LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v James Xavier Madden* [2008] LPT 2
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **JAMES XAVIER MADDEN** (respondent)
FILE NO/S:	BS1119/07
DELIVERED ON:	8 February 2008
DELIVERED AT:	Brisbane
HEARING DATE:	3, 11 December 2007
TRIBUNAL MEMBERS:	de Jersey CJ Mr P Mullins Dr J Lamont
ORDER:	**1. That the name of the respondent be removed from the local roll.** **2. That the respondent pay $800 compensation to Mrs Elsie Portch within one month of the date of delivery of this judgment.** **3. That the respondent pay the applicant's costs, to be assessed if not agreed.** **4. Upon the respondent undertaking by his solicitor not to carry on practice as a legal practitioner, save as reasonably necessary to ensure the orderly transfer of his current client files to another firm of solicitors, and not to take instructions from any new clients, order that the removal of his name from the local roll not occur until 8 March 2008.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – SOLICITOR AND CLIENT – DISCIPLINARY PROCEEDINGS – DISCIPLINARY ORDERS — QUEENSLAND – General matters – where solicitor guilty of undue delay – where solicitor failed to maintain reasonable standards of competence and diligence – where solicitor acted without instructions – where solicitor withdrew funds from trust account without authority of client – where solicitor overcharged for fees – where solicitor acted for client notwithstanding conflict of interest – where solicitor has past disciplinary breaches – where solicitor co-operated with

investigation – whether a case of neglect and ineptitude or a more serious reflection of dishonesty – whether solicitor should be removed from the local roll

PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – SOLICITOR AND CLIENT – DISCIPLINARY PROCEEDINGS – DISCIPLINARY ORDERS — QUEENSLAND – General matters – where tribunal raised availability of an inference of deceit notwithstanding that the charges did not make such an allegation expressly– where commissioner was not prepared to apply to amend the application – whether power of amendment in such proceedings is only available at the instigation of the commissioner

Legal Profession Act 2004, s 432, s 455, s 649

Attorney-General v Bax [1999] Qd R 9
Council of the Queensland Law Society v Roche [2004] Qd R 574, 587
Legal Services Commissioner v Baker (No 2) [2006] Qd R 249
Legal Services Commissioner v Dore [2006] LPT 9
Legal Services Commissioner v Mullins [2006] LPT 12
Legal Services Commissioner v Ramsden [2006] LPT 10

COUNSEL:	BI McMillan for the applicant R P S Jackson for the respondent
SOLICITORS:	Legal Services Commission for the applicant Brian Bartlett Associates for the respondent

de Jersey CJ

[1] The respondent is a 53 year old legal practitioner. He was admitted as a solicitor in 1987. He is subject to six charges of professional breaches. The facts are agreed, and the respondent accepts that the orders sought by the applicant, the Legal Services Commissioner, should be made. What orders are ultimately appropriate is, however, a matter for the Tribunal.

The charges

[2] The first four charges concern the respondent's acting for Mr Keith Kampf in a personal injuries damages claim.

[3] Charge 1 is in these terms:

> "**Charge 1 Diligence & Competence (Complaint of Kampf)**
>
> 1. When acting for Mr Keith Kampf ("client") in respect of personal injuries proceedings in the District Court in Toowoomba ("proceedings") during the period between July 1997 to February 2004, the respondent:
>
> (a) has been guilty of neglect and undue delay;
>
> (b) has failed to maintain reasonable standards of competence or diligence in relation to the conduct of the proceedings;
>
> **Particulars**
>
> 1.1 At all material times, the respondent:
>
> (a) was a legal practitioner;
>
> (b) was the principal of the law practice, Madden & Co;
>
> (c) acted on behalf of the client in the proceedings.
>
> 1.2 During the period July 1997 to February 2004, the respondent was responsible for undue delay in the conduct of the proceedings. Some examples of the respondents delay are as follows:
>
> (a) July 1997 to March 1998: 8 month delay in corresponding with defendant about the clients claim;
>
> (b) July 1997 to January 1999: 18 month delay in filing a Claim and Statement of Claim;
>
> (c) May 1999 to October 1999: 5 month delay to file Statement of Loss & Damage;
>
> (d) November 1999 to August 2000: 9 month delay to file Supplementary Statement of Loss and Damage;
>
> (e) September 2001 to December 2003: 27 month delay to arrange settlement conference.
>
> 1.3 On or about 19 December 2003, the proceedings were compromised following a settlement conference."

