QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Thompson v Cannon* [2020] QCAT 109
PARTIES:	**EMMA THOMPSON** (applicant) **v** **JESSICA ANN CANNON TRADING AS CANNON & CO LAW** (respondent)
APPLICATION NO/S:	OCL080-18
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	29 May 2020
HEARING DATE:	16 March 2020
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member
ORDERS:	**1. The applicant's application is dismissed.** **2. The respondent's application is otherwise dismissed.** **3. The applicant is to pay the respondent's costs, assessed at $20,699.65.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where the applicant applied to the Tribunal to set aside a costs agreement – where the Tribunal made orders for the parties to engage in mediation – where the mediation resulted in the execution of a deed – where the applicant failed to make the payment agreed to under the deed – where the respondent sought the applicant's consent regarding draft orders but no consent was given – where the respondent brought an application seeking the dismissal of the applicant's application, the making of the agreed payment with interest, past and future costs of enforcing the deed, and a declaration that the deed created a charge over a property to secure payment – where the respondent offered to consent to orders that both applications be dismissed with no order for costs – where no response received – whether the applications should be dismissed PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OTHER

MATTERS – where s 100 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) requires parties to ordinarily bear their own costs in a proceeding – where s 102(1) of that Act gives the Tribunal discretion to make a costs order in favour of a party if it considers the interests of justice require the making of such an order – where s 102(3) sets out a number of factors that the Tribunal may have regard to, including whether a party acted in a way that unnecessarily disadvantaged another party, and anything else the Tribunal considers relevant – where the applicant failed to perform obligations agreed to in a mediation – where the applicant refused to accept offers to settle the proceedings - whether the interests of justice require the making of a costs order

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – NATURE OF COSTS: INDEMNITY DOCTRINE – APPLICATION TO PARTICULAR PERSON OR PARTY – OTHER CASES – where the respondent is the principal of an incorporated legal practice – where the incorporated legal practice has conducted proceedings on behalf of the respondent – where most of the work of the incorporated legal practice in the proceedings has been performed by the respondent – whether the respondent can recover her costs in these proceedings

Legal Profession Act 2007 (Qld) s 24, s 110, s 113, s 117, s 120, s 122, s 125, s 328
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 12, s 47, s 52, s 75, s 76, s 85, s 87, s 89, s 100, s 102

Bell Lawyers Pty Ltd v Pentelow (2019) 93 ALJR 1007
Bennett & Philp Lawyers v Winn [2019] QCA 196
Cachia v Haynes (1994) 179 CLR 403
Carmody v WA Solicitors Pty Ltd [2019] WADC 165
Carmody v WA Solicitors Pty Ltd [2019] WADC 165 (S)
Guneser v Aitken Partners [2019] VSC 649
London Scottish Benefit Society v Chorley (1884) 13 QBD 872
McEwen v Barker Builders Pty Ltd [2010] QCATA 49
McIlraith v Ikin (Costs) [2007] NSWSC 1052
Northern Territory v Sangare [2019] HCA 25
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412
Soia v Bennett [2014] WASCA 27
Soia v Bennett [No 5] [2012] WASC 289 (S)
United Petroleum Australia Pty Ltd v Herbert Smith Freehills [2020] VSCA 15

APPEARANCES &
REPRESENTATION:

Applicant:	M Robinson, solicitor for Robinson Locke Litigation Lawyers
Respondent:	W Thomas instructed by Cannon & Co Law

REASONS FOR DECISION

[1] While this matter came on for the hearing of an application by the respondent to strike out the applicant's application and for other orders, only questions of costs were agitated. Since the submissions relate to the conduct of the parties and the prospects of success, it is necessary to say something of the circumstances which led to it.

Background

[2] The applicant engaged the respondent to provide legal services relating to some body corporate and other matters. The parties entered into a costs agreement in October 2017. Invoices for the provision of services were the subject of a dispute. The respondent brought proceedings for the assessment of the costs in the Magistrates Court at Southport, resulting in an order in the respondent's favour in the sum of $42,468.91. This order was made on 8 June 2018. The respondent registered a writ of execution over the applicant's property located at 16 Aaron Street, Hawthorne ('Hawthorne property'). The applicant then commenced these proceedings on 14 December 2018, seeking to have her costs agreement with the respondent set aside, apparently on the ground that there was a '100% guarantee of success' given by the respondent.

[3] On 1 May 2019, Daubney J made orders that, in effect, required the parties to engage in a mediation. The order expressly stated that the mediation was to be a mediation under Part 6, Division 3, of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('*QCAT Act*'). The mediation resulted in the execution of a deed dated 29 May 2019. The deed recited a number of the facts set out above. In it, the applicant promised to pay to the respondent the sum of $50,000 by, at the latest, a date early in August 2019. It created a charge over the Hawthorne property to secure the payment, and the applicant and the respondent agreed to execute a consent caveat by 5 June 2019. The applicant agreed to lodge the caveat for registration within 48 hours of receiving it. The respondent agreed to take all steps to remove the writ of execution, after the caveat was registered. The parties agreed to sign all necessary forms for the discontinuance of the applicant's application in the Tribunal by 4 June 2019; and the applicant agreed within seven days of the receipt of the forms to file them in the Tribunal. The applicant agreed to pay any costs incurred in enforcing the deed, on an indemnity basis. The deed also provided that each party released claims and rights against the other party; and specifically, by the respondent, a release of all claims and rights which might exist against the applicant.

[4] The agreed payment has not been made. On 10 June 2019, consent caveat documents were sent to the applicant's solicitor. It was not lodged until 4 July. Ms Cannon has deposed, without challenge, that due to the applicant's refusal to lodge the consent caveat, it was necessary to renew the writ of execution.

