QCAT

Queensland Civil and Administrative Tribunal

AMENDED DECISION

Case number:	**OCR108-17**
Applicant:	**Legal Services Commissioner**
Respondent:	**Timothy John McQuaid**
Before:	**Hon Peter Lyons QC, Judicial Member** **Mr Peter Sheehy** **Dr Susan Dann**
Hearing Date:	**18 June 2018**
Delivered On:	**19 October 2018**
Proceeding Type:	**Tribunal Hearing**

IT IS THE DECISION OF THE TRIBUNAL THAT:

1. The respondent is publicly reprimanded.

2. The respondent is the pay the applicant's costs fixed in the sum of $2,500.

Signed

Hon Peter Lyons QC, Judicial Member
Queensland Civil and Administrative Tribunal

This order was amended on 29 October 2018 to include the delivery date, being 19 October 2018, which was the date on which the order was signed and published to the parties.

29.10.2018

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v McQuaid* [2018] QCAT
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **TIMOTHY JOHN MCQUAID** (respondent)
APPLICATION NO/S:	OCR 108-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	5 19 October 2018
HEARING DATE:	18 June 2018
HEARD AT:	Brisbane
DECISION OF:	Member Peter Lyons QC Mr Peter Sheehy Dr Susan Dann
ORDERS:	**1. The respondent is publicly reprimanded.** **2. The respondent is to pay the applicant's costs fixed in the sum of $2,500.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where respondent entered into joint venture with a client – where client had impaired mental capacity – conflict of duty and interest of respondent – whether conduct professional misconduct or unsatisfactory professional conduct – whether a fine should be imposed PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OTHER MATTERS – where s 462(1) of the *Legal Profession Act* 2007 (Qld) requires the Tribunal to order that a respondent, having engaged in unsatisfactory professional conduct, must pay costs including those of the commissioner – whether respondent should only pay part of the commissioner's costs *Australian Solicitors Conduct Rules* 2012, r 4.1.1, r 4.1.4, r 12 *Legal Profession Act* 2007 (Qld), s 456, s 462(1)

Boardman v Phipps [1967] 2 AC 46
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd [2010] HCA 19
Law Society of New South Wales v Harvey [1976] 2 NSWLR 154
Legal Services Commissioner v Bone [2014] QCA 179
Legal Services Commissioner v Jones [2015] QCAT 84
Legal Services Commissioner v Shand [2017] QCAT 159
Legal Services Commissioner v Shand [2018] QCA 66
Phipps v Boardman [1964] 1 WLR 993
White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd [2009] NSWCA 114

APPEARANCES & REPRESENTATION:	
Applicant:	M Nicholson, instructed by the Legal Services Commission
Respondent:	B I McMillan, instructed by Gilshenan & Luton Legal Practice

REASONS FOR DECISION

[1] The respondent entered into a joint venture arrangement with a client, Mr Keith Messer. The applicant contends that this amounts to professional misconduct, and seeks orders under section 456 of the *Legal Profession Act* 2007 (Qld) ('LP Act').

Factual background

[2] The material available to the Tribunal consists of a Statement of Agreed Facts ('SOAG') and an affidavit from the respondent. No issue has been taken with the facts deposed to by the respondent. The respondent has also admitted facts alleged in the discipline application; and has put before the Tribunal its reasons of 24 August 2015, when dealing with a guardianship and administration matter relating to Mr Messer's capacity for personal and financial matters ('guardianship proceedings').

[3] The respondent has been a solicitor for a little more than 30 years. On 1 July 1989 he became a partner in the firm now known as CSG Law, and remains a partner of that firm.

[4] Mr Messer has been a long-standing client of CSG Law. He was a farmer. He also invested in property; and conducted a business hawking fruit. The respondent commenced to act for Mr Messer in about 2002, following the retirement of the partner who had previously acted for Mr Messer. Most of the work performed by the respondent was conveyancing work. Mr Messer and the respondent became personal friends, and Mr Messer used to consult the respondent regularly about life and business matters.