[4] This first charge is, essentially, that the respondent was guilty of neglect and undue delay, and failed to maintain reasonable standards of competence or diligence. It is based on the respondent's delay and failure to communicate with his client Mr Kampf. As examples: Mr Kampf retained the respondent in July 1997, but the respondent did not correspond with the proposed defendant until March 1998, and took a further four months to brief counsel to draw a statement of claim; the

respondent did not commence proceedings until 18 months after he was retained, and there is no reasonable explanation for delay of that order; it took the respondent a further four months to advise Mr Kampf that he had commenced proceedings; the respondent filed a statement of loss and damage six months late, and only following interlocutory proceedings brought by the defendant; and the settlement conference eventually took place more than six years after Mr Kampf retained the respondent.

[5] The terms of charge 2 are as follows:

> "**Charge 2 Acting without instructions (Complaint of Kampf)**
>
> 2. Between September 1999 and March 2002 the respondent acted without instructions in respect of two applications by the defendant in the proceedings.
>
> **Particulars**
>
> 2.1 The applicant repeats and relies upon the particulars in charges 1, above.
>
> 2.2 On or about 27 September 1999 and, as a direct result of the respondent's failure to file a Statement of Loss and Damage in the proceedings within the required time, the defendant's solicitors applied to the District Court at Toowoomba for orders requiring the client to deliver the Statement of Loss and Damage and for costs ("the first application").
>
> 2.3 By letter dated 8 October 1999 to the defendant's solicitors, the respondent agreed to file and serve the Statement of Loss and Damage within 14 days and that Mr Kampf would pay the defendant's costs of and incidental to the first application.
>
> 2.4 Notwithstanding the agreement expressed in the respondent's letter dated 8 October 1999, the respondent:
>
> (a) failed to inform or otherwise advise the client of the first application;
>
> (b) purported to compromise the first application without the knowledge, authority or consent of the client;
>
> (c) bound the client to pay the defendant's costs of the first application without first obtaining the client's instructions to do so.
>
> 2.5 In or about November 2000, and as a direct result of the respondent's failure to provide particulars of the client's loss and damage, the defendant's solicitors again applied to the District Court for orders that the client provide details of his damage and to deliver a List of Documents ("the second application").
>
> 2.6 On 29 November 2000, the second application was dismissed with no order as to costs.

2.7 The respondent again failed to inform or otherwise advise the client of the second application.

2.8 By letter dated 13 March 2002, and without the knowledge, authority or consent of the client, the respondent purported to settle the defendant's solicitors costs for the first application in the sum of $1,125.70."

[6] The second charge is that between September 1999 and March 2002, the respondent acted without instructions in respect of two applications brought by the defendant. First, the respondent compromised the application to the court brought by the defendant (filed 4 October 1999 returnable 11 October 1999) for an order for the delivery of the statement of loss and damage, without the authority of Mr Kampf. The compromise was notified by letter of 8 October 1999, and no order was made by the court. Part of the compromise obliged Mr Kampf to pay the defendant's costs. Second, the respondent failed to inform Mr Kampf that the defendant had on 1 November 2000 applied for an order that Mr Kampf provide particulars of his loss and damage and deliver a list of documents. The respondent appeared without instructions at the hearing on 29 November 2000. The application was dismissed with no order as to costs. The respondent subsequently agreed that the defendant's costs of the first application be set at $1,125.70.

[7] The respondent says he considered his overall retainer extended to his dealing with these matters without involvement of his client. He now accepts that was wrong, and that he should have informed his client. That is especially the case, it might be thought, where the problems were the result of the respondent's own unacceptable delay and default.

[8] These are the terms of the third charge:

"**Charge 3 Breach of section 8 Trusts Accounts Act 1973 (Complaint of Kampf)**

3. On 15 March 2002 the respondent breached section 8 of the *Trusts Accounts Act 1973*.

Particulars

3.1 The applicant repeats and relies upon the particulars in charges 1 and 2 above.

3.2 On 15 March 2002 the respondent withdrew the sum of $1,125.70 from his trust account without authority or knowledge of his client, or otherwise being entitled to do so, and paid that sum to the defendant's solicitors in breach of section 8 of the *Trust Accounts Act 1973*."

