SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v McQuaid* [2019] QCA 136
PARTIES:	**LEGAL SERVICES COMMISSIONER** (appellant) **v** **TIMOTHY JOHN McQUAID** (respondent)
FILE NO/S:	Appeal No 12363 of 2018 QCAT No 108 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2018] QCAT 342 (Members Lyons QC, Sheehy and Dann)
DELIVERED ON:	4 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2019
JUDGES:	Sofronoff P and Morrison JA and Douglas J
ORDERS:	**1. Appeal allowed.** **2. Order (b) of the orders made by the Queensland Civil and Administrative Tribunal on 19 October 2018 is set aside.** **3. The respondent is to pay the applicant's costs of the proceedings before the Queensland Civil and Administrative Tribunal, to be assessed.** **4. The respondent is to pay the appellant's costs of the appeal.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the appellant dealt with a complaint against the respondent who was said to have breached his duty as a solicitor by allowing his interests to conflict with the interests of a client – where the Tribunal found that the respondent's conduct amounted to unsatisfactory professional conduct – where the respondent conceded that that there should be an order for costs in favour of the appellant – where oral submissions were made by the respondent contending that costs should be fixed rather than assessed – where the appellant contended that the order should simply be for the payment of the costs, to be assessed – where the Tribunal fixed the applicant's costs to $2,500 –

where the appellant has submitted that in the limitation of costs there was no basis or method for reaching the conclusion given, and no evidence to support it – where the Tribunal's interpretation of s 462 of the *Legal Profession Act* 2007 (Qld) was applied in the limitation of costs – whether the Tribunal had the power to limit costs

Legal Profession Act 2007 (Qld), s 416, s 435, s 439, s 443, s 447, s 448, s 452, s 453, s 455, s 456, s 457, s 459, s 462

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498; [1989] QSCFC 145, cited
Legal Services Commissioner v Baker (No 2) [2006] 2 Qd R 249; [2006] QCA 145, cited
Legal Services Commissioner v Bone [2014] QCA 179, cited
Legal Services Commissioner v Bradshaw [2009] QCA 126, cited
Sweeney v Volunteer Marine Rescue Currumbin Inc [2000] QCA 455, cited

COUNSEL: G R Rice QC for the appellant
No appearance for the respondent

SOLICITORS: Legal Services Commission for the appellant
No appearance for the respondent

[1] **SOFRONOFF P:** I agree with Morrison JA.

[2] **MORRISON JA:** The Queensland Civil and Administrative Tribunal dealt with a complaint against the respondent who was said to have breached his duty as a solicitor by allowing his interest to conflict with the interest of a client. The matter was dealt with by the Tribunal on the basis of a statement of agreed facts and an affidavit from the respondent. No issue was taken with the facts deposed to by the respondent.

[3] The issues before the Tribunal were: (i) whether the admitted breach was capable of constituting professional misconduct or unsatisfactory professional conduct under the *Legal Profession Act* 2007 (Qld); (ii) the punishment that might be imposed, depending on findings made; and (iii) the order for costs, the Legal Services Commissioner seeking an order for the payment of its costs, assessed on the standard basis.

[4] No issue arises on the appeal as to the findings made by the Tribunal that the breach of duty amounted to unsatisfactory professional conduct, nor as to the finding that in the circumstances it was appropriate to issue a public reprimand only. The issue on appeal concerns the Tribunal's approach to the costs issue and the orders made in respect of costs.

[5] Before the Tribunal, counsel for the respondent conceded that there should be an order for costs in favour of the Commissioner. In oral submissions it was contended that costs be fixed rather than assessed. The submission made was that, based upon "comparable cases" and counsel's assertion as to what might be recovered on an

assessment of costs, the sum of $2,000 to $2,500 was an appropriate figure. No evidence was adduced to support that figure.

[6] The Commissioner contended that the order should simply be for the payment of the costs, to be assessed.

Relevant legislation

[7] The central provision with which the appeal is concerned is s 462 of the *Legal Profession Act*, which provides:

> "(1) A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the Commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.
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> (2) A disciplinary body may make an order requiring a person whom it has found not to have engaged in prescribed conduct to pay costs, including costs of the Commissioner and the complainant, if the disciplinary body is satisfied that -
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> (a) the sole or principal reason why the proceeding was started in the disciplinary body was the person's failure to cooperate with the Commissioner or a relevant regulatory authority; or
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> (b) there is some other reason warranting the making of an order in the particular circumstances.
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> (3) …
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> (4) A disciplinary body may make an order requiring the Commissioner to pay costs, but may do so only if it is satisfied that -
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> (a) the Australian legal practitioner or law practice employee has not engaged in prescribed conduct; and
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> (b) the body considers that special circumstances warrant the making of the order.
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> (5) An order for costs -
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> (a) may be for a stated amount; or
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> (b) may be for an unstated amount but must state the basis upon which the amount must be decided.
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> (6) An order for costs may state the terms on which costs must be paid.
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> …
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> (8) In this section -
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> ***engaged in prescribed conduct*** means engaged in unsatisfactory professional conduct or professional

misconduct, or engaged in misconduct in relation to a relevant practice, as mentioned in section 456(1) or 458(1)."

[8] The proper interpretation of s 462 must be considered by reference to its text, in the context of the *Legal Profession Act* as a whole. The context in which s 462 is found is revealed by the Act, the relevant provisions of which were set out in *Legal Services Commissioner v Bone*;[1] they bear repeating here.

[9] One of the main purposes of the Act is:

> "…to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally."[2]

[10] The Act makes quite extensive provision in relation to many aspects of the ability of legal practitioners to engage in legal practice, including eligibility and suitability for admission, admission to the legal profession, the issue of practising certificates, regulation of interstate legal practitioners, how practices are conducted, making of rules governing practice and practitioners, trust accounts and trust money, costs agreements and the ability to recover costs, and claims on the fidelity fund in the event of defaults on the part of a practitioner. Chapter 4 deals with complaints and discipline, and s 416 provides as follows:

> "The main purposes of this chapter are as follows –
> (a) to provide for the discipline of the legal profession;
> (b) to promote and enforce the professional standards, competence and honesty of the legal profession;
> (c) to provide a means of redress for complaints about lawyers;
> (d) to otherwise protect members of the public from unlawful operators."