[5] In early 2012, Mr Messer discussed with the respondent the possible sale of land owned by Mr Messer in Hervey Bay. Mr Messer was, according to the respondent, unhappy with the prices being suggested for the land by local real estate agents; and

was considering developing the land himself. He decided that he did not want to follow this course, and there was some discussion between Mr Messer and the respondent about a joint venture between them relating to the development of this land. The proposal was that the respondent, who had some experience relating to land development, would develop the land with Mr Messer's assistance. Mr Messer would achieve the price he sought for the land; and any profit would be split between them equally.

[6] On 16 August 2012, the company Canefields Estate Pty Ltd (Canefields) was registered. Mr Messer was the director of this company. On 5 September 2012, the Canefields Unit Trust was established. Mr Messer was one unit holder. The other unit holder was Chareden Pty Ltd, the director of which was the respondent's wife, who along with the respondent was a shareholder in that company.

[7] In 2013, Mr Messer lent Canefields $100,000 to fund development costs. In mid-2013 a part of the land was sold to Ergon for $870,000. Of this sum, $761,000 was ultimately deposited to Canefields' bank account. In the same year, another part of the land was sold to Fraser Coast Regional Council for infrastructure works. Rather than receive the purchase monies, Mr Messer elected to have them retained by the Council as a credit. The amount of the credit was $983,000, and attached to lot 3, being part of the land retained by Mr Messer.

[8] On 9 September 2013, Canefields as trustee of the unit trust entered into contracts with Mr Messer to purchase the land, including lot 3, for approximately $8 million. Under the contract, Canefields was to have the benefit of the credit with the Council, and the monies from Ergon.

[9] The respondent gave evidence that, before Mr Messer entered into the contracts, the respondent asked him to discuss them with his family. He also gave evidence that he asked Mr Messer whether he wanted to talk to his accountant or another solicitor, no doubt about the proposed sales; but Mr Messer declined. The respondent obtained an independent valuation of the land, and the contract price was above that valuation (however the Tribunal was informed at the hearing that the valuation was only of the retained land, so that it did not reflect the value of the infrastructure credit, or the money from Ergon). There has been no challenge to this evidence, and no suggestion that it should not be accepted.

[10] On 13 August 2007, Mr Messer had executed an enduring power of attorney, appointing his daughter Tracey Messer and the respondent severally as his attorneys. On 25 July 2014, Mr Messer signed a document revoking the 2007 appointments; and another document appointing Ms Messer as his attorney. These documents were described by the Tribunal in the guardianship proceedings as having the effect of removing the respondent as Mr Messer's attorney. The two documents were prepared by the respondent, and executed by Mr Messer in the presence of the respondent and Ms Messer. There has been no suggestion that the respondent exercised any power conferred on him by his appointment as Mr Messer's attorney.

[11] On 3 September 2014, Mr Messer transferred 10 shares in Canefields to the respondent for $10. He resigned as a director of Canefields. He also, on the same date, transferred his units in the unit trust to Chareden for sum of $500. The Statement of Agreed Facts rather curiously records the resignation as being a consequence of Canefields' obtaining financial approval for the development in October 2014. The

respondent's evidence is that Mr Messer did not want to be involved in any bank loan, beyond making some of the land available as security; and that he resigned his directorship and transferred the units to enable the respondent to take on the financial obligation for the loan.

[12] On 19 May 2015, the contract for the sale of the land made between Mr Messer and Canefields in September 2013 was terminated on the instructions of Ms Messer. The land remains registered in the name of Mr Messer. The material does not reveal the fate of the money from Ergon; but it has not been alleged that the respondent has retained an interest in it.

Mr Messer's mental condition

[13] This matter is relied upon by the applicant as demonstrating the vulnerability of Mr Messer, which should have put the respondent on notice that more care should have been taken in respect to the dealings with Mr Messer.

[14] Consequent on a hearing held on 18 August 2015, this Tribunal found in the guardianship proceedings that Mr Messer did not then have capacity for personal and financial matters. It held that the documents executed in July 2014 by Mr Messer were valid, the Tribunal not being satisfied that he then lacked capacity.