[9] The third charge involves a breach of s 8 of the *Trust Accounts Act 1973*. It relates to the respondent's withdrawal of the sum of $1,125.70 from his trust account without Mr Kampf's authority, and his payment of that sum to the defendant's solicitors. The respondent subsequently refunded that amount of $1,125.70 to Mr Kampf.

[10] The fourth charge reads:

"**Charge 4 Overcharging (Complaint of Kampf)**

4. On or about 14 January 2004, the respondent charged the client legal fees which he knew, or ought to have known, were not properly chargeable.

Particulars

4.1 The applicant repeats and relies upon the particulars in charges 1 to 3 above.

4.2 On or about 14 January 2004, the respondent rendered an invoice in the amount of $23,107.20 for his professional fees to his client, which invoice included charges for legal services performed by the respondent relating to the first and second applications.

4.3 The respondent's account was rendered to the client in circumstances where:

(a) the respondent did not first obtain instructions from his client to provide legal services relating to the first and second applications;

(b) the respondent knew, or ought to have known, he was not entitled to receive payment for those services from his client;

(c) the respondent did not obtain his client's authority to deduct his fees for those services from the settlement sum.

4.4 On 14 May 2004, the respondent transferred the sum of $23,107.20 from his trust account to his general account in payment of the invoice dated 14 January 2004."

[11] Charge four is of overcharging. It concerns an amount of $23,107.20, charged for work for Mr Kampf. The respondent subsequently refunded an amount of $2,000 to Mr Kampf on the basis it was "reimbursement to you for the work we carried out on your behalf…", being an estimate of costs thrown away because of the respondent's acting without instructions.

[12] The fifth and sixth charges relate to the respondent's acting for a Mr Portch in respect of an application for financial orders in the Family Court of Australia.

[13] The terms of the fifth charge are:

> "**Charge 5 Diligence and competence (Complaint of Portch)**
>
> 5. The respondent failed to maintain reasonable standards of competence and/or diligence when drafting a financial agreement dated 14 August 2002 ("agreement") between Ms Elsie Dakin ("complainant") and Mr Colin Portch ("husband").
>
> **Particulars**
>
> 5.1 At all relevant times, the respondent acted on behalf of both the husband and the complainant.
>
> 5.2 In or about July 2002, the complainant and the husband instructed the respondent to prepare the agreement.
>
> 5.3 On or about 14 August 2002, the complainant and the husband executed the agreement prepared by the respondent.
>
> 5.4 In or about February 2005, the complainant and the husband separated.
>
> 5.5 In breach of his duty as a solicitor, the respondent failed to maintain reasonable standards of competence and/or diligence in the preparation of the agreement as the respondent failed to comply with the requirements of section 90G of the *Family Law Act 1975*."

[14] Charge five concerns the respondent's failure to maintain reasonable standards of competence when drafting a financial agreement between Mr Portch and his then fiancée Ms Dakin. The agreement was executed on 14 August 2002. It was a pre-nuptial agreement. The respondent acted for both parties. The respondent did not comply with s 90G of the *Family Law Act 1975*, which provides that such an

agreement is binding only if it contains an acknowledgement that the parties have received independent legal advice on certain matters. The agreement drafted by the respondent and executed by the parties did not comply with that provision.

[15] Mr and Mrs Portch separated in February 2005. The following month, Mrs Portch gave the respondent instructions for the revision of her will. She gave him a detailed account of her separation from Mr Portch.

