QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Manz* [2019] QCAT 147
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **MATTHEW KENNETH MANZ** (respondent)
APPLICATION NO/S:	OCR059-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	10 June 2019
HEARING DATE:	23 April 2018; 25 October 2018; 5 November 2018
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member Assisted by: Ms Patrice McKay Mr Michael Meadows
ORDERS:	**1. The respondent is publicly reprimanded.** **2. The respondent is ordered to pay a penalty of $30,000.** **3. The respondent is to pay the applicant's costs of and incidental to the application to be assessed on the standard basis.** **4. Atrium Resort CTS 4043 shall advise the Tribunal and the respondent as to whether it wishes to pursue its notice of intention to seek compensation order within 14 days of the publication of this decision.** **5. If Atrium Resort CTS 4043 advises that it wishes to pursue a compensation order, then the matter will be listed for directions on a date to be advised by the Tribunal.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where two of the respondent's three clients had their letting agent licenses revoked following conviction of offences of dishonesty – where the respondent prepared a deed of assignment of the right to operate the letting business to the third client –

where the respondent was instrumental in the creation of a reason other than the revocation of the licences as the reason for the assignment – where the respondent communicated that reason to the body corporate whose agreement to the assignment was required – where the respondent caused another solicitor to confirm that false reason – where the discipline application did not allege that the respondent's conduct was dishonest – whether the discipline application should be amended to make clear that it alleged the respondent's conduct was dishonest – whether the respondent's conduct is characterised as unsatisfactory professional conduct or professional misconduct under the *Legal Profession Act* 2007 (Qld) – what orders should be made upon finding of professional misconduct

Legal Profession Act 2007, s 418, s 419, s 443, s 455

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498
Attorney-General v Bax [1999] 2 Qd R 9
Commonwealth v Director, Fair Work Building Industry Inspectorate & Ors (2015) 258 CLR 482; [2015] HCA 46
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Legal Services Commissioner v Bevan [2015] QCAT 290
Legal Services Commissioner v Gould [2016] QCAT 533
Legal services Commissioner v Mullins [2006] LPT 12
Legal Services Commissioner v Voll [2008] QCA 293
Legal Services Commissioner v XBV [2018] QCAT 332
Minister for Industry, Tourism, and Resources v Mobil Oil Australia Pty Ltd [2004] ATPR 41-993
NW Frozen Foods v Australian Competition and Consumer Commission (1996) 71 FCR 285; [1996] FCA 1134
Re Wheeler [1992] 2 Qd R 690
Trade Practices Commission v CSR Ltd [1991] ATPR 52,135

APPEARANCES & REPRESENTATION:

Applicant:	D A Holliday instructed by Legal Services Commissioner
Respondent:	D Atkinson QC instructed by HopgoodGanim Lawyers

REASONS FOR DECISION

[1] A question arose in this matter as to whether the application should be amended to make clear that it alleged that the respondent's conduct was dishonest. An order was made to that effect. It is therefore necessary to determine whether the respondent's conduct was dishonest. Two further matters arose for consideration in this

application. The first is whether the respondent's conduct is to be characterised as unprofessional conduct or professional misconduct. The second is the determination of the orders to be made. It is convenient first to give reasons relating to the discipline application and its amendment.

The application and proceedings

[2] The application alleged that the respondent had as clients two natural persons and a company. The company had the contract for the provision of caretaking and letting agent services of a resort. The company and one of the natural persons were convicted of offences of dishonesty, and their letting agent licences were revoked. It was then alleged that the cancellation of the letting licences created a number of problems, ultimately placing the contract for the sale of the management rights business in jeopardy. The respondent prepared a Deed of Assignment of the right to operate the letting business to the third client. The assignment required the agreement of the resort's body corporate. If the body corporate became aware that the letting licences had been revoked, its agreement, and the business, and the sale of the business, would have been placed in jeopardy. These matters were alleged to be known to the respondent.

[3] The application then alleged that the respondent forwarded the Deed of Assignment to the body corporate manager. Its lawyer wrote to the respondent seeking an assurance that the assignment was not an attempt to defeat creditors; and that it was intended to grant flexibility to the Assignor and Assignee in relation to distribution of income.