[15] The Tribunal recorded medical and other evidence available to it. On 16 October 2014 Dr Bruce Monsour administered a Mini Mental State Examination of Mr Messer, the results demonstrating mild impairment. Dr Samantha Hutson, geriatrician, saw Mr Messer on 15 December 2014. She administered the Montreal Cognitive Assessment, with the result demonstrating significant cognitive impairment. Mr Messer overestimated his functional abilities, and needed assistance to decide complex matters. He was not able to make complex decisions regarding investments or property. He was vulnerable to financial abuse due to impaired judgement. His Alzheimer's disease was first apparent in (late) 2012, but there had been a more rapid decline in the previous six months. When seen by Dr Hutson, Mr Messer was unable to sign legal documents.

[16] Ms Messer gave evidence about a decline in her father's capacity. However she also gave evidence that he had capacity to execute the enduring power of attorney, and the revocation of the earlier document, in July 2014.

[17] In the present application, the respondent gave evidence that at no time during the relevant events did he notice any sign of Mr Messer's declining mental faculties. Rather, Mr Messer presented as an acute and skilled businessman, though he was slowing down his direct involvement in business. Nevertheless, throughout the period over which steps were taken to develop the land, Mr Messer continue to operate his fruit business; and collected rent for multiple properties without a managing agent. He was also actively involved in discussions and meetings regarding the development of the land. He gave advice relating to the development; and in about August 2014 chose not to provide support for a bank loan for development finance, other than to permit the land to be used as security.

[18] The evidence demonstrates that, at the time when he entered into the contracts to sell the land, Mr Messer did not lack mental capacity to do so. The evidence does not show that at any relevant time, it was, or should have been, apparent to the respondent that

Mr Messer was in a state of mental decline. There is no evidence that in July 2014 Mr Messer lacked mental capacity, and on balance, it appears that he did. At some time thereafter, his mental capacity declined fairly rapidly.

The respondent's conduct

[19] The application alleges that the respondent, in breach of his duty as a solicitor, allowed his interest to conflict with the interest of his client, Mr Messer, in contravention of Rules 4.1.1., 4.1.4, and 12 of the *Australian Solicitors Conduct Rules* 2012 (Qld) ('ACSR'). The conduct specifically relied upon in the application was the failure of the respondent to have an independent solicitor act for Mr Messer in relation to the sale of the land to Canefields. This was alleged to amount to a failure to act in the best interests of Mr Messer. The respondent's firm acted for Mr Messer in relation to these transactions.

[20] The applicant's submissions contend that the respondent was then subject to a conflict of interest; and that his conduct should be characterised as professional misconduct. Reference was made to the fact that the respondent had then been acting as Mr Messer's solicitors for some years. Mr Messer's mental health, as mentioned earlier, was said to have demonstrated his vulnerability, which should have put the respondent on notice that more care should be taken when dealing with Mr Messer about financial matters. In oral argument, reliance was placed on the value of the land as a matter relevant to the characterisation of the respondent's conduct.

[21] The respondent gave evidence that, to his knowledge, Mr Messer had purchased or sold property on some 20 to 30 occasions. He acted on his own judgment. When the respondent had recommended to Mr Messer to take advice on other matters, Mr Messer refused to do so. The joint venture was intended to enable Mr Messer to get the price for the land that he wanted; and to give him a half share in any profit from its subsequent development. Mr Messer was aware, and pleased, that the respondent would also do well from the venture. Mention has already been made of the respondent's evidence of events leading up to the execution of the contracts for the sale of the land to Canefields.

[22] In his affidavit, the respondent accepted there was an obvious conflict in the arrangement, but said that he lost sight of this, being convinced that the transaction was what Mr Messer wanted.

[23] For the respondent it was submitted that there was no dishonesty or improper motive involved. He was convinced that the venture was what Mr Messer wanted, and was in his best interests. There is no evidence to suggest that the transaction was not in Mr Messer's best interests. The respondent obtained the land valuation to ensure the transaction was fair; and he encouraged Mr Messer to take independent advice, but Mr Messer refused to do so. The conduct should be characterised as unsatisfactory professional conduct.

[24] The SOAG refers to rules 4.1 and 12 of the ACSR. The former requires a solicitor to act in the best interests of a client, and to avoid any compromise to the solicitor's integrity and professional independence. The latter prohibits a solicitor from acting for a client when there is a conflict between the solicitor's duty to serve the best interests of the client, and the interests of the solicitor or an associate of the solicitor.

In the present case, reference to the provisions of rule 4.1 add little to the reference to rule 12.