[16] The terms of charge 6 are:

> "**Charge 6 Conflict of interest (Complaint of Portch)**
>
> 6. The respondent acted in circumstances of conflict by continuing to act for the husband in an application for final financial orders against the complainant in the Family Court of Australia between April 2005 and June 2005.
>
> **Particulars**
>
> 6.1 The applicant repeats and relies upon the particulars in charge 5 above.
>
> 6.2 Following the breakdown of the marriage, the respondent acted for the husband in respect of an application for final financial orders.
>
> 6.3 On 9 April 2005 the respondent filed the application with the registry of the Family Court of Australia.
>
> 6.4 The application sought an order that:
> '…an account be taken of the matrimonial assets and liabilities with such Orders being made as are appropriate to vest in the Applicant an amount equivalent to 50% of the net matrimonial pool.'
>
> 6.5 At paragraph 20 of the application, the respondent answered 'No' as to whether the parties had 'entered into a binding financial agreement under Part VIIIA of the *Family Law Act* or under any relevant State or Territory legislation'.
>
> 6.6 Prior to filing the application, the respondent acted for both the husband and complainant including the preparation of the agreement and taking instructions from the complainant regarding the preparation of the complainant's Will.
>
> 6.7 On behalf of the husband, the respondent:
> (a) prepared the application for final financial orders dated 6 April 2005;
> (b) represented the husband in respect of the application;
> (c) appeared on behalf of the husband at a case assessment conference on 12 May 2005, notwithstanding the objection of the complainant.

> 6.8 By letter dated 1 July 2005, the complainant's solicitors, Murdoch Lawyers, wrote to the respondent regarding the respondent's apparent conflict of interest in representing her husband.
>
> 6.9 By letter dated 8 June 2005, the respondent agreed to cease representing the husband in the application."

[17] This final charge concerns conflict of interest. Following the break down of the marriage between Mr and Mrs Portch, the respondent acted for Mr Portch in an application for final financial orders. That included appearing for Mr Portch at a case assessment conference notwithstanding the objection of Mrs Portch. The respondent did then withdraw from his retainer from Mr Portch.

Inferences from agreed facts

[18] When the matter came on for hearing, on 3 December 2007, the Tribunal raised the possible availability of an inference that the respondent had acted deceitfully, particularly in acting without his client's instructions or notice, to extricate himself from a problematic situation of the respondent's own making. In addition, it was arguable that the respondent misled a fellow practitioner, in what is referred to above as "the first application", and the District Court, in the second, as to his holding instructions when he did not.

[19] When Counsel for the respondent objected, pointing out the charges did not allege "deceit" as such, the Tribunal invited an application for amendment. Possible amendment was the purpose of adjournment of the hearing on 3 December. It should be said, however, that while the statement of agreed facts and application did not in terms raise that possible complexion of the matter, that would not exclude its consideration by the Tribunal, provided the respondent was adequately put on notice.

[20] As it turned out, the applicant Commissioner was not prepared to apply to amend the application. But because the Tribunal considered these issues did arise, at the adjourned hearing on 4 December the Tribunal put before both parties a document headed "Arguable inferences from agreed facts", and indicated that it could benefit from hearing relevant oral evidence from the respondent at the further adjourned hearing on 11 December.

[21] The document was in these terms:

> "**Arguable inferences from agreed facts**
>
> **1. Charge two**
>
> (a) That having, through delay and inattention, created a situation where the defendant had to make the "first application", the respondent chose deceitfully to refrain from informing his client of that application and seeking his client's instructions, in the hope he could resolve the matter without his client becoming aware of it, and thereby preferred his own interests over those of his client;
>
> (b) that the respondent implicitly represented to the defendant's solicitor that the respondent had his client's instructions, whereas he did not;
>
> (c) similar to (a) in respect of the "second application";
>
> (d) similar to (b) in respect of the "second application";
>
> (e) appearing before the court on the "second application", implicitly representing to the court that the respondent had his client's instructions, whereas he did not.
>
> **2. Charge three**
>
> (a) That the respondent deliberately debited his client the cost of the "first application" when he knew, or should have known, that fairness meant the respondent should himself have borne them, because the application had been necessitated by the respondent's own default;
>
> (b) thereby preferring the respondent's own interests over those of his client."

[22] The Tribunal was, as said, of the view these inferences could arise from the agreed facts, and that whether they did should be ventilated. The point of putting the

document before the parties on 4 December was to alert them to this, and it was of course in that context the respondent gave oral evidence on 11 December.

