

119 The evidence as to why Mr Dale leaked the documents does not cause me to doubt Mr Dale's credibility in relation to his evidence concerning his dealings with Mr Myers.

Conclusions of fact

120 I largely accept Mr Dale's account of the August 2004 meeting and 2005 phone call. Notwithstanding my comments about his demeanour while being cross-examined about the correspondence concerning the leaked documents, I formed the impression that Mr Dale was generally a witness of credit. That impression was fortified by the fact that his account:

(a) Is perfectly plausible, given the state of his relationship with Clayton Utz at the relevant times, and his previous dealings with Mr Myers;

(b) Is consistent with such documents as do exist and touch upon the matters;

(c) Is not directly contradicted by Mr Myers, who has no recollection of either communication. Mr Myers' evidence about his "universal practice" does not deny the possibility that the August 2004 meeting and the 2005 phone call took place, as Mr Dale says they did; it only goes to Mr Myers' belief as to the basis on which Mr Dale was speaking to him.

121 By accepting Mr Dale's account, I am not in any way suggesting that Mr Myers is not a truthful witness.

The importance of the matters discussed with Mr Myers

122 The matters which Mr Dale discussed with Mr Myers in the August 2004 meeting are clearly relevant, and will be important issues at the trial of this proceeding. The defence, which Mr Myers signed:

(a) Alleges that Mr Dale's handling of the Ebner matters justified his expulsion;[13]

(b) Pleads the circumstances surrounding the incurring of disbursements in the Ebner matters, and the payments made by Mr Dale to the firm in respect of the disbursements; and

(c) Specifically alleges that in his meeting with Mr Fagan on 2 September 2004, Mr Dale "acknowledged that the disbursements he had incurred ... in the Ebner matters were incurred in a manner which breached the Ebner Retainer and the general arrangements of [Clayton Utz] for incurring disbursements on pro bono matters."[14]

123 There is a direct conflict between that pleading and Mr Dale's version of events. Mr Dale says he agreed to reimburse the firm for the Ebner disbursements "without any admission of wrongdoing ... and on the basis that the reimbursement would finally

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13 Paragraph 49 of the defence alleges that the matters pleaded in paragraphs 50 to 101 inclusive justified the termination of Mr Dale's partnership. The Ebner matters are pleaded in paragraphs 93 to 100 inclusive.

14 Paragraph 100.

conclude the matter." He says he told Mr Fagan those things in the 2 September meeting, on the specific advice of Mr Myers given in the August 2004 meeting.

124 The matters which Mr Dale discussed with Mr Myers in the 2005 phone call are also clearly relevant, and will be important issues at the trial of this proceeding. Whether or not Clayton Utz had an obligation to afford Mr Dale procedural fairness, and whether an action for bad faith could be maintained in respect of the termination decision, are matters squarely raised by the pleadings.

Does Mr Myers owe a duty of loyalty to Mr Dale?

The nature and extent of the duty of loyalty

125 It was not disputed before me that an injunction may be granted to ensure that a lawyer's duties of loyalty to a former client is respected, notwithstanding the termination of any formal retainer.[15] However, there is a dispute as to whether Mr Myers was acting in a professional capacity, at the August 2004 meeting and in the 2005 phone call.

126 The most common way to establish that such a professional relationship exists is to prove the existence of a contract of retainer. A retainer with a legal practitioner may be express or implied. In *Watson v Ebsworth & Ebsworth (a firm)*,[16] the Court of Appeal quoted with approval the following summary of the law:[17]

> Proof of an implied retainer rests on proof of facts and circumstances sufficient to establish a tacit agreement to provide legal services. Its existence is determined by inference from objective facts, not merely by the lawyer's belief as to which clients he or she was acting for. The reasonable expectations of the alleged client carry significant weight here, as the lawyer may always take steps to dissuade any person from a belief that the lawyer acts for that person.
>
> The lawyer's file (including letters and other correspondence) and diary notes, specifically regarding how he or she has referred to and dealt with the claimant, may prove useful. Aspects that may impact upon a client's

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15 The existence of the duty has been approved in a number of Victorian cases, including *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 per Brooking JA, cited with approval in *Sent* at [104] ("*Sent*"); *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* ("*Adam 12*") [2006] VSC 152 at [40]; *Pinnacle Living Pty Ltd v Elusive Image Pty Ltd* [2006] VSC 202 at [13]; *Commonwealth Bank v Kyriackou* [2008] VSC 146 at [28]-[29]. A contrary position has been taken in NSW.