[4] On 13 May 2013, the respondent wrote to the clients stating that he would like to avoid telling the body corporate the reason for the assignment, and asking whether there was some "accounting/income distribution reason that your accountant can come up with as a reason for the assignment? It would be good to be able to give them something so that they don't ask any further questions" (The suggested reason was referred to in the application as the "accounting reason"). A file note of 14 May 2013 recorded a subsequent conversation between the respondent and one of the clients, who said she would talk to an accountant "about providing a reasoning for the transfer of the right to operate". A later file note of the same date recorded a further conversation between the respondent and this client and included a statement that the client had talked to the accountant; and the respondent was to leave the suggested email to the body corporate manager as it was for the moment, and "if they question then it will be for tax purposes". Shortly after this, the respondent sent an email to the body corporate's lawyer, stating that the restructure was not an attempt to defeat creditors. That lawyer then asked the respondent to identify the purpose for the proposed assignment. The respondent then asked the clients for instructions to reply, "our clients have been advised by their accountant that the assignment will be advantageous from a tax perspective, hence the assignment request"; but suggested that the clients first ask the accountant whether he was happy for the respondent to say that. After a conversation with one of the clients, of which there is a file note, recording acceptance of the respondent's proposal, the respondent replied to the body corporate's lawyer, "Our clients have been advised by their accountant that the assignment will be advantageous to them from a tax perspective, hence the assignment request".

[5] The application then alleged that on 20 June 2013, while the respondent was on leave, a solicitor from his firm (apparently an employee) queried the purpose behind the assignment. He told her that the assignment was for taxation purposes, and that, in accordance with instructions, the firm was not to disclose the clients' licensing and other issues to the body corporate. On the same day the employed solicitor wrote to the body corporate's lawyer, stating that the client had received some structuring advice from their accountant, and as part of that advice it was believed that the Deed of Assignment would provide taxation benefits.

[6] Paragraph 1.15 of the application then made a number of allegations based on these facts, including that the respondent "failed to be honest in all dealings in the course of the legal practice"; that he was "instrumental in orchestrating 'the accounting reason'"; that he provided the accounting reason as the purpose for the proposed assignment; and that he provided that reason to the employed solicitor who then reconfirmed it (no doubt to the body corporate's lawyer). These things were alleged to amount to a failure by the respondent to maintain reasonable standards of competence and diligence. A second charge was based on the same conduct, but was deleted.

[7] The matter came on for hearing on 23 April 2018. At that hearing, a question arose as to whether the respondent's conduct could be found to be dishonest. Notwithstanding the language of the application, both parties contended that such a finding would be outside the scope of the allegations in the application. Although that contention is, at the very least, open to question,[1] it was considered appropriate to proceed on the basis that there was an agreement between the parties that the application did not allege dishonesty. Reference was then made to the Tribunal's power, found in s 455 of the *Legal Profession Act* 2007 (Qld) (*LP Act*), to vary a discipline application, if satisfied that it is reasonable to do so, having regard to all the circumstances. The parties were invited to make written submissions in response to several related questions. Subsequently they made oral submissions about whether the application should be varied.

[8] Both parties contended that it was inappropriate to order a variation of the application. The applicant contended that the application appropriately encapsulated the seriousness of the respondent's conduct. It would not be reasonable to vary the discipline application as the fairness of the proceeding would be affected. The respondent would be denied procedural fairness by the amendment.

[9] The respondent referred to the length of time which had elapsed since the conduct and to the respondent's co-operation in relation to the application. The respondent submitted that the variation was unnecessary, because the conduct could be characterised as professional misconduct or unsatisfactory professional conduct without the variation. The variation was not necessary to protect the public, because the Tribunal could see how the respondent had conducted himself over the five year period that has now elapsed. The joint position of the parties was not clearly wrong, and should not be departed from. To do so would create policy difficulties, because

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1 Both from the language used in the application and by reference to *Belmont Finance Corporation Pty Ltd v Williams Furniture Ltd & Ors* [1979] Ch 250 at 268, where it was said that the facts alleged may sufficiently demonstrate that dishonesty is allegedly involved; cited with approval in *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301 at [54].

the course taken by the applicant encourages early pleas and ensures parity in sentencing, and to follow it would recognise the Commission's expertise.