[23] The Commissioner had declined to amend because he did not consider the complaint disclosed any arguable dishonesty. He acknowledged his power to seek amendment (s 455 *Legal Profession Act 2007*), but effectively disavowed the Tribunal's expression of concern that the complaint raised an arguable case of dishonesty, relying by process of analogy on the Commissioner's summary dismissal power under s 432. Because the Commissioner not infrequently levels, in the one application, alternative charges of differing levels of gravity, he must have been saying that in this case the possible complexion of the matter, which the Tribunal was interested in exploring, was in his view unarguable.

[24] When the prospect of the Tribunal's amending the charges of its own initiative was raised, Counsel for the respondent submitted that the only power of amendment in such proceedings was at the instigation of the Commissioner, because of s 455. If those submissions are correct, the resultant position is unsatisfactory. It may be consideration was not given to s 602(1).

[25] Unless the respondent is claiming that he routinely acts without particular instructions from clients, the Tribunal needed some explanation why he did so in this instance. The natural inference was that he did so to serve his own interest. Given that, the Commissioner should either have drawn that inference directly himself, or at least have advanced it as a clear option for the consideration of the Tribunal. The Tribunal flagged this to Counsel for the Commissioner, and invited the Commissioner to make an appropriate amendment. The Commissioner refused,

and in the Tribunal's view could provide no good reason for that refusal. His Counsel did not explain to the Tribunal why that was not an inference naturally to be drawn. Counsel did not advance any argument, for example, why the Commissioner may have felt that the better explanation for the respondent's behaviour was the respondent's incompetence, rather than a wish to cover up his neglect. Counsel instead asserted that the reason for the Commissioner's not seeking leave to amend, was the Commissioner's belief there was no reasonable prospect of the Tribunal's finding that the respondent had deliberately acted to cover up his own neglect, at the expense of his client.

[26] That position was difficult to sustain, given that the inference the action was deliberate was a naturally available inference from the facts, and since the Tribunal had notified the Commissioner it wished actively to consider that possibility. In these circumstances, it is difficult to resist the conclusion that the reason why the Commissioner chose not to seek to amend was because he wished actively to preclude the Tribunal's consideration of the availability of that inference. As already noted, that attempt could not succeed, because the agreed facts opened consideration of that aspect by the Tribunal. It would nevertheless be an unfortunate course of events if in the future the Commissioner actively sought to exclude the Tribunal from consideration of such matters of public interest. It should fairly be noted the Commissioner's Counsel did, in the end, robustly cross-examine the respondent.

[27] The Tribunal should not be denied the opportunity to explore an arguably serious case against a practitioner because the Commissioner may peg the charge at what may turn out to be an inappropriately low level. There must be capacity for the

Tribunal in such a case, independently, to intervene to ensure an appropriately arguable case is properly ventilated, notwithstanding the attitude of the Commissioner, especially recognizing it is the Tribunal, as an emanation of the Supreme Court, which is the ultimate custodian of professional standards. The Commissioner should not try to put the Tribunal into a straitjacket in these matters. It was always the intention behind the legislation that the Tribunal, thence the Court, be the ultimate arbiter of professional standards.

[28] It is not however necessary to confront the issue of amendment definitively in this case. That is because the question was what inferences should reasonably, and acknowledging the standard of proof provided for by s 649, be drawn from the statement of agreed facts. It was enough to activate the Tribunal's consideration that possible inferences, which it wished to have explored, were comprehensively drawn to the attention of both parties. That was done, and the respondent had the opportunity to give evidence bearing on those possible interpretations, which he utilized.

[29] The Tribunal obviously must not be expected to assess a statement of agreed facts as a sterile recitation of events. The Tribunal must be entitled, indeed it is obliged, to give consideration to the motivations of those involved. The Commissioner's own outline of submissions comes very close to, if not actually, acknowledging that position – notwithstanding the submissions made on his behalf before the Tribunal, in these passages:

> "…the first application…was brought due to the respondent's undue neglect and delay. In an apparent attempt to obviate that delay, the respondent agreed to compromise the application…that conduct would be less offensive had the respondent not bound his client…to pay the costs…the respondent's conduct…is made even more serious

> by the fact that he later charged Mr Kampf for his professional costs in resolving the application.
> …
> The conduct alleged in charges 3 and 4 arises directly from the conduct in charge 2. If the Tribunal accepts that the respondent acted without instructions in relation to the first application for the purpose of correcting his own neglect, then it follows in the applicant's submission, that charges 3 and 4 can not be viewed simply as isolated incidents of unsatisfactory conduct. The conduct alleged in those charges must be seen as wilful acts further compounding the conduct in charge 2."