[25] Rule 12 appears to be designed to protect clients from a breach by a solicitor of the obligations which the solicitor as fiduciary owes to the client. A related purpose may be to protect the general reputation of solicitors. When discussing dealings between a solicitor and a client, and after reference to the judgment of Street CJ in *Law Society of New South Wales v Harvey*,[1] dal Pont wrote:

> This strict view requires a lawyer to eschew transactions that will result in the intermingling of his or her personal affairs - including affairs of companies, ventures or others with whose financial position he or she has a personal connection – with client affairs.[2]

[26] However, the author immediately went on to state:

> While the strict approach represents sound practice, it is not an absolute prohibition on dealing with clients. The lawyer may deal with a client provided that he or she has, with full candour and disclosure, taken steps to ensure that the client has given a fully informed consent to the transaction. Ensuring that the client seeks independent advice may be an important step in the informed consent process. As the lawyer bears the onus of proving full disclosure and informed consent – a heavy onus – lawyers who deal with clients assume the risk of the transaction being set aside, an order for compensation or account of profits against them, and/or some professional sanction.[3]

[27] When discussing circumstances involving a lawyer buying from or selling to a client, the author wrote of the 'duty to ensure that the client seeks independent advice regarding the dealing'.[4] However, he went on to say:

> It follows that a failure to make full disclosure, and to counsel the client to seek independent advice, may expose the lawyer to a claim for fiduciary breach or undue influence, and potentially threaten the enforceability and validity of the transaction.[5]

[28] Rule 12 adopts the strict approach, representing sound practice, as discussed by dal Pont. However, not every breach of the rule would place the lawyer at risk of equitable orders in favour of the client; and counselling a client to seek independent advice is a not unimportant matter in this context.

[29] Mr Messer expected that the respondent would benefit from the venture. There has been no suggestion that the respondent was not candid with Mr Messer, or that he did not disclose something to him.

[30] The respondent breached rule 12. Such a breach is capable of constituting professional misconduct or unsatisfactory professional conduct.[6] In characterising the respondent's conduct, it is considered necessary to take into account the fact that the respondent

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1 [1976] 2 NSWLR 154, 171.
2 Gino dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co., 6th ed, 2017), 222 (citations omitted).
3 Ibid 222-223 (citations omitted).
4 Ibid 229.
5 Ibid.
6 See s 420 of the LP Act.

invited Mr Messer to discuss the contracts with his family, and to see another lawyer or his accountant. While that does not go so far as counselling Mr Messer to seek independent advice, or ensuring that he did so, it was a substantial step in that direction, and a strong indication that the respondent was not seeking to take advantage of Mr Messer. Moreover, it seems unlikely that any attempt by the respondent to take either course would have had any effect on Mr Messer. Other relevant factors are Mr Messer's commercial experience and independence of mind, and the fact that a valuation was sought for the purpose of ensuring that the price was fair. There has been no suggestion that the contracts (and the venture itself) were disadvantageous to Mr Messer. On the contrary, they seem to have been designed to ensure that Mr Messer obtained the price he sought for his land, which he could not get on the open market; and a share in the profit from the development.

[31] In the circumstance, the breach of Rule 12 should be characterised as unsatisfactory professional conduct.

[32] It may also be said that the respondent breached Rule 4.1 by failing to avoid any compromise to his integrity and professional independence. His independence was plainly compromised when he acted for Mr Messer in relation to the contracts. Save because he did not ensure that Mr Messer obtained independent advice (or at least counsel him to do so), and because he placed himself in a position of conflict between duty and interest, it is not clear that the respondent failed to act in the interests of Mr Messer. Reference to rule 4.1 does not alter the characterisation of the respondent's conduct as unsatisfactory professional conduct.

Orders

[33] The respondent's conduct warrants a public reprimand.

[34] The respondent has undertaken to complete the Queensland Law Society's Legal Ethics course, at his own expense, within 12 months. The cost of participation is $1,500, and will involve the respondent travelling to Brisbane. The applicant contended that the respondent should be ordered to complete this course. Given the undertaking in the respondent's affidavit, an order is not necessary.

[35] The applicant contended that a modest fine should also be imposed. The respondent submitted that the cases referred to by the parties demonstrated a range from no fine (with a public reprimand) to a fine of $1,500.