[5] On 27 June 2019, Ms Cannon wrote to the applicant's solicitor stating that she intended to write to the mediator to ask if he had filed the deed with the Tribunal's Registry; and if not, whether he would proceed under s 85 of the *QCAT Act* to make orders to give effect to the settlement. She asked for a response by 10 am on 28 June. On that day she contacted the mediator, who said he would only make orders if the parties consented. On 3 July, Ms Cannon sent draft orders to the applicant's solicitor. He replied the next day, stating that the applicant did not consent to the orders, the deed being final, and the orders being a rewording of the agreements reached. The mediator did not have power to make orders. Any unnecessary application to the Tribunal would be opposed, and costs would be sought.

[6] On 1 August 2019 the applicant's solicitor again wrote to the respondent, stating that his client's application to this Tribunal had been resolved by the deed, and the rights created by it were outside the Tribunal's jurisdiction. The Tribunal was *functus officio*. Any of the orders sought would be opposed on that basis. On 21 August 2019, he wrote to the Tribunal, to similar effect.

[7] On 14 August 2019, Ms Cannon wrote again to the applicant's solicitor. She gave notice of an intention to file in the Tribunal an application seeking orders, essentially those in her application filed on 21 August 2019. She sought consent to the orders by 16 August 2019. She deposed that she did not receive a meaningful response. She also deposed that she had been given no reason for the applicant's failure to make the agreed payment (and there has been no suggestion of a subsequent explanation). Nor had she received notification of any action taken by the applicant to have the original application dismissed.

[8] While there is some awkwardness in the statement of orders sought in the respondent's application, those orders may be stated as follows:

(a) The applicant's application to set aside the costs agreement be dismissed;

(b) The applicant to pay the respondent the sum of $50,000;

(c) The applicant to pay interest on that sum from 1 August 2019;

(d) The applicant to pay the respondent's costs of enforcing the deed, from 29 May 2019 until the date of the order, on an indemnity basis;

(e) The applicant to pay the respondent's future costs of enforcing the deed; and

(f) A declaration that the deed created a charge over the Hawthorn property securing the obligation to make payments created by the deed (the declaration was sought from the President, in the exercise of his jurisdiction as a Supreme Court Judge).

[9] On 11 October 2019, the applicant's solicitor wrote to the respondent, again asserting that the respondent's application was beyond the Tribunal's jurisdiction, and inviting its withdrawal. The letter also stated that the applicant would seek an order for costs, such an order being in the interests of justice, as the application was beyond the Tribunal's jurisdiction.

[10] The applicant's submissions filed on 11 November 2019 referred to s 12 of the *QCAT Act*, and submitted that the Tribunal's jurisdiction was limited to claims for amounts up to $25,000. Nor could an order be made under s 328 of the *Legal Profession Act* 2007 (Qld) ('*LP Act*'). Reference was also made to s 85 of the *QCAT Act*; but it was submitted that this did not extend the jurisdiction of the

Tribunal beyond its statutory jurisdiction, which could not be extended by the agreement of the parties.

[11] The respondent filed submissions dated 11 November 2019. They contended that the applicant's contention that the Tribunal was *functus officio* was wrong. The Tribunal had power under s 328 of the *LP Act* to make an order for the payment of an amount in excess of $25,000. The power of the Tribunal to make orders under s 89(2) of the *QCAT Act* was not 'capped'. The orders sought could be made under s 89 of the *QCAT Act*, save for the declaration, the application for which should be transferred to the Supreme Court under s 52 of the *QCAT Act*. There were also further submissions relating to costs and interest.

[12] The applicant filed supplementary submissions on 23 January 2020. In these submissions the applicant for the first time expressly relied upon s 87 of the *QCAT Act*, for the contention that the orders sought were beyond the jurisdiction of the Tribunal.

[13] On 5 March 2020 the respondent wrote a letter stated to be made pursuant to the principles in *Calderbank v Calderbank*.[1] The respondent would agree to the dismissal of her application, if the applicant agreed to the dismissal of her application, and to pay the respondent's costs, fixed at $10,000. That offer was the subject of further communications between the parties, including a statement by the applicant's solicitor that, if the respondent offered to withdraw, with no order as to costs, he would recommend the offer to his client. On 10 March 2020, the respondent wrote to the applicant's solicitor, offering to consent to orders that the applicant's application and the respondent's application be dismissed, with a suggestion that the orders be filed before the scheduled hearing. No order for costs was proposed in this letter. No response was received.

[14] At least from the time of the costs agreement, the respondent had conducted a legal practice under the name of Cannon + Co Law. On 28 June 2018, Cannon + Co Pty Ltd was registered as a company; and from 1 July 2018, that company has conducted a legal practice, under the name of Cannon + Co Law (the 'ILP'). The ILP has conducted these proceedings on behalf of the respondent, though the person who carried out this work was generally Ms Cannon.

[15] At the hearing, Mr Thomas of Counsel, who appeared for the respondent, indicated that he sought orders for the dismissal of both applications, and an order for costs. Mr Robinson, the solicitor who appeared for the applicant, queried the necessity for an order dismissing the applicant's application, but ultimately did not oppose it. He too sought an order for costs in his client's favour; and opposed any order in favour of the respondent. He also submitted that any order for costs in favour of the respondent should not include the costs of the work of the ILP.

Submissions on costs

[16] The costs which the respondent ultimately sought were for professional work performed from 13 June 2019. They all related to enforcement of the deed. It was common ground that, from 7 August 2019, the work related to the respondent's application. Much of the work was performed by the respondent or other staff of the ILP. Fees for Counsel were included in the amount claimed.

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1 [1975] 3 All ER 333.

[17] Mr Thomas referred to ss 100 and 102 of the *QCAT Act*; and to *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*.[2] He submitted that the interests of justice required the making of a costs order in his client's favour. He referred to the applicant's failure to comply with the deed, and her failure to accept the offers of 5 and 10 March 2020. He also referred to the applicant's failure to cooperate 'to develop consent orders' in July 2019. He submitted that these were relevant matters for s 102 of the *QCAT Act*, and that the applicant had acted vexatiously.