16 [2010] VSCA 335 at [111].

17 Taken from *Lawyer's Professional Responsibility* by Professor G E Dal Pont.

> reasonable expectations of a retainer include the capacity in which the lawyer acted (say, giving advice in a non-legal capacity), who instructed the lawyer, who is liable for the lawyer's charges, and whether a contractual relationship existed with the claimant in the past (as the court may be readier to assume that the parties intended to resume that relationship in such a case).

127 However, a professional lawyer/client relationship can arise even in the absence of a contract.[18] In such a case, the retainer is "consensual" not contractual.[19]

128 As mentioned earlier, the existence of a professional relationship is a matter for the court to determine, from the objective facts, not from the subjective beliefs of the lawyer or the party alleging to have retained the lawyer.

The August 2004 meeting

129 Mr Dale arranged an appointment and went to see Mr Myers in his chambers, to discuss the Ebner matters which Mr Fagan had raised with him a few days earlier, and which had caused Mr Dale to be so concerned about his legal position.

130 Although Mr Dale's counsel sought to characterise the contact as a "direct access" matter, Mr Dale did not suggest he approached Mr Myers on that basis, or that he sought to comply with the Bar rules in relation to direct access briefs.

131 Nor does Mr Dale suggest that he asked Mr Myers to act for him in relation to an actual or potential dispute with Clayton Utz. Rather, he seems to have simply explained the background to the Ebner matters, and sought Mr Myers' advice as to what he should do.

132 Mr Myers gave Mr Dale oral advice in the meeting, which lasted for about an hour. No written advice was sought or provided. The advice was legal advice as to Mr Dale's position and what he should do.

133 No brief or backsheet was sought or delivered at any stage. No fee was discussed or charged. Although relevant, those matters are not determinative of the issue of

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18 *Beach Petroleum NL v Abbott Tout Russell* (1999) 48 NSWLR 1 at [188]-[205]; *Hawkins v Clayton* [1988] 164 CLR 539 at 578 per Deane J; *Hill v van Erp* [1997] 188 CLR 159 at 166 per Brennan CJ, at 172-3 per Dawson J, at 234 per Gummow J.

19 *MacPherson and Kelly v Kevin J Prunty and Associates* [1983] 1 VR 573 at 574.

whether or not a professional relationship was in fact created (although I accept that they played an important role in Mr Myers' perception of the situation).

134 Mr Dale went to see Mr Myers, because he regarded him as a leading member of the Victorian Bar, and the person who could best help him. That was the only capacity in which Mr Dale went to see Mr Myers; they were not personal friends. Mr Dale asked for and obtained legal advice from Mr Myers about important legal matters. Given all the circumstances, it was reasonable for Mr Dale to think that he was entering into a professional relationship with Mr Myers.

135 I accept that Mr Myers did not believe he was being professionally retained. But Mr Myers did not say to Mr Dale that he was seeing him other than in his capacity as senior counsel, even though the discussion lasted for about an hour and went into some detail about Mr Dale's current predicament. Someone in Mr Myers' position could easily have taken steps to make it clear that he was not acting in a professional capacity.

136 In all the circumstances, I am satisfied that a professional relationship was created during, and for the purposes of, the August 2004 meeting.

The 2005 phone call

137 I am not satisfied that the earlier professional relationship was still in existence in November 2005.

138 Between the August 2004 meeting and the November 2005 phone call, Mr Dale had not communicated at all with Mr Myers about the Ebner matters or his relationship with Clayton Utz. There had been ample opportunity to do so.