[11] Chapter 4 has a very wide operation, with very broad provisions in relation to the sort of conduct about which complaint may be made and detailed provision as to the way in which a complaint is dealt with. Section 435 applies if the Commissioner believes that an investigation should be started into the conduct of a practitioner. It grants power to refer the complaint or the investigation to the Queensland Law Society or the Bar Association. Section 439 makes provision in relation to the role of those entities if they are involved in the investigation.

[12] Powers for investigations are conferred by s 443, and s 447 makes provision in relation to the Commissioner's decision to start proceedings under Chapter 4:

> "As the commissioner considers appropriate in relation to a complaint or investigation matter that has been or continues to be investigated, other than a complaint or investigation matter about the conduct of an unlawful operator, the commissioner may start a proceeding under this chapter before a disciplinary body."

[13] The Commissioner is given power to dismiss a complaint in certain circumstances: s 448:

> "(1) The Commissioner may dismiss the complaint or investigation matter if satisfied that –

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1 [2014] QCA 179 at [36]-[42].

2 Section 3.

(a) there is no reasonable likelihood of a finding by a disciplinary body of -

(i) for an Australian legal practitioner – either unsatisfactory professional conduct or professional misconduct; or

(ii) for a law practice employee – misconduct in relation to the relevant practice; or

(b) it is in the public interest to do so."

[14] The Commissioner has an obligation under s 450, to deal with complaints as efficiently and as expeditiously as is practicable. However, there is specific provision, under s 434, for circumstances in which the Commissioner may delay dealing with a complaint.

[15] Specific provisions are made in relation to starting proceedings before a disciplinary body, such as the Tribunal: commencing with s 452. Those provisions include sections dealing with hearings, decisions of the Tribunal and enforcement of orders. Section 453 requires the Tribunal to "hear and decide each allegation stated in the discipline application". Section 455 gives power to vary a discipline application if it is "satisfied that it is reasonable to do so having regard to all the circumstances", and in doing so the Tribunal "must have regard to whether varying the application will affect the fairness of the proceeding". Power to make orders against a practitioner is given by s 456, but only after the Tribunal "has completed a hearing of a discipline application". Those orders provide a very wide ambit for relief, including removal from the role of practitioners, suspension of practising certificates, imposition of conditions, public reprimands and the like. Enforcement of orders is dealt with by s 457, and applies to an order under s 462: s 457(1). Those orders are enforced by filing them in the Supreme Court and giving the minister a copy of that order and the reasons for making it: s 457 and s 459.

Approach of the Tribunal

[16] The Tribunal's decision[3] commenced by observing that there was no suggestion of "exceptional circumstances" under s 462(1), and therefore the Tribunal had to make an order for costs.

[17] The Tribunal then referred to the decision in *Legal Services Commissioner v Shand*[4] which considered an order by the Tribunal fixing the costs of the Commissioner in that case in the sum of $2,500.[5] The Tribunal then referred to this Court's decision in *Legal Services Commissioner v Bone*[6] and in particular to a passage where it was held that the wording of s 462(4) and (5) was such that an order for a "stated amount" comprehended that the costs ordered might be part only of the overall costs.[7]

[18] The Tribunal then turned its attention to factors affecting the order that it might make as to costs. They were:

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3 *Legal Services Commissioner v McQuaid* [2018] QCAT 342 **[Reasons below]**.
4 [2018] QCA 66.
5 Reasons below at [41].
6 [2014] QCA 179.
7 Reasons below at [43] and [44].

(a) the manner in which the Commissioner conducted the case;[8] in this respect it referred to an "apparently wilful" misreading of an affidavit, and "ill-founded" reliance on the client's condition;

(b) that "an element of unreasonableness permeates the applicant's case as presented before the Tribunal";[9] this related to the Commissioner urging that the relevant conduct be characterised as professional misconduct, whereas the Tribunal's characterisation of the facts did not warrant that conclusion.

[19] The Tribunal's ultimate findings on the question of the order for costs were expressed in the following way:[10]

> "[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.
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> [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."

Tribunal's reliance upon *Legal Services Commissioner v Bone*

[20] The Tribunal adopted a passage from *Legal Services Commissioner v Bone*,[11] which dealt with s 462(4), as applicable to s 462(1). The relevant passage is:[12]

> "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 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 that 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."

[21] As is apparent those comments were made in respect of s 462(4) which applies where the disciplinary body or Tribunal is satisfied that the legal practitioner has not engaged in prescribed conduct and that "special circumstances warrant the making of the order".

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8 Reasons below at [46].
9 Reasons below at [47].
10 Reasons below at [48] and [49].
11 [2014] QCA 179.
12 *Bone* at [45].

[22] This Court considered the meaning of s 462(1)[13] in *Legal Services Commissioner v Baker (No 2)*.[14] There the Tribunal ordered that the practitioner pay the Commissioner's costs to be assessed on a standard basis, but on the appeal an apportionment was sought having regard to the Commissioner's failure on some of the charges, and his withdrawal or failure to pursue some others.[15] The section under consideration was then numbered s 286, but was in the same terms as s 462 at the time of the present case. McPherson JA[16] had the following to say:[17]

> "[55] It was submitted on behalf of the practitioner that the Tribunal was wrong in construing s 286(1) as conferring no discretion but to order costs against a practitioner found guilty within the meaning of s 286(7), except where satisfied that 'exceptional circumstances' exist. By reference to s 286(5), it was submitted that there is discretion to apportion the quantum of costs where, as here, each party has had a measure of success. Any other interpretation could, it was said, lead to absurd results; for example, a practitioner might be successful in defeating all but a single charge against him, which was relatively minor in the overall context of the time and effort expended on it in comparison to all the other charges in which the practitioner was successful. Yet he would nevertheless be bound to pay all the costs of the whole proceedings even though only one or a few charges might have been proved.
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> [56] In my view, however, the criterion adopted in s 286(1) is whether the practitioner has been found guilty of one or more of the forms of misconduct specified in s 286(7). If he has, then an order requiring him to pay costs must be made against him unless the Tribunal is satisfied that 'exceptional circumstances' exist. **It is true that s 286(1) refers simply to 'costs' and not to all the costs of the proceedings; but the latter is I consider its primary meaning in this context. Section 286(1) is not designed to confer or preserve the broad discretion over costs commonly found in statutory provisions conferring power to award costs. If it had been intended to do so, it could and would have been expressed to that effect. On the contrary, the mandatory rule imposed by s 286(1) is designed to follow unless the Tribunal is satisfied that exceptional circumstances exist that call for some other order to be made, either generally or in terms of an amount under s 286(5)(a) or (b) or against the Commissioner under s 286(4)**."