[18] Mr Robinson submitted that his client's non-acceptance of the offers of 5 and 10 March did not provide a basis for an order for costs against her. The earlier offer required her to pay costs; and the later offer required her to forego her right to pursue costs. Orders by the mediator would have been beyond his power. The other conduct relied upon was not relevant, or not vexatious.

[19] Mr Robinson also submitted that a costs order could not be made for work done by the respondent, in view of the decision of the High Court in *Bell Lawyers Pty Ltd v Pentelow*,[3] extended in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*[4] to incorporated legal practices such as the ILP.

[20] Mr Robinson submitted that the respondent's application was entirely without merit. For that reason, his client should have a costs order in her favour.

[21] Mr Thomas submitted that *Bell Lawyers* recognised that a particular statute could authorise an order for the payment of costs for work performed by a legally qualified litigant, and he submitted that s 102 of the *QCAT Act* is such a statute. He also submitted that the respondent's application had merit, relying on the submissions dated 11 November 2019. He submitted that the application was being withdrawn to consolidate it with other proceedings (presumably for the declaratory relief mentioned earlier).

[22] Subsequent to the hearing, the Tribunal raised, by correspondence to the parties, questions about the role of Cannon + Co Law Pty Ltd in this matter, not made clear in the material before the Tribunal at that stage. It received material from the applicant dated 24 March 2020; and from the respondent under cover of a letter dated 6 April 2020. With one relatively minor exception on a question of calculation, the material, so far as it relates to matters of fact, is uncontentious.

[23] In the further material, the applicant submitted that the principle identified in *Bell Lawyers* should apply in the present case. No costs were incurred by the respondent, the costs claimed being in fact for the respondent's own time 'in acting for herself through the business structure by involving an ILP'. Mr Robinson also referred to *Guneser v Aitken Partners*,[5] *Bennett & Philp Lawyers v Winn*,[6] and *Carmody v WA Solicitors Pty Ltd*.[7]

[24] Mr Thomas emphasised, by reference to *Salomon v A Salomon & Co Ltd*,[8] that it has long been recognised that companies have a separate and distinct legal personality

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2 [2010] QCAT 412.
3 [2019] HCA 29 ('*Bell Lawyers*').
4 [2020] VSCA 15 ('*United Petroleum Australia*').
5 [2019] VSC 649, [74]-[79] ('*Guneser*').
6 [2019] QCA 196, [46]-[51].
7 [2019] WADC 165 ('*Carmody*').
8 [1897] AC 22.

from their shareholders; accordingly, the 'general rule' that a self-represented litigant is not entitled to costs for his or her own work in relation to the litigation (recognised in *Bell Lawyers* as applying to solicitors as well as other self-represented litigants) had no application in the present case. Accordingly, the rejection of the '*Chorley* exception'[9] was of no relevance. In *Carmody*, the Deputy Registrar considered that, where a solicitor was represented by a company of which he was the sole director and shareholder, he was nevertheless entitled to professional costs.[10] In *McIlraith v Ikin (Costs)*,[11] Brereton J had stated that 'a solicitor defendant, who had been represented by a solicitor corporation of which he was the director, was to be treated as having acted as his own solicitor'; but the High Court in *Bell Lawyers* was not prepared to say that his Honour was correct. His Honour attributed no significance to the role of the corporation, as the *Chorley* exception applied.

[25] Mr Thomas referred to the position taken by the High Court in *Bell Lawyers*[12] that the question whether costs could be awarded to an ILP acting for a solicitor employed by the ILP 'may require close consideration of the legislation which provides for incorporation of solicitors' practices and the intersection of that legislation with the provisions of the *Civil Procedure Act* (the source of the power to award costs under consideration in *Bell Lawyers*) in light of the general rule…'. The relevant power to award costs is found in the *QCAT Act*, which did not define costs. Accordingly, it is difficult to see any intersection in the legislation.

[26] With respect to *Guneser*, Mr Thomas submitted that it was a case of an ILP acting for itself, unlike the present case. *Bennett & Philp* supported the respondent's position, a costs order being made in favour of an ILP representing itself. It is binding on the Tribunal. *Carmody* did not consider *Bell Lawyers* or ILPs at all. In that case, WA Solicitors was both a party and its own advocate.

Power to award costs

[27] The parties ultimately accepted that any right to claim costs in relation to the applicant's application up to 29 May 2019 was compromised by the deed. The respondent accepted that the costs which she sought from that date till 7 August 2019 were for work to enforce the deed, unrelated to her application.[13] Thus, while the costs claimed may be regarded as costs for the enforcement of the deed, only some of them were costs of the respondent's application. There was no suggestion that the applicant sought costs other than in relation to the respondent's application.

[28] Section 328(9A) of the *LP Act* provides that the Tribunal may make a costs order 'under the *QCAT Act* in relation to a hearing' under s 328 (which provides for an application to set aside a costs order). Neither party has suggested that this provision affected the Tribunal's power to make costs orders in relation to the respondent's application. Nevertheless, it is appropriate to consider the effect of s 328, in case it alters the powers of the Tribunal conferred by the *QCAT Act*.[14] Although brought as an application in the proceedings commenced by the applicant,

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9 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, 877.
10 See *Carmody*, [16]-[17].
11 [2007] NSWSC 1052, [11] ('*McIlraith*').
12 *Bell Lawyers*, [50]-[53].
13 This appeared to be a concession made for convenience; some of the work prior to that date related to the respondent's application.
14 See *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ss 6–7 ('*QCAT Act*').

the relief sought from the Tribunal was sought under s 89 of the *QCAT Act* (which relates to the enforcement of an offer to settle the dispute the subject of a proceeding in the Tribunal). In view of the terms of the deed, even the application for the dismissal of the applicant's application may be so regarded, though it could perhaps have been sought under s 47 of the *QCAT Act* also. Whatever the effect of s 328(9A) might be in relation to costs having some connexion with an application to set aside a costs agreement, there is no reason to think that it limits the Tribunal's power to make an order for costs in relation to the respondent's application.[15]

[29] It is now necessary to note the provisions of the *QCAT Act* relevant to the costs applications:

> **100 Each party usually bears own costs**
>
> Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding.
>
> …
>
> **102 Costs against party in interests of justice**
>
> (1) The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order.
>
> (2) However, the only costs the tribunal may award under subsection (1) against a party to a proceeding for a minor civil dispute are the costs stated in the rules as costs that may be awarded for minor civil disputes under this section.
>
> (3) In deciding whether to award costs under subsection (1) or (2) the tribunal may have regard to the following–
>
> (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);
>
> (b) the nature and complexity of the dispute the subject of the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties to the proceeding;
>
> (d) for a proceeding for the review of a reviewable decision–
>
> (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and
>
> (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;
>
> (e) the financial circumstances of the parties to the proceeding;
>
> (f) anything else the tribunal considers relevant.