[10] For the respondent it was also submitted that the variation would be arid, because there was no difference between engaging in misleading conduct, failing to act honestly, and acting dishonestly. It was submitted that it was not reasonable in the circumstances to order the variation.

[11] In support of the submission that it would be unfair now to vary the discipline application, Mr Atkinson QC who appeared for the respondent referred to the respondent's full co-operation with the Tribunal; the fact that the allegations had been the subject of joint consideration by the applicant and the respondent's legal representatives, his plea of guilty, and his role in the production of the SOAF.

[12] In oral argument, Mr Atkinson accepted that the fact that the respondent had not addressed the question of dishonesty could be dealt with by giving him the opportunity to adduce further evidence. When asked whether he was submitting that the respondent had suffered prejudice by reason of making the admissions found in the SOAF, he said that he did not have instructions as to whether the respondent would have acted differently if facing an allegation of dishonesty.

[13] There is plainly a difference between an allegation of misleading conduct, and an allegation that a person acted dishonestly. The former refers only to the actions of a person and their effect, but not to the person's state of mind;[2] whereas the latter involves an allegation that the person knew that what was being communicated was untrue. There is a real public interest in the identification of dishonesty and the making of appropriate orders in response to it. The facts alleged in the application, notwithstanding the position taken by the parties, show that there was a real question about the honesty of the respondent in his communications (both directly and through the employed solicitor) to the body corporate's lawyer. The evidence supports those facts. There is good reason, therefore, to give consideration to the honesty of the respondent in relation to the conduct the subject of the charge. Not to do so would require the Tribunal to close its eyes to a matter of some seriousness, clearly raised by the evidence.

[14] The respondent's submission that there is no difference between an allegation of failing to act honestly, and acting dishonestly, is one which the Tribunal would in other circumstances accept. However, the question of an amendment only arose because the parties took the position that a finding that the respondent acted dishonestly could not be made, because the application went no further than alleging that he failed to act honestly. The submission does not provide a basis for determining that the application should not be amended in the present case.

[15] The passage of time is a matter which may be of some significance in determining what orders ultimately to make. Of itself, it is not of great significance in the present case in determining whether the respondent was dishonest. The evidence relating to the question of the respondent's honesty is essentially documentary. It is unlikely, and there has been no suggestion, that anyone, other than the respondent, could add

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2 See, for example, *Hornsby Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 228; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197. The situation is usually different when the conduct is a representation as to the representor's state of mind.

to the evidence recorded in documents on the question of the respondent's honesty. It has not been suggested that the passage of time has affected the respondent's ability to give evidence on this question. Accordingly, the passage of time is not of great significance in determining whether it would be reasonable, in the circumstances, to direct that the application be amended.

[16] It is a misconception to refer to a plea of guilty. This Tribunal is not a criminal trial. The respondent's co-operation with the Commission is to his credit. It is to be weighed with other factors in determining whether the application should be amended.

[17] The submission of the respondent that the public would be adequately protected, because the respondent has not subsequently engaged in any misconduct, ignores the fact that determinations and orders of the Tribunal are expected to have a salutary effect on other members of the profession, which itself has a protective effect. It is undesirable to create the impression that the Tribunal would ignore dishonesty by a practitioner, even if the parties are willing to do so.

[18] Although the respondent's knowledge of the position of his client is the subject of an admission in the SOAF, nevertheless, there is a substantial body of documentary evidence to establish his relationship with his clients, and his role in the development of another reason to be communicated to the body corporate. Indeed, his conduct, as revealed in the documents, after the body corporate's lawyer commenced to enquire as to the reason for the assignment, is difficult to explain except by reason of his knowledge of the difficulties faced by the clients. The documents would have been available to the Commissioner in the exercise of his powers under s 443 of the LP Act. In those circumstances, the respondent's admissions can hardly be regarded as a basis for concluding that the respondent would be unfairly prejudiced by a variation of the discipline application to allege dishonesty. And in any event, the respondent has not submitted that his dealings with the applicant in relation to the matter would have been different, had he been facing a charge of dishonesty.