[23] That passage in *Baker* was adopted by this Court in *Legal Services Commissioner v Bradshaw*:[18]

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13 Then numbered s 286(1). Section 286 was then in the same terms as s 462.

14 [2006] 2 Qd R 249; [2006] QCA 145.

15 *Baker* at [54].

16 With whom Jerrard JA and Douglas J agreed. Emphasis added.

17 *Baker* at [55]-[56].

18 [2009] QCA 126, at [63] per McMurdo P and Holmes JA; (emphasis added; internal citations omitted).

> "Mr Bradshaw has not provided any material to the tribunal or this Court to suggest that exceptional circumstances warranted orders different from the costs orders made and otherwise required to be made under s 462(1), or that the tribunal erred in exercising its broad discretion in framing those costs orders under s 462(5) and (6). **Although Mr Bradshaw was successful on three of the four charges brought against him, the mandatory terms of s 462(1) applied to the costs of the whole proceedings: *Baker v Legal Services Commissioner*.**"

[24] Neither *Baker* nor *Bradshaw* was drawn to the attention of this Court when considering *Bone*. But s 462(1) was not in issue in *Bone*. There was no need to refer to *Baker* unless it was intended to argue that the reasoning in *Baker* applied to s 462(4). Had that occurred *Baker* would have been followed in so far as it was necessary to deal with s 462(1). This Court is bound by its own previous decisions unless it is demonstrated quite clearly that they are almost certainly wrong.[19] The principles were summarised in *Sweeney v Volunteer Marine Rescue Currumbin Inc:*[20]

> "An intermediate Court of Appeal will usually follow its own decisions. In *Nguyen v Nguyen* (1989-1990) 169 CLR 245 at 269, Dawson, Toohey and McHugh JJ noted:
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> > 'Where a Court of Appeal holds itself free to depart from an earlier decision, it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from the previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law (see *Queensland v The Commonwealth* per Aickin J).'
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> The circumstances in which an intermediate appellate court will be free to depart from its previous decisions were discussed more fully by the Federal Court in a recent case of *Telstra Corp Ltd v Treloar* [2000] FCA 1170; N 644 of 1999, 22 September 2000 at [22] to [28]. The following comments at [27] to [28] are particularly apposite to the present case:
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> > 'The problem is very real when what is at issue is the construction of a statute. For one thing, statutory language is often ambiguous. Courts can struggle to determine the legislative intent. It is often impossible to discover any legislative intent. In many instances, the generality of the statutory language is deliberate and allows the Court to develop a body of law to fill the gaps. This may lead to disagreement among Judges about what the statute means. It would be sound policy that once that intent has been discerned by an Appellate Court, then that should be the end of the matter. The view which we prefer is that unless an error in construction is patent or has produced

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19 See, for example, *R v Essenberg* [2002] QCA 4; *Re Monckton* [1995] QCA 321, [1996] 2 Qd R 174; *McNab Constructions Pty Ltd v Queensland Building Services Authority* [2010] QCA 380; and *DAR v DPP (Qld)* [2008] QCA 309 at [24].

20 [2000] QCA 455, per McMurdo P, Cullinane and Wilson JJ concurring.

> unintended and perhaps irrational consequences not foreseen by the Court that created the precedent, the first decision should stand.'"

[25] *Baker* and *Bradshaw* should be followed unless this Court is convinced that the interpretation reached was plainly wrong.[21] For several reasons I do not consider that to be the case.[22]

[26] First, the Commissioner carries out its function in the public interest, rather than any private interest. It acts to further the "interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally": ss 3 and 416 of the Act. That is emphasised by s 448 under which the Commissioner can only dismiss a complaint if there is no reasonable likelihood of a finding that the conduct is either unsatisfactory professional conduct or professional misconduct, or if it is in the public interest to do so. And the Commissioner is obliged by the Act to deal with complaints as efficiently and as expeditiously as is practicable: s 450. Those considerations suggest that the intention was that the public purse should not be burdened in the event of a finding that a practitioner has been guilty of unsatisfactory professional conduct or professional misconduct, and therefore the costs ordered are all the Commissioner's costs of the proceedings.

[27] Secondly, as was pointed out in *Baker*, the precondition for a costs order is a finding of unsatisfactory professional conduct or professional misconduct. Once a guilty finding is made the disciplinary body "must make" an order, unless exceptional circumstances exist. That wording is not apt to convey a general discretion as to costs. And, s 462(1) follows on a finding that the practitioner has engaged in prescribed conduct. By contrast the wording of s 462(4), which deals with the topic of costs being ordered against the Commissioner, does convey a general discretion, using the permissive "may make an order". It is not confined to circumstances where there has been a finding against the practitioner; to the contrary it only requires that the disciplinary body be "satisfied" that the practitioner has not engaged in prescribed conduct. And it poses a different test, that it must be "satisfied" of a particular circumstance, namely that "special circumstances" warrant the making of an order. Whatever "special circumstances" are, a question that need not be examined further, as discussed in *Bone* they are not necessarily the same as "exceptional circumstances" in s 462(1).

[28] Therefore, s 462(1) is not apt to confer or preserve the broad discretion over costs commonly found in statutory provisions conferring power to award costs. If the legislature had so intended, it could and would have said so. Instead, the only basis upon which a costs order does not automatically follow a finding of guilt is if "exceptional circumstances" exist.