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15 See, generally, *QCAT Act* ss 6–7.

The respondent's application for costs considered

[30] The power to award costs found in s 102(1) is to be understood in the context provided by Chapter 2, Part 6, Division 6 of the *QCAT Act*. The chapter deals with the jurisdiction of the Tribunal; and Part 6 contains 'Other provisions about a proceeding' in the Tribunal.[16] These factors alone would indicate that Division 6 deals with costs of a proceeding. That is reinforced by the language of s 100, which states the usual rule that each party 'must bear the party's own costs for the proceeding'. The character in which someone may have the benefit of, or be subject to, an order for costs under s 102 is as a party to the proceedings. It follows that an order may be made only in relation to the costs of a proceeding.

[31] As noted, some of the costs sought by the respondent are costs of enforcing the deed, but unrelated to the respondent's application. Section 102 does not confer on the Tribunal the power to make an order for such costs. It has not been suggested that the costs sought relate to the applicant's application. No source of power to award costs has been identified other than s 102. So far as the respondent applies for an order for costs of this type, the application is unsuccessful. No order will be made for the costs of work performed prior to 7 August 2019.

[32] The applicant submitted that his client's failure to perform obligations under the deed was not relevant for the considerations raised by s 102. There was no substantial elaboration of this submission. The question is to be considered in light of the statutory context of s 102(1).

[33] Statutes commonly confer on courts a power expressed in general terms to award costs.[17] As Gageler J stated in *Bell Lawyers*,[18] the development of principles by which the broadly expressed statutory discretion is to be exercised has been left to the courts, either through case law or rules of legislative force.[19] The starting point is that costs follow the event. In Division 6, the legislature has taken an approach which departs from the approach developed generally by the courts. The general position in the Tribunal (that each party to a proceeding bears its own costs) is stated in s 100, which recognises that other statutory provisions might have a different effect. Section 102 is such a provision.

[34] The key question raised by s 102 is whether the Tribunal considers that the interests of justice require it to make an order for costs. In *McEwen v Barker Builders Pty Ltd*,[20] Wilson J said,

> The phrase 'in the interests of justice' is not defined in the [QCAT] Act but is to be construed in its ordinary and plain meaning, conferring a broad discretionary power on the decision-maker.[21]

[35] Section 102(3) then sets out matters to which the Tribunal 'may have regard' in determining the key question. The considerations are not identical with those which the courts have come to recognise as relevant to the exercise of powers to award costs generally conferred on them. Thus success in the 'event' is not expressly

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16 The headings of chapters, parts and divisions of an Act are part of the Act: see *Acts Interpretation Act* 1954 (Qld) s 14 ('*AI Act*').

17 See, eg, *Civil Proceedings Act* 2011 (Qld) s 15; *Civil Procedure Act* 2005 (NSW) s 98.

18 *Bell Lawyers*, 59.

19 See, eg, *Uniform Civil Procedure Rules* 1999 (Qld) r 680.

20 [2010] QCATA 49, [13].

21 *Herron v The Attorney-General for New South Wales* (1987) 8 NSWLR 601, 613 (Kirby P).

recognised, in contrast to r 680 of the *Uniform Civil Procedure Rules* 1999 (Qld), and is plainly not a 'guiding principle', or one of the most important considerations[22] for an award of costs under s 102 (by virtue of the effect of s 100). Additionally, the financial circumstances of the parties are expressly made a matter for consideration, in contrast to the position with the courts,[23] where such circumstances are not relevant (at least without more) to the question whether a costs order should be made. These matters tend to suggest that s 102 should be approached without assuming the applicability of principles developed in relation to the power to award costs conferred on courts of general jurisdiction. That is not to say that the reasoning of the courts will not be helpful; often it will. But the ultimate question is whether the statutory test in s 102(1) has been met.

[36] It is against that background that the question of relevance raised by s 102(3)(f) is to be considered. It would seem that the Tribunal could only consider a matter to be relevant, if there is a rational connection between that matter and a conclusion that the interests of justice require an order for costs. It is also of assistance to remember that costs are awarded 'by way of … partial indemnity … for the professional legal costs actually incurred in the conduct of litigation'.[24]

[37] It seems to me appropriate to refer to the circumstances which led to the respondent's application. The *QCAT Act* gives particular prominence to mediation as a method of concluding disputes between parties. Thus, s 75 confers a power to refer the subject matter of a proceeding for mediation (with or without the consent of the parties); and s 76 confers a power to compel attendance at a mediation. A series of provisions regulates such mediations. Section 85 provides for the recording of terms of settlement, and the making of orders to give effect to them. Section 88 gives to such an order the effect of an order made by the Tribunal after deciding the application. The legislative adoption of this approach no doubt reflects the benefits provided to the party by mediation, including the saving of costs and the flexibility of outcomes; and the public benefit resulting from the early determination of a dispute without a full hearing.

[38] Here, at a mediation, the applicant agreed to the dismissal of her application. She did nothing to give effect to this agreement. On the contrary, she has resisted any attempt to have the application dismissed, until the hearing.