What if any inferences should be drawn?

[30] The issue which has concerned the Tribunal is whether this should be seen as a case of neglect and ineptitude, where a fine would be an appropriate response, or as a more serious case, reflecting dishonesty on the part of the respondent. If the latter, protection of the public may justify a suspension or striking off. Dishonesty of substantial proportion bespeaks unfitness for practice. What if any of the flagged inferences should be drawn?

[31] In my assessment of the respondent's evidence, I have been greatly assisted by the views of the panel members, Mr P Mullins and Dr J Lamont.

[32] As to the respondent's reliance on what he called a "general retainer", as meaning he need not seek his client's instructions on particular matters, it is important to note his concession that nothing his client said to him justified that reliance.

[33] The respondent spoke of his client as "unsophisticated". To a responsible solicitor, that may have emphasized the need for comprehensive information to the client, not the reverse.

[34] We considered disingenuous the statement in the letter of 16 June 2003 (p 64): "There was an amount which we had to pay to Messrs Epsworth and Epsworth, Solicitors, of $1,125.70 in relation to an application they had brought on their clients' behalf." (The solicitors were Ebsworth and Ebsworth.) The vice lay in the words, "we had to pay". Bear in mind that was four years after the event, with the respondent still not being forthcoming with his client.

[35] But it was the circumstance that for the first time, in oral evidence before the Tribunal, the respondent sought to cast blame on his client, which led to our seriously doubting the credibility of his claim to have believed at the time he could ethically do these things without specific notice to his client. He was equivocal, also, about the circumstances rendering the "first application" necessary.

[36] The Tribunal, doubting the respondent's credibility, rejected his contention he acted innocently in all of this. We considered the more probable scenario was that, lacking the moral courage to front up to his client with the problem he had through his own neglect created, the respondent took the expedient course of hiding it from his client, and proceeded independently in the hope he could sail through the problem without his negligence being uncovered. That involved dishonesty. There are degrees of dishonesty in these situations: here, it is noted, the respondent expediently preferred his own interests over those of his client.

Characterization of conduct

[37] The conduct involved in charge two, acting without instructions, should be characterized as professional misconduct. The respondent should be seen as having acted without instructions, certainly in relation to the first application, for the

purpose of dealing with the consequences of his own neglect, as submitted for the Commissioner. Charges three and four arose directly from the dishonest conduct involved in charge two. They involve wilful acts compounding the conduct involved in charge two, again as submitted for the Commissioner. They should also be characterized as involving professional misconduct. While taken in isolation, charge five and charge six might be characterized of instances of unsatisfactory professional conduct, when seen with the other misconduct, they go to evidence a consistent failure to reach or keep a reasonable standard of competence and diligence. They also should therefore be characterized as instances of professional misconduct.

Matters favouring the respondent

[38] These things may be said in favour of the respondent. He cooperated in the investigation conducted by the Queensland Law Society, and has accepted that the charges are made out; he made recompense to Mr Kampf in the total amount of $3,174.75; he voluntarily ceased acting for Mr Portch without the need for Mrs Portch to bring her court application to a hearing; and he has undertaken a practice management course at his own expense. Also, he has apologized to Mr Kampf and extended his apologies to Mrs Portch. He has remodelled his practice, employing a solicitor and an additional paralegal.

Respondent's past disciplinary breaches

[39] In determining the orders the Tribunal should make, it is of some significance that on 4 November 1999, the Solicitors Complaints Tribunal found the respondent guilty on six charges, all breaches of statutory provisions relating to his trust account. He was fined $1,250 and ordered to pay the Society's costs. One of the

charges involved his transferring $20,000 trust moneys to his Visa account, without authority, to fund travel undertaken on the client's behalf.

Orders sought

[40] The applicant Commissioner has sought the imposition of a pecuniary penalty in the amount of $10,000, the public administration of a reprimand, and costs. The Commissioner's attitude is based on the respondent's cooperativeness, his remorse and his having completed a practice management course and refined his practice in some respects.