[29] Thirdly, the comments in *Bone* were made in respect of s 462(4) which deals with a set of circumstances different from those that apply under s 462(1). Section 462(4) enables a costs order to be made against the Commissioner but only if the

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21 The principle is the same when applied to decisions in intermediate appellate courts in other jurisdictions: *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22, at [135].

22 I pause to observe that the excerpt of s 286(1) which appears in paragraph [54] of *Baker* wrongly includes the word "the" before "costs". The Act at the time did not include that word. The headnote to the decision sets out the correct text, and it is apparent from paragraph [56] that the excerpt in paragraph [54] was simply a typographical error.

disciplinary body is satisfied that two conditions are met, namely (i) the practitioner is found not guilty, and (ii) "special circumstances" warrant the making of an order. As was discussed in *Bone*,[23] s 462(4) deals with considerations quite different from s 462(1), because it also applies where charges are withdrawn or abandoned, and therefore no finding of guilt is necessary. Those differences in the statutory requirements, and the considerations referred to in paragraph [26] above, do not compel the conclusion that the word "costs" in s 462(4) means all the costs of the proceedings.

[30] Consequently, the Tribunal's reliance upon the particular passage from *Bone*, set out in paragraph [20] above, was misplaced.

Order to limit costs?

[31] The Tribunal's approach was to "limit the costs to be awarded to the applicant".[24] Accepting the interpretation of s 462(1) to be that it refers to "all the costs of the proceedings", as if s 462(1) referred to "the costs",[25] one must then turn to s 462(5). It provides that an order for costs may be one of two things, namely:

(a) "for a stated amount"; or

(b) "for an unstated amount but must state the basis upon which the amount must be decided".

[32] On its face s 462(5) obliges the Tribunal to adopt one or other form of the order for costs. Either it can state the amount, or if it does not it must state the basis upon which the amount "must be decided". In the latter case, it seems plain that the basis for the decision as to the amount of the costs will not be one made by the Tribunal. That suggests, by inference, an order for costs to be assessed.

[33] What s 462(5) does not permit is an order that limits the costs. To do so would run contrary to the obligation in s 462(1), which provides that the disciplinary body or Tribunal "must make an order" as to costs, and those costs, following *Baker* and *Bradshaw*, are all the costs of the proceedings. I do not accept the respondent's submission that this approach would render s 462(4)(a) nugatory.[26] Under that subsection an order for costs "may be for a stated amount". The two forms of order can operate together, as *Baker* recognised.[27] One can envisage cases where the order is made under s 462(1) but the evidence establishes what those costs actually are, in which case they can be for a "stated amount".

[34] It follows, therefore, that the Tribunal in this case purported to exercise a power it did not have. It could have stated the costs, if all of the costs of the proceedings could have been quantified in a way so they could be "stated". But that is not the case. Not only was there no evidence of what all of the costs were, but the Tribunal did not purport to do that exercise. Rather, it made an order limiting the costs.

Notification of the basis for limiting costs

[35] One of the Commissioner's contentions before this Court was that at the hearing of the Tribunal no indication was given that the Tribunal was contemplating limiting the costs by reference to the matters described in the Reasons below at paragraph

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23 *Bone* at [51]-[54].
24 Reasons below at [48].
25 The interpretation as found in *Baker* at [56], and adopted in *Bradshaw* at [63].
26 Respondent's amended outline, paragraph 23.
27 *Baker* at [56].

[48]. Consequently, it was said, neither party had the opportunity to make submissions about the merits of those matters.

[36] That contention seems to be correct. Nothing of the kind was said in the outlines before the Tribunal and reference to the transcript of argument concerning the question of costs does not disclose any consideration of the two matters identified, namely (i) the lack of success on the issues which were litigated, and (ii) the manner in which the case was conducted.

Manner in which the case was conducted

[37] The disciplinary application was filed on 7 June 2017. It recorded a contention that, on the particulars of the charges set out, the practitioner was guilty of professional misconduct and/or unsatisfactory professional conduct.[28] It also signified that upon a finding that the practitioner was guilty of either, part of the relief sought was the payment of costs.[29]

[38] In the response the practitioner admitted the charge, reserving his position as to whether the conduct constituted professional misconduct or unsatisfactory professional conduct. All of the facts were admitted.[30] The response was filed on 21 August 2017.

[39] Three months later, on 28 November 2017 the parties reached agreement on the statement of facts. That statement of facts recorded the charge, which was that the practitioner acted on behalf of his client when a conflict of interest existed.[31] The essence of that breach was that the practitioner acted on both sides of a land sale contract, and did not arrange for an independent solicitor to act for his client, particularly at a time when the practitioner acted as a director/secretary and member of a company which was a party to the contract.

[40] On 29 January 2018, two months after the agreed statement of facts was produced, the Commissioner's outline was filed. It contended that the practitioner was guilty of professional misconduct.[32] At that point all of the facts were agreed, and the practitioner accepted the charges and reserved the right to contend that the conduct was merely unsatisfactory professional conduct. In terms of the sanctions sought by the Commissioner, it was contended that there should be a fine, a public reprimand, the payment of costs and the practitioner should participate in an ethics course.[33]

[41] The Commissioner's outline referred to the client's medical condition. It referred to the fact that in 2015 the client's daughter applied for a declaration as to her father's capacity, asking the Tribunal to consider the status of a power of attorney document signed in July 2014. The Tribunal found that the client did not have the capacity for personal or financial matters, and validated the power of attorney signed in July 2014.[34] Paragraph 23 said:

> "The mental state of [the client] is relevant only to the extent that at the relevant time of the subject conduct, [the client] could not be said

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28 AB 39.
29 Paragraph A3, AB 39.
30 AB 44.
31 Paragraph 6, AB 46.
32 Paragraphs 2 and 3, AB 50.
33 Paragraph 30, AB 55.
34 Commissioner's outline before the Tribunal, paragraphs 21-23; AB 54.