[39] The respondent has, in her application, sought other orders. Those orders seek to compel the applicant to perform other terms of the agreement she made at the mediation. No explanation has been suggested for her continuing failure (generally) to comply with her obligations. Both the unexplained failure of the applicant to perform her obligations, and the fact that they were incurred in a mediation provided for by the legislation for the purposes of ending a dispute seem to me to be factors relevant to the interests of justice. Moreover, it seems to me that the applicant's unexplained failure to perform those obligations has unnecessarily disadvantaged the respondent. I consider that to be a matter I can take into account, either under s 102(3)(a), or under the general relevance provision in s 102(3)(f).

[40] I also consider the applicant's refusal to accept either offer to settle these proceedings to be a relevant consideration. It is true that each was made not long

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22 See *Northern Territory v Sangare* [2019] HCA 25, [25] ('*Sangare*').
23 *Sangare*, [27], [32].
24 *Cachia v Haynes* (1994) 179 CLR 403, 410; cited by the plurality in *Bell Lawyers*, [22].

before the hearing. In my view, it was not reasonable for the applicant not to accept the second offer. It was said that that would mean that the applicant gave up her opportunity to seek costs. I do not attribute any weight to this submission. The applicant's solicitor indicated that he would recommend acceptance of such an offer to his client, hardly consistent with the view that the applicant had any real prospect of successfully obtaining an order for costs. Moreover, the applicant faced the hurdles raised by ss 100 and 102, not expressly addressed in the applicant's submissions on her application for a costs order. As will be seen, they were not overcome; and there is no apparent reason for thinking they would be. Although with more hesitation, I also consider the refusal of the earlier offer to be unreasonable. Aside from the question of costs, she could not have hoped for a better outcome. As to costs, she left herself at risk of an order against her, potentially for a greater amount than sought; and she was likely to be able to save some of her own costs of the hearing. Nevertheless, I attribute greater weight to her refusal of the second offer.

[41] Mr Thomas also referred to the applicant's failure to co-operate in the development of consent orders in July 2019. That, it seems to me, is no more than an aspect of her failure to perform her obligations under the mediation agreement, and does not add to the matters already considered.

[42] Mr Thomas also submitted that the applicant's conduct has been vexatious. He referred to the conduct which has already been considered. While this conduct could very well be so characterised, I have already expressed a view as to its relevance, and its weight would not be affected by this characterisation.

[43] Mr Robinson has submitted that the respondent's application was entirely without merit. If that submission were made out, then it seems to me that would be relevant to the question whether the interests of justice required an order for costs in favour of the respondent.

[44] It should first be noted that the respondent has had some success. An order will be made dismissing the applicant's application.

[45] Secondly, there has not been full argument as to whether most of the other orders sought by the respondent were beyond the Tribunal's jurisdiction (declaratory relief was not sought in that jurisdiction). Mr Robinson may have taken some comfort from the provisions of s 87 of the *QCAT Act*. Whether, and to what extent, that would be an effective barrier to the relief sought by the respondent is a question of some complexity, requiring a detailed consideration of the powers of the Tribunal to make orders. Without full argument, I am not prepared to speculate on the outcome. Moreover, even if Mr Robinson is right with respect to a number of the orders sought by the respondent, it is not correct to characterise her claims as 'entirely without merit'. On the material before the Tribunal, the claims clearly have merit, the only question being whether the Tribunal has jurisdiction to grant the relief sought. Even an acceptance of Mr Robinson's submissions would not necessarily result in an order in his client's favour, dismissing the respondent's application. To the extent that orders were sought by the respondent which were beyond the Tribunal's jurisdiction, an order might well be made under s 52 of the *QCAT Act* for a transfer of matters to a court of competent jurisdiction.

[46] I therefore do not think that a costs order in the respondent's favour should be refused because her application was entirely without merit. In my view, for the reasons discussed, I consider that the interests of justice require such an order.

Accordingly, I propose to make an order that the applicant pay the respondent's costs of the respondent's application. It is then necessary to consider the quantum of costs to be ordered. A preliminary question is whether the respondent may recover costs for the provision of legal services by the ILP.

Exclusion of the ILP's costs?

[47] It is a feature of the present case that the litigant and the entity which provided her with legal services are not the same. Strictly speaking, the *Chorley* exception does not arise. Nevertheless, there is a particularly close relationship between the litigant and the entity which provided the legal services.

[48] In *McIlraith*, an indemnity costs order was made in favour of the second defendant. He was a solicitor, and it was contended that he ought not to be entitled to profit costs for acting for himself. Brereton J said:[25]

> Strictly speaking, Mr Ilkin did not act for himself; a solicitor corporation of which he is the director was the solicitor. However, I have attributed no significance to this distinction, and proceed on the basis that Mr Ilkin is to be regarded as having acted as his own solicitor.

[49] His Honour questioned the *Chorley* exception, stating:[26]

> Where a solicitor represents a litigant, the court is entitled to expect the litigant to be impartially and independently advised by an officer of the court….Where a solicitor acts for himself or herself there cannot be independent and impartial advice, and this is in principle a strong reason for holding that a solicitor litigant should not be entitled to costs for acting for him or herself.

[50] Nevertheless, Brereton J considered himself to be bound by authority to apply the *Chorley* exception, with the result that the costs order included solicitors' costs.

[51] In *Bell Lawyers*, the plurality judgment noted that Brereton J had attributed no significance to the role of the incorporated legal practice.[27] Their Honours refrained from determining whether his Honour was correct, but continued:

> 52. The resolution of this question may require close consideration of the legislation which provides for the incorporation of solicitors' practices and the intersection of that legislation with the provisions of the *Civil Procedure Act* [*2005* (NSW)][28] in light of the general rule; and so the resolution of that question may be left for another day, when all the legislation that bears on the question has been the subject of legal argument.
>
> 53. It is sufficient for present purposes to say that whether or not an incorporated legal practice that is a vehicle for a sole practitioner should be able to obtain an order for costs for work performed by its sole director and shareholder is ultimately a matter for the legislature.