[36] The findings made earlier in these reasons are relevant to this question. So are the respondent's previously unblemished professional record and general good character, his recognition of his error, his remorse, and his co-operation in the investigation and proceedings.

[37] It is apparent that the respondent put a considerable amount of time and effort into advancing the development of the land (the total project was described in the respondent's affidavit as 'a huge task'), including the dealings relating to the sale of part of the land to Ergon and the transaction with the local Council. Development approvals and an approval for finance had been obtained for the project, before the sale contracts were terminated. The respondent's efforts extended over a period of three and a half years. It is apparent from the tenor of the respondent's affidavit and submissions that he does not intend to seek recompense for his efforts in relation to

the development of the land. Notwithstanding the paucity of specific evidence, there is a very real prospect that such recompense would significantly outweigh any fine. The respondent will also incur expenses associated with attending the Legal Ethics course.

[38] Of the cases referred to in relation to proposed orders, that which bears some similarity is *Legal Services Commissioner v Jones.*[7] The respondent had borrowed $500,000 from a client. At the time, the respondent had been pursuing a case in the Family Court for another client, who, the respondent considered, had good prospects of success, but who had not been able to pay fees for some time. This had placed a significant burden on the respondent's firm, and the respondent sought the loan 'to stay afloat'. He offered to pay interest at 12% for the proposed 6 month term of the loan (effectively an annual rate of 24%), no doubt in recognition of the risk associated with the loan. The client lending the money called for repayment after four months, and the loan was repaid, with full interest, shortly after. The Tribunal determined that a public reprimand was sufficient to satisfy the requirement of general deterrence, and chose not to impose a fine. The respondent's breach exposed the client to some risk of loss; and gave him the benefit of the use of a substantial sum of money at a time of financial distress, albeit at a high cost to the respondent. The respondent in the present case has foregone any right to remuneration for his efforts in relation to the venture; and there is no evidence of disadvantage to the client from the respondent's conduct.

[39] In the circumstances, it is appropriate not to impose a fine on the respondent.

Costs

[40] Section 462(1) of the LP Act requires the Tribunal, having found a respondent to have engaged in unsatisfactory professional conduct, 'to pay costs, including costs of the commissioner…' unless satisfied that exceptional circumstances exist. It has not been suggested that such circumstances exist in the present case.

[41] In *Legal Services Commissioner v Shand,*[8] the Court of Appeal had to consider an order for costs made by the Tribunal in favour of the Commissioner, fixed in the sum of $2,500, although the Commissioner had ultimately sought from the Tribunal an order for his costs, to be assessed on the standard basis. The Commissioner had earlier sought an order for costs fixed in that sum, at a time when the hearing was expected to be on the papers. The costs were fixed by Tribunal, observing that the respondent's conduct enabled the Commissioner to deal with the matter 'upon the basis of what would seem to have been light preparation, with minimal investigation and without undue complication'.[9] It was held that there was no error in the Tribunal's reasoning as to costs; and it was 'well placed' to make an assessment on the basis identified.[10] It is apparent that the order made was by no means expected to be representative of the costs actually incurred by the Commissioner.[11]

[42] The Court of Appeal also noted, without criticism, the Tribunal's observation, by reference to the lack of success of the Commissioner on the only issue litigated, that

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7 [2015] QCAT 84.
8 [2018] QCA 66.
9 Ibid [64].
10 Ibid [66].
11 *Legal Services Commissioner v Shand* [2017] QCAT 159, [99].

he would have been inclined, in any event, to make an order for payment of costs of a limited amount.

[43] In *Legal Services Commissioner v Bone,*[12] the Court of Appeal had to consider s 462(4), which provides that the Tribunal 'may make an order requiring the commissioner to pay costs' in certain circumstances. Morrison JA, with whom the other members of the Court agreed, said:

> Because of the framework in which a discipline application may be commenced and heard, and the way in which orders can be made, it seems plain that when s 462(4) provides that an order may be made requiring the payment of costs, those costs are the costs of the proceedings before the Tribunal. That is not to say the phrase 'costs' means the costs of the entire proceeding, as the subsection does not use those words. It simply says 'pay costs'. Further, because subsection (5) provides that the order for costs may be for a stated amount, that seems clearly to comprehend that the costs ordered may be only part of the overall costs.