> to have full capacity for personal and financial matters. This vulnerability of [the client] over the relevant conduct period should have put the respondent on notice that more care should have been taken in respect to the respondent's dealings with [the client] with financial matters and the subsequent conduct that did occur."

[42] On 15 March 2018, six weeks later and three months prior to the hearing, the practitioner's outline was filed. By paragraph 2 the practitioner accepted the charge and that it amounted to unsatisfactory professional conduct. By way of sanction it contended that a public reprimand, a fine and payment of costs ought to be made.[35] The relevant conduct was not in doubt, as the facts were agreed.

[43] Under a heading dealing with the client's health, it was contended for the practitioner that there were no signs of the client's ill health or deterioration during the relevant period, and to the contrary, the client appeared sharp and was actively involved in complex business discussions and decisions. It was also contended that there was nothing that put the practitioner on notice about issues with the client's capacity or vulnerability.[36]

[44] Submissions were made as to why the conduct was not professional misconduct, but merely unsatisfactory professional conduct. Following that it was submitted that an appropriate penalty would be a public reprimand, a fine and a payment of costs. A separate undertaking to complete a course in ethics was given.[37]

[45] The application came on for hearing before the Tribunal on 18 June 2018, about three months after the practitioner's submissions were filed. The hearing took one hour and ten minutes. The Commissioner was given a period of time within which to put in supplementary submissions on costs, which was done on 22 June 2018. No further oral hearing was necessary.

[46] Paragraph [46] of the Reasons below commenced an examination of the "manner in which the applicant conducted his case". In that respect the Reasons state that Counsel for the Commissioner:

> " … 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 [the client] 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 [the client's] declining faculties. It might be observed that the respondent was not cross-examined about the statement; moreover the proposition submitted on behalf of the applicant was not put to the respondent. … The applicant's reliance on [the client's] condition, both in written submissions and at the hearing, was ill-founded."

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35 Paragraph 2, AB 57.
36 Paragraphs 7 and 8, AB 59.
37 AB 64-65.

[47] Insofar as the written submissions are concerned, the entirety of that which concerned the client's medical condition comprised paragraphs 21-23.[38] Paragraph [41] above sets out the relevant parts. The conduct the subject of the charges spanned mid-2013 to mid-2015.

[48] Nothing was said in the primary submissions by Counsel on behalf of the Commissioner with respect to the client's mental health. When Counsel for the practitioner made submissions he addressed that question, pointing to the practitioner's affidavit. It was submitted that what was relevant was the fact that that practitioner "deposes that he had no knowledge of any ill-health by [the client]".[39] That was a reference to paragraphs 40-42 of that affidavit[40] which deposed, in summary, to these matters:

(a) "at no time during the development did I notice any sign whatsoever of [the client's] declining mental faculties. To the contrary, he presented to me throughout the entirety of our friendship as an acute and skilled businessman";

(b) the client "was actively involved in discussions and meetings regarding the development. I was surprised to learn that [he] had been diagnosed with Alzheimer's".

[49] Counsel for the practitioner then referred the Tribunal to a previous Tribunal decision with respect to the client's capacity. Paragraph 30 of that decision recorded that the "medical evidence suggests that he has suffered dementia since 2012". Counsel went on to say that what was relevant was what the practitioner knew and that what he deposed at paragraph 40 of his affidavit was that "he had no knowledge of [the client's] ill-health".

[50] That submission went too far. Paragraph 40 of the practitioner's affidavit merely deposed that at no time did he notice any signs of declining mental faculties, nor did the client show any signs of any deficits during regular conversations.

[51] In reply submissions, Counsel for the Commissioner addressed firstly the question of costs. Following that he addressed the submission made by the practitioner's Counsel, that by reference to his affidavit he had no knowledge of the client's diagnosis. The exchange is as follows:[41]

> "COUNSEL: The way I read it – and I might be mistaken – and if I could take the tribunal to paragraph 42 of the respondent's affidavit.
>
> …
>
> COUNSEL: … second line he deposes that he was surprised to learn that [the client] had been diagnosed with Alzheimer's.
>
> HIS HONOUR: Yes
>
> COUNSEL: So there seems to be some knowledge that he became aware ---
>
> HIS HONOUR: At the time of swearing the affidavit.

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38 AB 53-54.
39 AB 116 line 43.
40 AB 88.
41 AB 123 line 24 to AB 124 line 27.

> COUNSEL: Yes, but it doesn't - well, it doesn't mention what timing, whether he found out earlier or later ---
>
> HIS HONOUR: Well, he obviously learnt of it, at the latest, at the hearing – or as a result of the guardianship hearing.
>
> COUNSEL: I'd accept at least in July 2014, … as I've conceded, he provided a letter to the guardianship hearing about his involvement with [the client] in July of 2014.
>
> HIS HONOUR: Yes
>
> COUNSEL: And the guardianship hearing, I think, was in January of 2015.
>
> HIS HONOUR: Look, … to be blunt, I would read paragraph 42 as referring to some time prior to the swearing of the affidavit, probably the time of the guardianship proceedings.
>
> COUNSEL: I raise it for tribunal's benefit because it's unclear when he became aware of [the client's] diagnosis. That's the point I wish to make.
>
> HIS HONOUR: All right. Thanks.
>
> COUNSEL: So the submission was that he didn't know about it. I just query as to what he deposed in his affidavit. He was aware of it, but the affidavit doesn't depose when, and that's in the concession, at least, that he had provided a letter for the guardianship hearing, so there was some assumed knowledge before then, … the point to be made is that he was aware of the condition. When, it's unclear on the affidavit ---"

[52] That exchange could have taken no more than a few minutes. Counsel's submission was predicated on the basis that it was unclear from paragraph 42 when the practitioner became aware of the condition. That is true. The submissions were also based upon the fact that Counsel might have taken a mistaken view of paragraph 42.[42]

[53] Bearing that in mind, when one reads the transcript the Tribunal's characterisation of the submission at paragraph [46] of the Reasons below cannot be sustained. There, it is said that the submission was that the practitioner knew, at the time of the contracts in September 2013, that he suffered from Alzheimer's. That is not the submission that was made. All that was said is that the affidavit did not make it clear when the practitioner became aware of the diagnosis and that was to answer the submission made on behalf of the practitioner that he had no knowledge of the diagnosis.[43] I have already mentioned the fact that the submissions on behalf of the practitioner overstepped the bounds of the affidavit.