[52] It will be apparent that the High Court considered the question to be one determined as a matter of statutory interpretation. Nevertheless, I propose to make some brief comments on the other authorities referred to by the parties.

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25 *McIlraith*, [11].
26 *McIlraith*, [25].
27 *Bell Lawyers*, [51]-[53].
28 The NSW Act being the source of the power to award costs in that case.

[53] In *United Petroleum Australia*, the party with the benefit of a costs order was a firm of solicitors ('an unincorporated Australian partnership').[29] In light of the reasoning in *Bell Lawyers*, the Victorian Court of Appeal held that the costs order did not extend to the time spent by employees of the firm in the litigation.[30] Unlike cases where the litigant is a government, government agency, or a corporate litigant, the firm was not represented by an employed solicitor, but represented itself.[31] To allow a firm of solicitors to recover such costs would 'perpetuate the unequal treatment which *Bell Lawyers* sought to eradicate'.[32] The Court observed that, although not decisive in *Bell Lawyers*, there is a risk of a lack of objectivity and professional detachment when lawyers appear for themselves in litigation.[33] The Court noted that the undesirability of a solicitor profiting from the conduct of their own litigation was considered in *Bell Lawyers*, but considered that this was not decisive in relation to solicitors employed by a government or corporate litigant.[34]

[54] In *Carmody v WA Solicitors Pty Ltd*,[35] each of the successful defendants was an incorporated legal practice. They sought costs for the legal work they did in defending the plaintiff's application. Deputy Registrar Hewitt could 'see nothing to distinguish between an incorporated legal practice and a firm of legal practitioners',[36] and limited the costs order in their favour accordingly. The fact that the litigant and the lawyer were not separate legal entities was important to the determination.[37] In discussing earlier authorities in that State, the deputy registrar said:[38]

> Efforts have been made on behalf of the defendants to establish the proposition that a litigant which is an incorporated legal practice should be distinguished from firms of legal practitioners or individual legal practitioners, to whom the *Chorley* (*sic*) will no longer apply such that the incorporated body be entitled to recover its fees for work which was undertaken. Amongst the cases referred to by counsel for the defendant was *Soia v Bennett* [2014] WASCA 27. In that case Mr Bennett, a legal practitioner, was sued in regard to a business association between himself and the plaintiff and a company associated with the plaintiff. In conducting his defence Mr Bennett appointed a company of which he was the sole director and shareholder named Bennett & Co. It was held by the court that the company and Mr Bennett were separate legal entities and it was not appropriate to pierce the corporate veil and thus deny Mr Bennett of the costs of his successful defence.
>
> An important distinction exists in this case because the company and Mr Bennett were separate entities and the company would have been, if it wished to do so, able to render an account to Mr Bennett for which he would have been liable. The law in Western Australia at that time included the decision of *Dobree v Hoffman*(1996) 18 WAR 36 which was a decision of the Full Court of the Supreme Court of Western Australia in essence reaching a similar decision that which was eventually delivered in the *Bell* lawyer's case. It was

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29 *United Petroleum Australia*, [53].
30 *United Petroleum Australia*, [119]-[122].
31 *United Petroleum Australia*, [102]-[105].
32 *United Petroleum Australia*, [108].
33 *United Petroleum Australia*, [117].
34 *United Petroleum Australia*, [118].
35 [2019] WADC 165 (S) ('*Carmody (Costs)*').
36 *Carmody (Costs)*, [7].
37 *Carmody (Costs)*, [10].
38 *Carmody (Costs)*, [8]-[9].

> therefore critical in the decision in the *Bennett* case that the court identified the company providing the legal services and Mr Bennett as separate entities and did not regard the company as the alter ego of Mr Bennett notwithstanding that fact that he was the sole director and shareholder.

[55] Prior to *Soia v Bennett*, the *Chorley* exception was not considered to be part of the law of Western Australia, as stated by the deputy registrar. The position was reversed by the Court of Appeal in that case, upholding a notice of contention filed on behalf of Mr Bennett. With respect to the decision at first instance, the Court of Appeal said:[39]

> The trial judge in this case decided the costs issue on the basis that *Dobree v Hoffman* could be distinguished because Mr Bennett was not represented by himself or by a firm in which he was a partner, but by a corporate legal practice, albeit a corporation in which Mr Bennett was the only director and shareholder. The trial judge said, in effect, that because the incorporated legal practice was a separate legal entity, the 'corporate veil' could not be lifted to deny Mr Bennett his costs. That reasoning does not have to be examined further given the conclusion that *Dobree v Hoffman* should be overruled and the *Chorley* exception applied. As a result, Mr Soia's and PTS' ground of appeal should be dismissed and the notice of contention should be upheld.

[56] At first instance, Commissioner Sleight said:[40]

> Although counsel for Mr Bennett submitted that *Dobree v Hoffman* was contrary to High Court authority, he conceded that it was the duty of a single judge of this Court to follow the Full Court decision: *Huntingdale Village Pty Ltd (Receivers and Managers Appointed) v Corrs Chambers Westgarth* [24].
>
> However, I have come to the conclusion for reasons set out below that the rule of practice in *Dobree v Hoffman* should not be applied in the present case.
>
> As stated above, in 1996 when *Dobree v Hoffman* was decided the Legal Practitioners Act 1893 was the applicable legislation governing legal practice. There was no provision for a legal practice to be conducted by an incorporated body. Accordingly, where two or more persons operated a legal practice in 1996 they did so in partnership and were otherwise subject to the provisions of the *Partnership Act 1895* (WA). A partnership is not a separate legal entity. Hence, the comment by Parker J in his decision that 'any fees paid or payable to the partnership by the solicitor litigant are also paid or payable to the solicitor litigant by virtue of the partnership'. In this case unless the corporate veil is lifted, the solicitors on the record, Bennett & Co, are a legal entity quite separate from Mr Bennett. Also, unlike the situation in *Dobree v Hoffman*, Mr Bennett was a party to these proceedings as an individual quite separate from the operation of the legal practice of Bennett & Co. In other words Bennett & Co was not a party to the litigation.
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> The rule that self represented litigants are not entitled to costs for their own time and inconvenience is built upon the premise that costs awarded are confined to money paid or liabilities incurred for professional legal services: *Cachia v Hanes*. The majority in that case stated:

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39 Pullin JA, Newnes JA and Murphy JA agreeing.