[19] The Tribunal is required to reach its own view about matters which come before it, and is not bound by the position taken by the parties. While conscious that further evidence had the potential to put the material already before the Tribunal in a different light, it considered that that material showed a strong case of dishonesty on the part of the respondent, sufficient to warrant a variation of the discipline application to ensure that it was clearly raised. The public interest in doing so outweighed the factors which had been raised in opposition to that course.

[20] Accordingly the Tribunal concluded that it would be reasonable, having regard to all the circumstances, to vary the application, and on 25 October 2018, it directed that the following be inserted after paragraph 1.15.2, "engaged in conduct which was dishonest and/or".

[21] The respondent then filed further material, and a further hearing took place on 5 November 2018.

[22] On 23 November 2018, the applicant filed an Application for miscellaneous matters for leave to amend the discipline application in accordance with the orders of the Tribunal. Given the substance of those orders, the application was not required and it is unnecessary to deal with it further.

Factual conclusions

[23] The factual matters alleged in the application (other than the matters set out in paragraph 1.15) are established by the SOAF.

[24] It will be apparent from what has already been set out that the respondent knew that the real reason why his clients wanted to assign the management rights was the difficulty arising from the cancellation of the letting licences of two of them, and the resulting jeopardy to the company's business. He then set about finding another reason for the assignment to be communicated to the body corporate's lawyer. He then communicated the accounting reason to the body corporate's lawyer as the reason why the assignment was sought, and caused the employed solicitor to confirm it. It should be added that there is no evidentiary basis for finding that no tax advantage would result to the clients from the assignment.

[25] The respondent's conduct in seeking and communicating to the body corporate's solicitor the accounting reason for the assignment, when he knew the true reason to be the difficulty with the licences, was dishonest. It was also dishonest of him to cause the other solicitor to communicate to the body corporate's solicitor potential taxation advantages as the reason for the proposed assignment.

Characterisation of conduct

[26] The applicant has submitted that the respondent deliberately misled "the other party", and that it could be considered that his conduct "reaches the level of professional misconduct".[3] It fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. The respondent had been instrumental in orchestrating the accounting reason, and providing that reason to the body corporate and its solicitor as the purpose for the proposed assignment; as well as providing the reason to the other solicitor working at his firm, who confirmed it to the other party.

[27] For the respondent, it was submitted that the conduct should be characterised as unsatisfactory professional conduct. It was a "one off" event; it was motivated by his desire to protect his client's interests, and not for personal gain; and the reason asserted for the assignment was "a notionally valid reason… verified by (the) clients' accountant, even though it was in fact misleading because it was not the real reason for the request"[4] for consent to the assignment.

[28] The LP Act contains statutory definitions relevant to the respondent's conduct. Thus s 418 of the Act provides:

> ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

[29] Section 419 of the same Act provides that professional misconduct includes:

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3 Outline of submissions on behalf of the Legal Services Commissioner, filed 12 July 2017, at [46].

4 Outline of Submissions on behalf of the Respondent, filed 28 July 2017, at [8].

> unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

[30] Because these definitions are inclusive, and because these expressions were in common use before the LP Act was enacted, common law tests for the assessment of such conduct remain relevant. In *Adamson v Queensland Law Society Inc*,[5] Thomas J said, with respect to professional misconduct, "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."[6] Such conduct has also been described as conduct that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency.[7]

[31] While it is not inappropriate to characterise the respondent's conduct as a "one off event", it has some features which should be noted. The conduct persisted over some time. It began with the respondent initiating a course of events intended to provide a false reason for the assignment. No doubt, in providing that reason, he intended that it be accepted and acted upon by the body corporate and its solicitor as the true reason, when the respondent knew that not to be the case. He later communicated that reason to the solicitor handling the matter while the respondent was on leave. It is apparent from the communication that he then appreciated that the solicitor was likely to relate the reason for the assignment to the solicitor for the body corporate. There is no suggestion that at any time the respondent attempted to correct the misrepresentation.