[44] It is difficult to conclude that his Honour's reasoning would not also apply to s 462(1); so that the Tribunal might make an order under it, which would result in the payment of only part of the Commissioner's costs. The support in the Court of Appeal in *Shand* for the Tribunal's order confirms that view.

[45] The applicant submitted that, where there is no agreement, the only course open to the Tribunal is to make an order that the respondent pay the applicant's costs, to be assessed on the standard basis; there being no material to enable the Tribunal to assess an appropriate figure for costs. That puts the applicant in the position that, because he has not provided evidence of his costs, the Tribunal must award him his costs in full, assessed on the standard basis, if his submission is correct. That does not seem consistent with the view of s 462 taken earlier, based on the decisions discussed.

[46] As for the manner in which the applicant conducted his case, Counsel for the applicant went so far as to rely on the statement in the respondent's affidavit, sworn 15 March 2018, that he was surprised to learn that Mr Messer had been diagnosed with Alzheimer's disease, in support of his submission that the respondent knew, at the time of the contracts in September 2013, that he suffered from this disease. That reliance was clearly misplaced. It reflects a misreading of the affidavit, apparently wilful, in that two paragraphs earlier, the respondent swore that at no time during the development did he notice any signs whatsoever of Mr Messer's declining faculties. It might be observed that the respondent was not cross-examined about this statement; moreover the proposition submitted on behalf of the applicant was not put to the respondent. The Tribunal's findings in the earlier proceedings showed that it was not established that Mr Messer lacked capacity in July 2014. Although the reasons record the view of Dr Hutson that Mr Messer's Alzheimer's disease was 'first apparent' in 2012, that is no evidence that the respondent knew, or should have known, this; nor indeed is it evidence that the disease then made him vulnerable to inducement to enter into disadvantageous transactions. The view of Ms Messer as to her father's condition in July 2014 has previously been mentioned. The applicant's reliance on Mr Messer's condition, both in written submissions and at the hearing, was ill-founded.

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12 [2014] QCA 179.

[47] Indeed, an element of unreasonableness permeates the applicant's case as presented before the Tribunal. The submission that the respondent's conduct should be characterised as professional misconduct appears to be based primarily on the amounts involved in the sale contracts, perhaps buttressed by the submission about Mr Messer's health, but otherwise without regard to the circumstances revealed by the evidence. That position cannot be correct. It was submitted that the steps the respondent took to encourage Mr Messer to get independent advice were not relevant to the characterisation of his conduct. Again, that cannot be correct. It was submitted for the applicant that the fact the respondent had not been recompensed for his work for the proposed development did not affect the question whether a fine should be imposed. That he was in the position in which he found himself, so it was submitted, was 'entirely at his own feet', because he did not ensure that the parties were at arm's length in entering into the transaction. A defaulting fiduciary who is nevertheless entitled to compensation for his efforts, is so entitled despite acting in breach of fiduciary obligations.[13] In the present case, assuming an entitlement, at a factual level the respondent has not received any compensation because he has not pursued it.

[48] Weighing up the applicant's lack of success on the issues which were litigated, and the manner in which the case was conducted, it seems appropriate to make an order which would limit the costs to be awarded to the applicant.

[49] The submissions for the respondent relied on the costs orders made in *Shand* and *Jones*; and submitted that they supported an order that the respondent pay the applicant's costs fixed at $2,500. It might be noted that in *Jones* the amount was $1,500. In the present case, it is appropriate to fix the applicant's costs at $2,500. That sum appears to represent a substantial proportion, but by no means the entirety, of the amount which would be ordered on taxation; and bears some relationship to the amounts fixed in the cases referred to.

Conclusion

[50] The following orders are made:

(a) The respondent is publicly reprimanded.

(b) The respondent is to pay the applicant's costs fixed in the sum of $2,500.

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13 *Boardman v Phipps* [1964] 1 WLR 993; [1967] 2 AC 46 provides an example. See also *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* [2009] NSWCA 114, [113]; the proposition stated appears consistent with the outcome on this issue in the High Court: see [2010] HCA 19, [110].