40 *Soia v Bennett [No 5]* [2012] WASC 289 (S).

> It has not been doubted since 1278, when the Statute of Gloucester introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant.

> In my opinion, the potential for receipt of profit by Mr Bennett from any award of costs is, in the context of this case, not sufficient to extend the *Dobree v Hoffman* rule of practice to the present situation where Mr Bennett is represented by a legal practice which is not a party to the proceedings and which is a separate legal entity to him. The circumstances are somewhat analogous to cases where corporate litigants have been represented by solicitors employed by the corporate litigant. The traditional approach has been to award costs on the basis of comparable costs which would have been incurred and allowed on taxation had an independent solicitor been engaged, without enquiry as to how these compare with the expense of the internal employment of a solicitor. In other words, on the taxation, the taxing officer need not conduct an enquiry as to the extent the corporation might profit from costs been allowed on the basis of an independent solicitor acting: *Commonwealth Bank of Australia v Hattersley* [2001] NSWSC 60; (2001) 51 NSWLR 333, 337 [11].

[57] In *Guneser*, an incorporated legal practice was a party in a costs dispute with a person it had represented in other proceedings. In that dispute it acted for itself. A question arose as to whether *Bell Lawyers* had the effect that it could not recover costs for its own work in the dispute. Wood AsJ said:[41]

> In fact there are provisions in the Uniform Law[42] that are relevant. The notion of an incorporated legal practice is clearly permissible. Section 32 states that 'Legal services may be provided under any business structure...' The combined effect of sub-sections 33(1) and (2) however is that both a legal practitioner and a law practice must comply with the *Uniform Law*, Uniform Rules and 'other professional obligations *regardless of the structure*' (emphasis added).
>
> The majority in *Bell Lawyers* stated 'Importantly, the view that solicitors should be encouraged to act for themselves is contrary to the modern orthodoxy that it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation.' Given that these professional ethical considerations underpin *Bell Lawyers,* and the abolition of the *Chorley* exception, it is clear that a business structure cannot be used as a basis to avoid the underlying rationale. The *Uniform Law* governing the practice of law in Victoria makes that clear.

Having noted that the respondent was an incorporated legal practice acting for itself in the costs proceeding,[43] his Honour limited the costs order to the respondent's disbursements.

[58] The respondent in *Winn* was a legal practice representing itself. It successfully applied for an order dismissing the applicant's application for leave to appeal against a judgment of the District Court. One course considered by McMurdo JA was to

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41 *Guneser*, [78]-[79].
42 *Legal Profession Uniform Law* 2014 (Vic).
43 *Guneser*, [70], [74].

adjourn the proceedings to permit the applicant to attempt to remedy her defaults. His Honour decided not to do so, one of his reasons being that:

> The respondent's position, so far as recovering costs from the applicant, for example, costs occasioned by a further delay in the hearing of this case, would be affected by the recent decision of the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007; [2019] HCA 29, where the High Court held that the common law of Australia does not allow for the exception, commonly referred to as the *Chorley* exception, which had existed for a self-represented litigant who is a solicitor.

[59] The respondent sought costs on the indemnity basis. His Honour was then informed that the respondent was an incorporated legal practice, which his Honour said, 'matters for the reasons that appear in paragraphs 46 through 51 of the judgment of the plurality in *Bell Lawyers*'. He stated that that did not affect his conclusion that the applicant's application should be dismissed, but ordered that costs be assessed on the standard basis.

[60] It is apparent that McMurdo JA was conscious of the view of Brereton J referred to in *Bell Lawyers*; but appears to have thought that the incorporation of the respondent 'matters' because it affected one of his grounds for ordering the dismissal. Although the decision of a single appellate judge, given ex tempore, it is deserving of some weight.

[61] It is now necessary to consider the statutory provisions under which an ILP may conduct legal practice. Legal practice engaged in by an ILP under Part 2.7 of the *LP Act* is an exception to the general prohibition on persons who are not Australian legal practitioners engaging in legal practice in this State.[44] An ILP is defined as a corporation which engages in legal practice in Queensland, whether or not it provides services that are not legal services. For Part 2.7, a corporation is a company within the meaning of the *Corporations Act* 2001 (Cth).[45] An ILP is not required to hold a practising certificate.[46] It is, however, required to have at least one legal practitioner director,[47] that is, a director who is an Australian legal practitioner holding a practising certificate entitling the practitioner to practise as a principal.[48] Each legal practitioner director of an ILP is, for the purposes of the *LP Act*, responsible for the management of the legal services provided by the ILP; and must ensure that appropriate management systems are implemented and kept to enable the provision of legal services by the ILP under the professional obligations of Australian legal practitioners and other obligations imposed by the *LP Act*; and so that the obligations of the Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice[49]. If it ought to be reasonably apparent to a legal practitioner director that the provision of legal services by the practice will result in breaches of the professional obligations of an Australian legal practitioner or other obligations imposed under the Act, the director must take all reasonable action to ensure that the breaches do not happen.[50] Professional obligations are defined to include duties to

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44 See *Legal Profession Act* 2007 (Qld) s 24 ('*LP Act*').
45 See *AI Act* s 36 and Schedule 1.
46 *LP Act* s 113(3).
47 *LP Act* s 117.
48 See the definition in *LP Act* s 110.
49 *LP Act* s 117(3).
50 *LP Act* s 117(4).