139 Instead, in mid 2005, Mr Dale retained Strongman & Crouch to act as his solicitors, and they had briefed a number of barristers to advise him, both in relation to the Schmidt matter and his relationship with Clayton Utz. Strongman & Crouch and Dr Pannam were still acting for Mr Dale, when he rang Mr Myers' chambers and left a message for Mr Myers to call back.

140 Mr Dale only spoke to Mr Myers about "broad partnership issues", not by reference to the Clayton Utz partnership agreement, just as a matter of general legal principle.

141 Mr Myers provided Mr Dale with general legal advice about whether Clayton Utz had to afford procedural fairness, and whether an action for bad faith could be maintained.

142 Mr Dale says that the 2005 phone call was "short", as he became upset and could not continue. But Mr Dale does not say for how many minutes it lasted.

143 Once again, no brief or backsheet was sought or delivered at any stage. No fee was discussed or charged.

144 Mr Dale contacted Mr Myers as a leading counsel, whose advice he valued. But, in contacting Mr Myers in November 2005, I conclude that Mr Dale was just seeking a second opinion, or some sort of confirmation about the detailed advice he had already been given by the lawyers who he had formally engaged. The previous few months had been tumultuous ones for Mr Dale, with his expulsion from the partnership and his health problems. I have no doubt he was seeking comfort and reassurance from somebody whose professional opinion he valued.

145 But I am not persuaded that satisfied that a professional relationship was created during, or for the purposes of, the 2005 phone call, or that the previous professional relationship still existed at that time.

Is there a risk of disclosure of confidential information by Mr Myers?

The protection of confidential information

146 A court will restrain a legal practitioner from acting for a party to litigation if a reasonable person informed of the facts might reasonably anticipate a danger of misuse of confidential information to the opponent's detriment, and there is a real and sensible possibility that the interests of the practitioner in advancing the case in the litigation might conflict with the practitioner's duty to keep the information

confidential.[20] In that case, the court acts to prevent a threatened breach of confidence.

147 *Halsbury's Laws of Australia* conveniently summarises the relevant principles applicable to an action for breach of confidence:

> In order for an action for breach of confidence to succeed, the plaintiff must establish that the recipient of confidential information owed the plaintiff an obligation to keep the information confidential. Such an obligation may arise as a result of a contract between the creator and recipient, by virtue of what the courts have described as a special relationship or as an express stipulation on the part of the creator at the time of disclosure. The test for determining whether an obligation of confidence exists is whether a reasonable person in the position of the recipient would have recognised that the information was given to him or her in confidence.[21]

148 It is not necessary that there be any contractual relationship between the parties, as long as the relevant obligation of confidentiality has otherwise arisen. Here, there is no suggestion that Mr Dale expressly stipulated to Mr Myers that what he was communicating to him was confidential; therefore any obligation of confidence would have to be founded either in a retainer or in a special relationship.

149 In order to be protected, it is often said that the confidential information must be identified "with precision and not merely in global terms."[22] That said, the degree of particularity must depend on the circumstances, and less precision may be required where more would destroy the very confidence sought to be protected.[23]

150 Where information is communicated within a lawyer-client relationship, it has been accepted that the court should not be slow to accept the existence of a confidential communication "given the relationship between solicitor and client and the ambit of professional confidence of which professional privilege is a manifestation."[24]

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20 *Sent* at [33] and the cases cited therein.

21 At para [240-670]; footnotes omitted.

22 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 314-5; *Sent* at [66].

23 *Yunghanns v Elfic* (1998) Butterworths Cases 9803031 at [8]; *Sent* at [69]; *Village Roadshow Limited v Blake Dawson Waldron* [2003] VSC 505 at [36]; *Commonwealth Bank v Kyriackou* [2008] VSC 146 at [16].

24 *Village Roadshow Limited v Blake Dawson Waldron* [2003] VSC 505 at [36]; *Sent* at [69].