[32] The parties referred to two cases. They were *Legal Services Commissioner v Bevan*[8] and *Legal Services Commissioner v Gould*.[9]

[33] In *Bevan*, it was common ground that the respondent's conduct in stating to the Court that his client's absence was due to a medical condition, when he had in fact advised the client not to remain at the Court, constituted professional misconduct. In *Gould*, the respondent was found guilty of professional misconduct because he had misled his client and the Queensland Law Society. He was said to have been reckless in doing so, at least with respect to one of the communications.[10] Neither case provides any real assistance in the present case.

[34] There is some limited analogy between the conduct of the respondent in the present case, and one matter dealt with in *Re Wheeler*.[11] One of the charges alleged a false representation by the appellant-solicitor, in response to a request as to the disposition of funds paid into his trust account. Assertions in the response were factually untrue, to the knowledge of the respondent. The Court also inferred that the response was designed to discourage further enquiry.[12] Dowsett J, sitting as a member of the Full Court of the Supreme Court of this State, had "no difficulty in concluding that to write

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5 [1990] 1 Qd R 498.
6 At 507.
7 See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in Dal Pont, *Lawyers' Professional Responsibility* (6th ed) LawBook Co 2017 at [23.85].
8 [2015] QCAT 290.
9 [2016] QCAT 533.
10 See *Gould* at [48] to [51].
11 [1992] 2 Qd R 690.
12 See *Wheeler* at 701-702.

such a letter to a fellow practitioner enquiring as to the whereabouts of funds paid to the appellant by a client of the enquiring solicitor was professional misconduct".[13]

[35] However, what is really called for is an assessment of the conduct of the respondent, in the light of the statutory and common law definitions previously referred to. Factual analogies are of only limited assistance.

[36] Notwithstanding the matters advanced on behalf of the respondent, his conduct should be characterised as professional misconduct. While it may not fall comfortably within the definition in s 419 of the LP Act, it nevertheless fell short, to a substantial degree, of the standard of professional conduct approved by members of the profession of good repute and competency, and would reasonably be regarded as dishonourable.

Orders

[37] It should be noted at the outset that, as mentioned, the respondent has co-operated fully with the investigation carried out on behalf of the Legal Services Commission in this matter. Moreover, the respondent received no personal benefit from his misconduct, other than the receipt of professional fees for the provision of legal services.

[38] The applicant submitted that the respondent should be publicly reprimanded, ordered to pay a fine of $5,000, required to undertake ethics training, and be ordered to pay the applicant's costs of the application, to be assessed on the standard basis.

[39] For the respondent it was submitted that these orders were appropriate. Reference was made to the respondent's cooperation in the applicant's investigations and in this proceeding; his acceptance of responsibility for the conduct of the other solicitor with his firm; and his admission of fault and expression of regret.

[40] The respondent provided an affidavit which recorded his professional history and the absence of any previous conduct complaint. He described the matter as stressful. He said that the clients were at a real risk of losing their business, and becoming bankrupt. He also expressed remorse. He has taken steps to be more aware of his professional obligations, and to ensure that his staff are also conscious of them. He described stress which he has suffered as a result of the charge; and difficulties which he and the law practice would encounter if he were suspended from practice. He has also provided references from other partners in the law practice, and a practitioner in another practice, as to his general good character and professional conduct.

[41] The respondent also contended that the Tribunal should not depart from the position taken by both parties in relation to the orders to be made. Reliance was placed on *NW Frozen Foods v Australian Competition and Consumer Commission*,[14] *Commonwealth v Director, Fair Work Building Industry Inspectorate & Ors*[15] *(CFMEU case)*, and *Legal Services Commissioner v XBV*.[16]

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13 *Wheeler* at 702.
14 (1996) 71 FCR 285; [1996] FCA 1134.
15 (2015) 258 CLR 482; [2015] HCA 46.
16 [2018] QCAT 332.

[42] In *NW Frozen Foods*, the Court upheld an appeal against a pecuniary penalty order imposed under s 76 of the *Trade Practices Act* 1974 (Cth) which was more than the penalty jointly proposed by the parties. It said:[17]

> Because the fixing of the quantum of a penalty cannot be an exact science, the Court, in such a case, does not ask whether it would without the aid of the parties have arrived at the precise figure they have proposed, but whether their proposal can be accepted as fixing an appropriate amount.