[54] That being the case, the finding that Counsel for the Commissioner indulged in an "apparently wilful" misreading of the affidavit cannot be sustained. Equally, the finding that reliance on the client's condition in the written submissions was ill-founded cannot be sustained. All that was said was that the mental state of the client was

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42 AB 123 line 24.

43 AB 123 line 20.

relevant, but only to the extent that it might be said that at the time of the conduct[44] the client might be said not to have full capacity. It did not urge the lack of capacity.

Unreasonableness in the Commissioner's case

[55] The Tribunal held that "an element of unreasonableness permeates the applicant's case as presented before the Tribunal".[45] It then listed several submissions, each of which was said to be incorrect, and which were the apparent foundation for the conclusion of "elements of unreasonableness":

(a) first: the submission "appears to be based primarily on the amounts involved in the sale contracts, perhaps buttressed by the submission about [the client's] health, but otherwise without regard to the circumstances revealed by the evidence";

(b) second: it was submitted that the steps the respondent took to encourage [the client] to get independent advice were not relevant to the characterisation of his conduct; and

(c) third: 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, was "entirely at his own feet", because he did not ensure that the parties were at arm's length in entering into the transaction.

[56] In my respectful view, the three points cannot be sustained.

[57] As to the first, the Commissioner relied upon the test laid down by Thomas JA in *Adamson v Queensland Law Society Incorporated*:[46]

> "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency."

[58] The written submissions[47] urged that: (i) the conduct involving the conflict extended over two and a-half years, between late 2012 and May 2015; (ii) while acting for his client, the practitioner entered into a joint venture with him, and for that purpose established a joint venture company of which they were both directors and shareholders; (iii) that company received about $861,000 from the client; (iv) that company purchased land from the client for about $8 million; (v) by January 2015 the practitioner was the sole director and shareholder of the company, the client having revoked a power of attorney in the practitioner's favour, transferred his shares and resigned as a director; and (vi) the practitioner did not arrange for his client to get independent advice.

[59] The submission was that, applying *Adamson*, the practitioner's conduct in allowing himself to deal with a client in respect to financial matters demonstrated his conduct had fallen short of the standard expected of a legal practitioner.

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44 Which spanned two years.
45 Reasons below [47].
46 [1990] 1 Qd R 498 at 507.
47 Outline paragraphs 14-27, AB 52-55.

[60] At the time those submissions were filed the statement of agreed facts contained nothing about efforts of the practitioner to get independent advice for his client. In fact it was agreed that the practitioner "did not have and/or arrange for an independent solicitor to act for [the client] in respect to the contractual arrangements".[48]

[61] The affidavit of the practitioner was filed on 15 March 2018. For the first time the background between the practitioner and the client was given, including that they were friends and the client was "intelligent, determined and single-minded", "stubborn", and did not take advice that he seek independent advice from others.[49] Then, as to the joint venture dealings between them this was said:[50]

> "32. Prior to signing the contracts I asked [the client] to discuss the contracts with his family. He refused and said words to the effect *"it is my land, I will* do *whatever I want* with it". To the best of my knowledge he has not discussed purchases and sales with his family previously and was not agreeable to discuss this matter with them. I also asked if he wanted to talk to his accountant or another solicitor. He flatly declined. Knowing [the client] as I did, I considered that pressing the matter any further would have been considered an insult. He did not like being told what to do.
>
> 39. I accept that these arrangements involved a conflict and I should not have become involved without a completely independent legal framework for [the client] and [the joint venture company]. In light of my friendship and firm belief that the joint venture was in [the client's] interests, I did not turn my mind to the conflict that existed. I was utterly convinced that the deal was entirely what [the client] wanted and as a result the obvious conflict inherent in the arrangement was something that I lost sight of."

[62] Three things are apparent from those passages. First, the practitioner only asked if the client "wanted to talk to … another solicitor". He did not insist on that course, which is what his duty to avoid a conflict required, whether or not his client might have seen it as an insult. Secondly, the practitioner did not even turn his mind to whether there was a conflict, a somewhat surprising confession given that he was about to intermingle his own affairs with those of a client. Thirdly, he accepted that the arrangements did involve an obvious conflict and he "should not have become involved without a completely independent legal framework" for the client and the joint venture company.

[63] Notwithstanding that the practitioner thought that he and the client were friends, that their interests might have aligned, that the client wanted him in, and they worked together on the project, there was a breach of standards that arguably fell within the test in *Adamson*.

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48 Paragraph 26 of the agreed facts, AB 48.
49 Paragraphs 21-25, AB 84-85.
50 Paragraphs 32 and 39, AB 86 and 88.

[64] As to the second point, the submissions for the Commissioner responded to questions from the Tribunal about the impact of the Australian Solicitor's Conduct Rules, in particular rules 4.1.1 and 4.1.4.[51] Rule 4.1.1 requires that a practitioner "act in the best interests of a client in any manner in which the solicitor represents the client". Rule 4.1.4 stipulates that the practitioner must "avoid any compromise to their integrity and professional independence". Counsel for the Commissioner agreed with the Tribunal's propositions that the rules operate regardless of informed consent,[52] and that inviting independent legal advice was not the same as getting it.[53] Counsel then phrased the question as being whether, notwithstanding those steps, there should be professional independence.[54]

[65] The Tribunal observed that it was not in dispute that the practitioner did not perform his duties, and turned to the characterisation of the conduct.[55] This exchange followed, in which the submission the subject of the second point was made:[56]

> "HIS HONOUR: And my question is: is it relevant to the characterisation that the respondent took some steps in the direction of doing what he should have done, even though he didn't go the full distance?
>
> MR NICHOLSON: In my submission, no. Because the rules don't envisage or anticipate steps in place. It may go towards sanction.
>
> HIS HONOUR: All right.
>
> MR NICHOLSON: I would accept there is some mitigating benefit on the evidence of Mr McQuaid that he put some steps in place.
>
> HIS HONOUR: Okay.
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> MR NICHOLSON: And there should be some reflection to that. Your question is: should it go to the characterisation of the conduct? And my answer is: no, it should not.
>
> HIS HONOUR: All right.
>
> MR NICHOLSON: But it should - it should benefit in some format.
>
> HIS HONOUR: Okay.
>
> MR NICHOLSON: And, in my submission, it could be dealt with in terms of the sanction. If that assists the tribunal."