151 In considering whether there is any likelihood of the confidence of the information being abused, the fact that the lawyer has sworn that they have no recollection of the information is not determinative. In *Sent*, senior counsel had sworn that he had no recollection of the short meeting with the client, or what was said at it; it was argued that there was therefore no likelihood of that confidence being abused. Nettle J accepted the truth of senior counsel's evidence as to the state of his memory. However, as his Honour observed, "recollections **are** liable to be revived, even as long after the event as 14 years, and that process may well be facilitated by what is said and done in the preparation which will be undertaken in the lead-up to trial and during the trial itself."[25] His Honour concluded that there was "a real and sensible possibility of a revival of recollection, and in my view that is enough."[26] Even though the meeting in *Sent* can only have lasted around one or two hours, some 14 years earlier, that did not preclude Nettle J from granting an injunction to prevent the other party from continuing to retain the senior counsel.

The August 2004 meeting

152 Mr Dale says that he communicated confidential information to Mr Myers in the August 2004 meeting. The information is that referred to in paragraph 16 of his April affidavit, namely:

> ... the history of the Ebner matters; my conduct of that matter including the circumstances concerning the incurring of counsel fees and disbursements on behalf of Mr and Mrs Ebner on my authority; [Clayton Utz's] pro bono policy; Mr Fagan's assertion that I had acted outside my authority in incurring counsel fees and disbursements on behalf of Mr and Mrs Ebner; my explanation as to why I did not accept that assertion; and Mr Fagan's demand that I reimburse [Clayton Utz].

153 Clayton Utz says that Mr Dale has not identified the alleged confidential information with sufficient particularity to invoke the law's protection. However, the specificity of the description in the Dale affidavit is greater than that which was identified and protected in *Sent*.

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25 At [88].
26 At [91].

154 In order not to destroy any confidentiality, Clayton Utz was prevented from cross-examining Mr Dale as to precisely what was communicated to Mr Myers; this obviously limited the firm's ability to test how much of what was communicated was confidential, and how much was in the public domain. It is true that there would be much information about these topics that would not be confidential to Mr Dale, and would have been known to Mr Fagan and others. But Mr Dale's own perspective and opinions about what had happened, and the position in which he then found himself, are precisely the sort of matters which one would expect to be communicated frankly and confidentially to a person who you believed was acting as your legal adviser. Irrespective of whether there was a formal professional relationship between them, I accept that in the August 2004 meeting Mr Dale was seeking advice from Mr Myers about serious legal matters, in his capacity as a leading senior counsel at the Victorian Bar. I am satisfied that he would have communicated confidential information to Mr Myers, in circumstances which imposed an obligation of confidentiality on Mr Myers.

155 The confidential information relates directly to matters in issue in this proceeding. I have already explained the importance of the allegations about the Ebner disbursements and the basis on which Mr Dale agreed to reimburse the firm in respect of them.

156 Clayton Utz says that because Mr Myers does not recall any discussion with Mr Dale, there is therefore no basis to apprehend that any confidential information could be disclosed or used by Mr Myers. The fact that the conversations took place more than 6 years ago is apparently relied upon to suggest that the information is stale. But, the observations of Nettle J in *Sent* are equally apposite here: recollections are liable to be revived, even many years after the event, and that process may well be facilitated by what is said and done in the preparation which will be undertaken in the lead-up to trial and during the trial itself. I am satisfied that there is a real and sensible possibility of a revival of recollection, about matters which are of critical importance in this proceeding.

The 2005 phone call

157 Although Mr Dale's counsel initially argued that confidential information was communicated during the 2005 phone call, it seemed that, by the end of submissions, that claim was no longer being pursued.

158 In any event, Mr Dale's own evidence does not identify any confidential information that was communicated during the phone call.

Should the court's inherent jurisdiction be invoked here?

The nature and extent of the jurisdiction

159 It is common ground that the court has inherent jurisdiction to make orders which have the effect of preventing Mr Myers from acting further in this proceeding. The nature and extent of that jurisdiction has been the subject of previous judicial consideration.

160 In *Grimwade v Meagher*,[27] Mandie J held that the court has inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process. As part of that jurisdiction, the court may prevent a lawyer from acting, in order that justice not only be done, but be seen to be done. His Honour held that the objective test to be applied was whether a fair-minded, reasonably-informed member of the public would conclude that the proper administration of justice required that the lawyer be prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of lawyer without good cause.