[43] It also said that a proper amount was "one within the permissible range in all the circumstances"; and continued:[18]

> The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.

[44] Emphasis was placed on the fact that the penalty was a civil penalty. Reference was also made to the following statement by French J in *Trade Practices Commission v CSR Ltd*[19] (*CSR case*):

> The principal, and I think the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by a contravener and by others who might be tempted to contravene the Act.

[45] The justification for the position taken in *NW Frozen Foods* was the important public policy involved, identified by reference to the burden placed on courts by "very lengthy and complex litigation"; and the resultant freeing up of Commission officers "to turn to other areas of the economy that await their attention".[20]

[46] The Court also pointed out that effects on the market, and other economic effects, will generally be among the most significant matters to be considered as relevant; and noted the assistance courts were likely to obtain from views put forward by the Commission or by economists called on behalf of the parties.[21]

[47] The Court also noted, after a review of earlier decisions:[22]

> There are, of course, limits to the approach accepted in these cases. The Court should not leave room for any impression of weakness in its resolve to impose penalties sufficient to ensure the deterrence, not only of the parties actually before it, but also others who might be tempted to think that contravention would pay, and detection lead merely to a compliance program in the future.

[48] In the *CFMEU case*, the High Court generally endorsed the approach taken in *NW Frozen Foods*, and in a later decision of the Full Court of the Federal Court, *Minister for Industry, Tourism, and Resources v Mobil Oil Australia Pty Ltd*[23] (*Mobil Oil*). The reasons of five members of the Court set out observations based on *Mobil Oil*,

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17 *NW Frozen Foods* at p 290-291.
18 At p 291.
19 [1991] ATPR 52,135 at 52,152.
20 *NW Frozen Foods* at p 290.
21 At p 291.
22 At p 294-295.
23 [2004] ATPR ¶41-993.

described as being "(b)y way of explication".[24] They included the observation that a court determining a civil penalty may begin with an independent assessment of the appropriate range of penalties and then compare it with the proposed penalty. Another observation included the following:[25]

> …the court is not bound by the figure suggested by the parties. Rather, the court has to satisfy itself that the submitted penalty is appropriate while acknowledging that, uninformed by the agreed penalty submission, the court might have selected a slightly different figure….

[49] The plurality also observed that the regulator should explain to the court the process of reasoning that justifies the discounted penalty. Subsequently, they stated:[26]

> Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and, for the reasons identified in *Allied Mills*,[27] highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.

[50] The plurality's analysis and conclusions drew heavily on the fact that a civil penalty regime is one which seeks to achieve compliance with a statutory regime by deterring non-complying conduct, without the stigma of a criminal conviction.[28] They repeated[29] a passage from the judgment of French J in the *CSR case*, which includes the passage set out earlier in these reasons.

[51] The plurality also stated that it was to be expected that a regulator of a statutory regime would be in a position to provide the court with "informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance", but continued:[30]

> That being said, the submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession.

[52] There are a number of reasons to doubt the applicability of the principles developed in relation to civil penalty regimes to a discipline application under the LP Act. The Tribunal's jurisdiction bears some analogy with the inherent jurisdiction of the Supreme Court in relation to the control and discipline of lawyers, which continues to exist.[31] The Tribunal's jurisdiction may be regarded as an adjunct to the Court's jurisdiction. The jurisdiction exists to protect members of the public from misconduct by lawyers.[32] Its orders are not penal. Moreover they extend beyond orders only intended to deter departure from a statutory regime. It may recommend the removal

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24 *CFMEU case* at [32].
25 Ibid.
26 Ibid [58].
27 *Trade Practices Commission v Allied Mills (No 5)* (1981) 60 FLR 38 at 41-42; 37 ALR 256 at 259 per Sheppard J.
28 See the *CFMEU case* at [16]-[24]
29 At [55].
30 At [60]-[61].
31 See s 13 of the LP Act.
32 Dal Pont, *Lawyers' Professional Responsibility*, at [23.25].

of a practitioner's name from the roll. Such an order will often carry considerable stigma. It may also order that a practitioner's practising certificate be suspended; and make orders which have the effect of controlling the manner in which a practitioner engages in legal practice. Some of the conduct which it must consider is undoubtedly criminal conduct. Cases are typically not lengthy; and do not raise the complexities for a court which is found in a consideration of the effect of certain conduct in a market place.