[41] So far as it is relevant, and as mentioned, the respondent would not oppose such orders.

[42] The issue is, however, whether that approach would adequately address the primarily relevant objective, which is protection of consumers of legal services.

[43] The respondent also does not oppose one additional order sought by the Commissioner, that within one month he pay $800 compensation to Mrs Portch, to reimburse her for legal costs incurred with a view to having the respondent enjoined from acting for Mr Portch.

Gravity of misconduct

[44] This misconduct was of serious proportion, as may be gathered from the following features. First, it was the respondent's own inordinate delay and ineptitude which drove the defendant's solicitors to make the first court application. Second, the respondent failed to inform his client of that application. Third, the respondent compounded that error by acting without instructions, which was itself inexcusable,

and in addition, he thereby implicitly misled the court and the defendant – which and who would have assumed the respondent was properly instructed. Then fourth, the respondent had the indiscretion to leave his client to bear the burden of the costs order, paying it with his client's money and behind his client's back. Fifth, the respondent again acted fundamentally wrongly, in proceeding on the second matter without notice to his client or with his client's instructions.

[45] The second set of charges reflects two things: first, clear negligence in failing to observe the uncomplicated statutory provision governing prenuptial agreements; and second, apparently failing to recognize that he the respondent was afflicted by what should have been a patently obvious conflict of interest. It shows a failure to understand something of fundamental significance to ordinary day-to-day practice.

[46] The instant misconduct included trust account infractions, which are "repeat" offences, in the context of the 1999 breaches.

[47] We have reached the view the respondent's conduct reflects an unfitness to practise. It goes beyond sporadic incompetence, and a situation of basic fitness to be restored after a period of "retraining". The aggregation of this misconduct persuades us the respondent should no longer be held out by the court as fit to practise.

[48] We are conscious this conclusion has been affected substantially by the respondent's evidence under cross-examination, to which we have given extended consideration. We were not in the end satisfied that the respondent properly appreciated the ethical commitment, expected of a practitioner then or now.

[49] We were referred to *Dore* [2006] LPT 9. That was a case of "grasping though not dishonest" conduct, an instance of unprofessional conduct. *Ramsden* [2006] LPT 10 was a special case for the circumstances listed in the judgment. So was *Mullins* [2006] LPT 12: he had sought third party advice, and the relevant ethical field had on one view not been fully charted.

[50] The Tribunal is of the view the aggregation of the respondent's professional misconduct, involving expediency, and his dishonestly preferring his own interests over those of his client, committed over a period, betraying various misconceptions about the basics of his professional role, and involving 'repeat' offending in relation to his trust accounts, warrants the conclusion the respondent is not fit to practise.

[51] Reference may be made to *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, 587, for the confirmation in *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 740, 748, that a lack of awareness in a solicitor of the nature of his or her obligation to the client will generally be regarded as demonstrating unfitness to practise. Of course the extent of the particular misapprehension needs to be considered, but it is significant here that the respondent's misapprehension was as to quite basic matters. Also, as observed in *Legal Services Commissioner v Baker (No 2)* [2006] 2 Qd R 249, 267, "in determining the sanction to be applied the Tribunal or court is entitled to take account of the persistence with which the conduct has been pursued and the degree of candour displayed by the practitioner in the course of the disciplinary hearing". It is the expediency of the respondent's approach which lends this case its distinctive gravity. As said in *Attorney-General v Bax* [1999] 2 Qd R 9, 22, "where…the dishonesty concerns a substantial rather than a trivial matter, and

where…it is not a casual act but carried on over a period of time, it is…likely to indicate unfitness to practise at the time at which it is engaged in; whether it does so will depend on all the circumstances."

Orders

[52] There will be orders:

1. that the name of the respondent be removed from the local roll;
2. that the respondent pay $800 compensation to Mrs Portch within one month of the date of delivery of this judgment;
3. that the respondent pay the applicant's costs, to be assessed if not agreed.
4. Upon the respondent undertaking by his solicitor not to carry on practice as a legal practitioner, save as reasonably necessary to ensure the orderly transfer of his current client files to another firm of solicitors, and not to take instructions from any new clients, order that the removal of his name from the local roll not occur until 8 March 2008.