161 The *Grimwade* decision has been approved in a number of subsequent decisions of this court, including by Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd*,[28] Byrne J in *Caruso v Tartaglia*,[29] Nettle J in *Sent*, Whelan J in *Adam 12*, and Judd J in *Kyriackou*.

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27 [1995] 1 VR 446 at 452 ("*Grimwade*").
28 (2001) 4 VR 501.
29 [2002] VSC 91 at [9].

162 In *Kallinicos v Hunt*[30], Brereton J undertook a comprehensive examination of the authorities concerning the court's supervisory jurisdiction over lawyers. His Honour concluded by helpfully summarising the following principles from the authorities:

(a) The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably-informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

(b) The jurisdiction is exceptional and is to be exercised with caution.

(c) Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.

(d) The timing of the application may be relevant, in that the cost, inconvenience and impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief.[31]

163 Although a number of the cases in which this jurisdiction has been invoked have involved a complaint by a former client against their lawyer, the jurisdiction does not depend on the existence of a legal retainer between the applicant and the lawyer. Indeed, lawyers have been prevented from acting in cases where there was no suggestion that they had ever acted for the applicant. For example, in *Grimwade*, the counsel who was restrained from acting had acted as the prosecutor of the applicant in earlier criminal proceedings. In *GT v Amare*,[32] the counsel who were restrained had always acted for the opposing party, not the applicant.

164 Similarly, although a number of the cases in which the jurisdiction has been invoked have involved the potential misuse of confidential information, that is not a requirement in order for the jurisdiction to be invoked. For example, in *Grimwade*,

30 (2005) 64 NSWLR 561.
31 At 582-3.
32 [2007] VSC 123.

Mandie J was not persuaded that there was a real danger of counsel unconsciously misusing confidential information he had acquired whilst prosecuting the applicant,[33] yet restrained counsel from acting nevertheless. In *Kallinicos*, the solicitor was restrained even though he held no confidential information.

165 Nor does it matter that the lawyer may have no memory of the relevant events. In *Sent*, the senior counsel had no recollection of acting for the client, or of what was said some 14 years earlier about the matter which was relevant to the current proceeding. But that did not preclude Nettle J from saying that a fair-minded, reasonably-informed member of the public would say that he should not now act for the former client's opponent.[34]

166 A number of cases have exercised this jurisdiction where the lawyer was a potential witness on a material matter, and the lawyer's conduct may be challenged in the case.[35]

167 Mr Dale's counsel made reference to a number of practice rules of the Victorian Bar, and submitted that they were highly relevant to the exercise of the court's inherent jurisdiction. For example, rule 92(o) of the practice rules prohibits a barrister from accepting a brief to appear, where the barrister "has already discussed in any detail, even on an informal basis, with another party to the proceedings the facts out of which the proceedings arise, except with the latter's consent." Rule 92(c) requires a barrister to return a brief if there are reasonable grounds to believe there is a real possibility the barrister may be a witness in the case.

168 Failure to comply with professional conduct rules may have disciplinary consequences for a lawyer. But a lawyer's ethical obligations under professional conduct rules are not the same as the circumstances in which the court will exercise its exceptional inherent jurisdiction to deprive a party of the counsel of their

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33 At 454.

34 At [116], by way of *obiter dicta*.

35 In *Kallinicos*, it was clear that the solicitor was a material witness whose conduct was likely to be challenged; in *Adam 12*, Whelan J said it was "not as clear" that the solicitor would be a witness or that his conduct would be challenged, but there was "a potential for that to occur" (at [39]).

choosing. It may well be that conduct of a type that the court would enjoin would also be in breach of the practice rules; but the converse does not necessarily follow.

Why the inherent jurisdiction should be exercised

169 The content of Mr Myers' advice in the August 2004 meeting, about whether or not Mr Dale should agree to pay the Ebner disbursements, and the terms upon which any such agreement should be entered if he did so agree, is directly relevant to whether or not:

(a) Mr Dale acknowledged wrongdoing to Mr Fagan in the 2 September meeting; and

(b) The payment by Mr Dale was made in full and final settlement of all disputes between him and Clayton Utz concerning payment of the Ebner disbursements, such as to preclude any reliance on such matters as a ground of expulsion.