[66] Counsel's final submission on this was:[57]

> "MR NICHOLSON: It gets to the stage, Mr Lyons, for example, if you had a solicitor and a client, the client wanted to give the solicitor all the money from his will, if you continue to act for him you would be clearly in a conflict of interest arrangement. But way of [sic] the

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51 Commencing at AB 107 line 38.
52 AB 108 lines 7-10.
53 AB 108 lines 27-31.
54 AB 109 lines 3-9.
55 AB 109 lines 11-18.
56 AB 109 lines 20-45.
57 AB 110 lines 1-9.

> solicitor, himself, could engage another solicitor to do the will, for example or arrange for a statutory will, depending on the circumstances. That's a solicitor's own professional independence and integrity by taking forward and taking steps in place to ensure that he's not compromised. And by mere words or [sic] mouth, as the respondent has identified, is not sufficient in the circumstances to absolving [sic] of his conduct or absolve him from the characterisation of the conduct."

[67] Therefore the submission was that the rules operate regardless of whether steps are taken to urge independent advice, in which case evidence of such steps, or the mere advice to take such steps, does not go to the characterisation of the conduct but to penalty. Even if that submission was wrong, it hardly warrants the conclusion that the Commissioner's case had "elements of unreasonableness" permeating it.

[68] The third point concerns a matter raised by the Tribunal with Counsel for the Commissioner. It was whether the fact that the practitioner had foregone any benefit from the transaction was a relevant factor on penalty.[58] Counsel's submission in response was:[59]

> "MR NICHOLSON: I accept at first blush, yes. But my submissions relate to, had the respondent conducted himself appropriately by engaging independent … legal advice and/or forensic advice - primarily the legal advice to ensure that there was the arm's-length transaction, that development may have continued. There were some factors there … I think in September 2014 when [the client] had resigned from the directorship there was the financial arrangements that were … arranged, that the company was about to take to the bank in terms of proceeding with the development. … it's ultimately the applicant's submissions that the undoing of the respondent was really at his own feet in terms of he shouldn't have profited … from a process where he was in conflict, and should have known at that early stage that there should have been an arm's-length transaction …"

[69] In my respectful view, contrary to the Tribunal's characterisation of it, the submission was not that the absence of recompense did not affect penalty. That was accepted, but another submission was made, that the influence it has should be diluted because the practitioner brought it on himself by his failure to ensure independent advice. Even if that submission was wrong it does not warrant the conclusion that it bespeaks unreasonableness.

The factual basis for limiting costs

[70] The analysis above demonstrates, in my respectful view, that there was no basis for limiting the costs ordered, even if the Tribunal had the power to do so.

[71] That the Commissioner failed in the submission that the conduct was professional misconduct as opposed to unsatisfactory professional conduct does not, in the circumstances examined above, warrant an apportionment of costs, let alone

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58 AB 100 lines 12-40.
59 AB 101 lines 28-42.

a limiting of them.[60] To speak of "weighing up the applicant's lack of success on the issues litigated" is to adopt an approach applicable where there is a general discretion as to ordering costs, not the statutory regime apparent in s 462 of the Act.

[72] As explained above there was nothing in the manner in which the case was conducted to warrant an apportionment of costs, let alone a limiting of them.

Discussion - ground 2 – fixing the costs at $2,500

[73] The Commissioner challenged the Tribunal's selection of $2,500 as the figure for costs. It was submitted that the Tribunal must have formed the view about a notional amount of costs, to which some (unspecified) reduction was applied. This was evident, it was said, from paragraph [49] of the Reasons below where the Tribunal said:

> "That sum appears to represent a substantial proportion, but by no means the entirety, of the amount which would be ordered on taxation; …"

[74] The submission was that there was no basis or method for reaching the conclusion given, and no evidence to support it. Further, insofar as it relied upon *Shand* and *Jones* as comparatives for the purpose of fixing costs, the differing circumstances behind those cases meant that there was no rational basis for selecting $2,500.

[75] Consideration of this aspect can only be conducted with a proper appreciation of the sequence of events at the Tribunal:

(a) at the end of the hearing Counsel for the practitioner observed that it was accepted that the practitioner would pay the Commissioner's costs, and that there had been a recent trend to order costs to be assessed;[61]

(b) it was submitted that in circumstances where the practitioner had already faced very significant personal costs arising from the conduct, and then the proceedings, there was some certainty to be gained by fixing costs;[62]

(c) Counsel urged that the practitioner be given some degree of certainty about the overall amounts of costs he would incur as a result of the proceedings so that there was some finality, more so than when costs are assessed;

(d) the Tribunal asked what sum Counsel contended for, and he responded:

> "Well, that's perhaps a matter for my friend to submit, but the range of costs … in the comparable cases seem to be about two to two and a-half thousand dollars, and that would seem to align with what you would likely get on a scale assessment";[63]

(e) in response Counsel for the Commissioner maintained the submission that the practitioner ought to pay the Commissioner's costs of the application;[64]

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60 *Baker v Legal Services Commissioner* [2006] 2 Qd R 249; [2006] QCA 145, at [57]; *Legal Services Commissioner v Atkins* [2009] LPT 10 at [80].