the Supreme Court, obligations in connection with conflicts of interest, duties to clients, and ethical rules.[51] An Australian legal practitioner who provides legal services for an ILP in the capacity of an officer (including a director)[52] is not excused from compliance with the professional obligations, or the obligations under any law, of an Australian legal practitioner;[53] and the professional obligations of an Australian legal practitioner apply as if, where there is only one legal practitioner director, the practice were a sole practitioner, and the employees of the practice were the employees of that director.[54] Further, for the application of any law or the legal profession rules relating to conflicts of interest to the conduct of an Australian legal practitioner who is a legal practitioner director of an ILP, the interests of the ILP are taken to be the interests of the practitioner.[55] Finally, legal profession rules which apply to an Australian legal practitioner, apply to a legal practitioner director of an ILP, unless the rules otherwise provide.[56]

[62] These provisions envisage that a corporation which is an entity separate from its shareholders, and its directors and employees, may conduct a legal practice. It ensures that legal practitioners who are officers or employees of an ILP remain subject to a wide range of professional obligations; and for that purpose only, where there is only one legal practitioner director, treats the practice as if the director were a sole practitioner. Otherwise, consequences of the separate existence of the corporation are unaffected.

[63] I have not identified anything in the provisions of the *QCAT Act* which in terms deals with the power to make orders for costs, where the litigant is a lawyer, represented by an associated ILP; nor where the litigant is an ILP representing itself. The term 'costs' is not defined in that Act; but seems to be used in the sense in which it is generally used in the courts.[57] On that basis, the general rule identified in *Bell Lawyers*[58] that a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation, could well apply to an ILP which represents itself. However, unless the separate existence of the ILP is not recognised, the general rule would not operate to limit the amount of costs which the respondent could recover. It is not possible to identify and examine the reasoning which led Brereton J to a different view. The circumstances in which the existence of a corporate entity separate from its shareholders might be ignored are limited.[59] Like Commissioner Sleight in *Soia*, I do not consider it appropriate to extend the general rule to a case where the litigant and lawyer are not in truth identical. The tax invoices discussed later in these reasons rather strongly indicate that the respondent has incurred a liability to the ILP for the provision by it of legal services.[60] An

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51 See the definition in *LP Act* s 110.

52 See the definition in *LP Act* s 110, together with the definition in *Corporations Act* 2001 (Cth) s 9.

53 *LP Act* s 120.

54 Ibid.

55 *LP Act* s 122.

56 *LP Act* s 125.

57 *QCAT Act* s 107 envisages costs being assessed by reference to a scale under the rules applying to a court.

58 *Bell Lawyers*, [1].

59 Robert Austin and Ian Ramsay, *Ford, Austin & Ramsay's Principles of Corporation Law* (LexisNexis, 17th ed, 2018) [4.250].

60 It is by no means improbable that some ILPs will be taxed on an earnings or accruals basis: see Taxation Ruling 98/1, [39]. For such an ILP, the issue of a tax invoice will usually result in the fee charged forming part of the ILP's income, and accordingly lead to a liability for tax in the ILP. While not raised by the parties in the present case, this consideration would suggest it would not be

award would thus provide the respondent with an indemnity for costs actually incurred in the conduct of litigation. I also note that while most of the work was performed by the respondent, some was performed by another person, presumably an employee of the ILP; and I consider it likely that there are some overheads fairly attributable to the work, which are borne by the ILP. The fact that the ILP is not the party to the litigation ultimately makes it unnecessary to consider the correctness of the view of Wood AsJ in *Guneser*. Accordingly, I do not propose to limit the award of costs to exclude the amounts claimed for the provision of services by the respondent.

Quantum

[64] The ILP rendered a tax invoice to the respondent dated 30 April 2019 (Invoice 557); and a tax invoice dated 11 November 2019 (Invoice 785). The respondent included in her affidavit material a draft tax invoice from the ILP dated 14 March 2020 (Invoice 920); a tax invoice from Mr Thomas dated 29 April 2019 (invoice 86), and another such invoice dated 11 November 2019 (Invoice 103). At the hearing on 16 March 2019, I was informed that the solicitor's costs of attendance were $1,636.25 (including GST); and Counsel's fees for the hearing were $962.50, including GST. The respondent also provided figures for Invoice 785, excluding work prior to 7 August 2019. The respondent in her recent material sought to correct the figures for Invoice 785. She also provided a tax invoice from the ILP for work relating to the provision of the further material of 6 April 2020 (Invoice 957); and a tax invoice from Mr Thomas (Invoice 119) for similar work.

[65] Invoices 557 and 86 relate to work prior to 7 August 2019. The claim for such costs was compromised in the deed, and these costs should be excluded. The adjustment to the amount shown in Invoice 785 was intended to exclude such costs. The applicant did not seek to challenge the figures ultimately put forward by the respondent, and I accept them. It is appropriate to fix costs in accordance with those figures, for the period from 7 August 2019.

[66] The figures (as adjusted) appear in the table below:

Invoice 785	$ 8,596.65	
Invoice 920	$ 5,987.00	
16 March 2020 Hearing	$ 1,636.25	
Invoice 957	$ 1,262.25	
	Solicitor's fees and disbursements	$ 17,482.15

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appropriate to develop a general rule which ignores the separate existence of the ILP, or its liability for tax.

Invoice 103	$ 1,210.00	
16 March 2020 Hearing	$ 962.50	
Invoice 119	$ 1,045.00	
	Counsel's fees	$ 3,217.50
	Total	$ 20,699.65

[67] Save for the submissions previously considered, there has been no submission by the applicant to challenge the inclusion of these amounts in a costs order in favour of the respondent. They appear to relate to her application. Accordingly, I propose to fix the amount of her costs at $20,699.65.

Applicant's application for costs

[68] As mentioned, the applicant's submissions did not address ss 100 and 102 of the *QCAT Act*. No reason has been advanced for concluding that the interests of justice require an order for costs in her favour. Accordingly, her application for costs is refused

Conclusion

[69] The following orders are made:

1. The applicant's application is dismissed;
2. The respondent's application is otherwise dismissed; and
3. The applicant is to pay the respondent's costs, assessed at $20,699.65.