170 For the reasons expressed earlier, I am satisfied that a professional relationship was in fact created during and for the purposes of the August 2004 meeting. But, even if I am wrong in relation to that, Mr Dale believed he was consulting Mr Myers in his professional capacity, and that belief was a reasonable one. That belief led Mr Dale to speak frankly and confidentially to Mr Myers about his current legal predicament, and to seek legal advice about what he should do to best protect himself. Mr Myers gave Mr Dale legal advice, which Mr Dale says led to him agreeing to repay the Ebner disbursements on a particular basis.

171 If Mr Myers' memory were to return, there is the possibility that he might be a witness at the trial, presumably called by Clayton Utz to rebut Mr Dale's evidence about why he agreed to reimburse the disbursements. Even if not called as a witness, if his memory were to return, that might give Mr Myers an unfair advantage in his cross-examination of Mr Dale on an important matter. Either of those situations would be most unsatisfactory.

172 But, even if Mr Myers' memory did not return, Mr Dale would be in the invidious position of being cross-examined about the basis on which he agreed to reimburse the disbursements, by the very person whose advice he sought about the matter. In order to advance Clayton Utz's pleaded case, Mr Myers would have to put to Mr Dale propositions which are directly contrary to the basis on which Mr Dale says he acted in reliance on Mr Myers' advice. That would be an intolerable position for most witnesses to find themselves in. It would be particularly intolerable given that Mr Dale is a party, not merely a witness, and the Ebner disbursements form such an important part of the litigation. It would be intolerable even without having regard to Mr Dale's past mental health issues, and the undoubted stress of being a witness in your own cause.

173 This proceeding is at a very early stage. The defence has been filed, but no further pleadings have yet been filed. Clayton Utz has issued a summons seeking to stay the proceeding and refer it off to arbitration, but the summons has not yet been heard, pending the determination of the injunction application. No other steps have yet been taken in the proceeding. There is no suggestion that Clayton Utz has briefed or paid Mr Myers to do anything other than draw the defence. That makes this quite a different case to the ones where applications have been made to remove lawyers shortly prior to trial, or after they have been working on a case for years.

174 Even before the defence was filed, as soon as Mr Dale learned that Clayton Utz proposed to retain Mr Myers, his solicitors wrote and objected to that occurring. Clayton Utz chose to continue to brief Mr Myers to prepare the defence, despite having received notice of Mr Dale's objection. They did so knowing there was a risk that Mr Dale might make, and succeed in, this very application.

175 In the unique circumstances of this case, I am satisfied that an injunction should be granted in order to ensure the due administration of justice and to protect the integrity of the judicial process, and in order that justice not only be done, but be seen to be done. I consider that a fair-minded, reasonably informed member of the

public would conclude that the proper administration of justice required that Clayton Utz be prevented from retaining Mr Myers in this proceeding. In coming to that conclusion, I have borne in mind that the jurisdiction is exceptional and is to be exercised with caution, and that due weight should be given to the public interest in a litigant not being deprived of the lawyer of their choice without due cause.

Conclusion

176 I propose to grant an injunction to restrain Clayton Utz from continuing to engage Mr Myers in this proceeding. Such an injunction would be justified by any of the following findings:

(a) That a professional relationship existed between Mr Dale and Mr Myers in relation to the August 2004 meeting;

(b) Further and alternatively, that Mr Dale communicated confidential information to Mr Dale in the August 2004 meeting, and there is a real and sensible possibility of a revival of recollection, about matters which are of critical importance in this proceeding;

(c) Further and alternatively, because a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that to occur.

CERTIFICATE

I certify that this and the 39 preceding pages are a true copy of the reasons for decision of Hollingworth J of the Supreme Court of Victoria delivered on 26 March 2013.

DATED this twenty-sixth day of March 2013.