61 AB 118 line 45.

62 AB 119 lines 1-3.

63 AB 119 lines 24-27.

64 AB 120 line 29 and paragraph 30 of the Commissioner's outline before the Tribunal, AB 55.

(f) after some debate the Commissioner was given seven days within which to file and serve "written submissions on the question whether costs should be taxed or fixed in a specific amount";[65]

(g) those supplementary submissions[66] made the following points:

(i) there was no agreement between the parties as to the stated amount of costs to be ordered;

(ii) where there is no agreement between the parties, the appropriate order is that the practitioner pay the Commissioner's costs to be assessed on the standard basis; and

(iii) absent agreement between the parties there was no material before the Tribunal on which it could assess an appropriate figure for costs.

[76] Properly understood, the submission by Counsel for the practitioner, when asked for the figure contended, was in two parts. The first was that the range of costs in "comparable cases" seemed to be $2,000 to $2,500. The second was that such a figure "would seem to align with what you would likely get on a scale assessment".[67] That submission urged that an appropriate figure on an assessment would fall between $2,000 and $2,500. Whilst no evidentiary foundation was offered for that view, nonetheless it was a submission that on an assessment the likely outcome was somewhere between $2,000 and $2,500.

[77] The Commissioner was then offered the chance to put in written submissions on the question of whether costs should be assessed or whether they should be fixed in a specific amount. The Commissioner could have filed material which contested the nominated figure of $2,000 to $2,500. Evidently it chose not to do so, but to maintain the position that absent agreement costs had to be ordered on the basis that they be assessed.

[78] During the course of the submissions in this Court, Senior Counsel for the Commissioner frankly conceded that consideration had been given to advancing such material, but a decision had been made not to do so.

[79] In those circumstances, and in particular where the Commissioner was given a chance to advance material and submissions to counter the contention that $2,500 was an appropriate figure to fix, it is not open to the Commissioner now to complain that there was no evidentiary foundation to support it. Bearing in mind that the proceedings are heard in QCAT, where proceedings are conducted more economically than in other courts and where the Tribunal is not bound to the normal rules of evidence, the proposition was plainly advanced that $2,500 reflected what might be achieved on an assessment. Absent some answer from the party seeking costs, that submission remained unopposed.

[80] Before the Tribunal the statement of agreed facts was filed on 28 November 2017, seven months prior to the hearing. The Commissioner's submissions were filed four and a-half months prior to the hearing. They contained paragraph 30[68] which

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65 AB 124 line 41.
66 AB 79-81.
67 AB 119 line 26.
68 AB 55.

sought, as part of the sanction imposed on the practitioner, that the practitioner "pays the applicant's costs to be assessed on a standard basis …". Three months prior to the hearing the submissions on behalf of the practitioner were filed. It listed two "comparable cases", being *Legal Services Commissioner v Jones*[69] and *Legal Services Commissioner v Devery*.[70] In *Jones* no fine was ordered but the practitioner was ordered to pay costs fixed in an amount of $1,500. In *Devery* the sanction was a public reprimand, a fine and an order that the practitioner pay the Commissioner's costs.[71] The only thing said in those submissions about the question of costs was in paragraph 39:[72] "The respondent accepts that costs should be awarded".

[81] That is the way in which things stood until the submission made by Counsel for the practitioner at the end of the hearing, suggesting that costs be fixed and nominating some figures. It was because Counsel for the Commissioner was taken by surprise at that change in position that the Tribunal gave time to respond.

[82] The Tribunal's basis for fixing the costs was expressed in this way:[73]

> "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."

[83] There are a number of difficulties with that process.

[84] First, the Tribunal's approach to "fixing" the costs was, in light of paragraph [48] of the Reasons below, simply the mechanics of its intention to "limit the costs to be awarded". As discussed above, the Tribunal lacked power to limit the costs.

[85] Secondly, there is no evidentiary basis for the conclusion that $2,500 "appears to represent a substantial proportion, but by no means the entirety, of the amount which would be ordered on taxation". The only thing said on that issue was the comment by Counsel for the practitioner, that $2,000 to $2,500 "would seem to align with what you would likely get on a scale assessment": see paragraph [75](d) above.

[86] Thirdly, that costs at a certain amount have been ordered in other cases would be of little guidance to the costs ordered in another case. Each depends on their own facts and the steps taken in each case to bring it to a conclusion. *Shand* was a vastly different case to the present one, and *Jones* involved the Commissioner seeking a very low figure, for reasons not disclosed. Neither of those cases can truly be said to be "comparable" for the purposes of fixing costs. The use of other cases as

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69 2015 QCAT 84.
70 2017 QCAT 155.
71 Outline for the respondents before the Tribunal, paragraphs 34-36, AB 63-64.
72 AB 65.
73 Reasons below [49].

comparative cases on costs has been deprecated where the basis of the other order or estimate is not known.[74]

[87] Fourthly, if costs are to be fixed, the estimation approach must be logical, fair and reasonable.[75] In my view, notwithstanding that QCAT's proceedings are not tied to the normal rules of evidence, something more than mere assertion by Counsel is needed to justify an order fixing costs.

[88] Fifthly, the Tribunal did not, as is submitted by the respondent,[76] take judicial notice of the likelihood that the amount fixed for costs was "by no means the entirety, of the amount which would be ordered on taxation". Had that been the approach the Tribunal would have said so.

Conclusion

[89] As explained above the order made by the Tribunal was without any proper evidentiary foundation and beyond the scope of s 462(1) of the *Legal Profession Act*. The appeal must be allowed and the order set aside. I propose the following orders:

1. Appeal allowed.
2. Order (b) of the orders made by the Queensland Civil and Administrative Tribunal on 19 October 2018 is set aside.
3. The respondent is to pay the applicant's costs of the proceedings before the Queensland Civil and Administrative Tribunal, to be assessed.
4. The respondent is to pay the appellant's costs of the appeal.

[90] **DOUGLAS J:** I agree with Morrison JA.

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74 *Legal Services Commissioner v Cooper* [2017] QCAT 151.

75 *Amos v Monsour Pty Ltd* [2009] QCA 65; [2009] 2 Qd R 303, citing *Harrison & Anor v Schipp* [2002] 54 NSWLR 738 at 743; *Goodwin v Driscoll* [2008] QCA 43 at [12].

76 Respondent's amended outline, paragraph 45.