[53] In any event, as has been noted, the plurality in the High Court has stated that the approach applies subject to two matters. One is that the Tribunal is "sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences".[33] That is not the present case. The parties are not completely in agreement about the matter, the applicant contending that the conduct should be characterised as professional misconduct, while the respondent contended that the conduct should be characterised as unsatisfactory professional conduct. The distinction between unsatisfactory professional conduct and professional misconduct is one the legislature considered to be of sufficient importance to warrant statutory recognition.

[54] More significantly, it is apparent that the agreement was struck at a time when the parties had also agreed that the respondent did not engage in dishonest conduct. The agreement therefore did not address the conduct as found by the Tribunal.

[55] Established dishonesty on the part of a member of the profession is a matter which requires careful consideration, and usually a serious sanction. As Professor Dal Pont has pointed out,[34] honesty on the part of legal practitioners is fundamental to both public and curial confidence in the legal profession. In *Law Society of New South Wales v Foreman*,[35] Mahoney JA emphasised the importance of honesty to fellow practitioners and the court. His Honour quoted a passage from the judgment of Isaacs J in *Incorporated Law Institute of New South Wales v Meagher*[36] which included the statement, "Fitness (to practise law) includes honesty as well as knowledge and propriety".[37] He later said, "A solicitor should be able to place reliance upon the word of another and to accept his undertaking that he will do what he promises…".[38]

[56] In *Attorney-General v Bax*,[39] Pincus JA observed:

> It is not, in my opinion, every proved act of dishonesty on the part of a practitioner which justifies a substantial penalty; dishonesty, like other forms of behaviour, has grades of seriousness.

[57] Nevertheless, his Honour said:[40]

> Those practitioners minded to engage in or institute, in the course of their professional work, dishonest means designed to deprive people of their legal rights must appreciate that doing so is risky, from the point of view of

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33 *CFMEU case* at [58].
34 At para [23-100], text at n 125.
35 (1994) 34 NSWLR 408.
36 (1909) 9 CLR 655.
37 At 681-682; see *Foreman* at 442-443.
38 *Foreman* at 445.
39 [1999] 2 Qd R 9, 20.
40 At 22.

> professional discipline and sometimes that of the criminal law. At least where, as here, the dishonesty concerns a substantial rather than a trivial matter, and where, as here, it is not a casual act but carried on over a period of time, it is my view that such conduct 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.

[58] In *Wheeler*, false responses to enquiries from another solicitor led to two findings of professional misconduct, which were among the matters on which an order for suspension from practice for three years was based.

[59] On the question of orders, in addition to *Bevan* and *Gould*, the applicant referred to *Legal Services Commissioner v Bussa*[41] and *Legal Services Commissioner v Smith*.[42] As previously mentioned, in *Gould* the respondent was alleged to have engaged in misleading conduct, but there was no allegation of dishonesty. In determining what orders should be made, the Tribunal described the respondent's conduct as "not being completely candid in communications both with the client and the Queensland Law Society".[43]

[60] In *Bevan* there was no allegation of dishonesty either; and the Tribunal recorded that the veracity of the respondent's explanation for his client's absence from the hearing was not the subject of evidence. It appears that the finding of misleading conduct arose from the respondent's failure to disclose that his client had been at the Court earlier on the day of the hearing, and he had advised her to leave.[44] The Tribunal found that the misleading was intentional, but said, "This does not mean, however, that the respondent *desired* or *wished* to mislead the Court" [45] (emphasis in original). It also said, "If it were established, however, that the account advanced by the respondent relating to the medical condition of Ms Ross was contrived to mislead the Court, more severe penalties would be required". [46] The Tribunal also noted that the conduct was not designed to acquire a benefit for the respondent or his client, or otherwise to prejudice the legal rights of the opposing party.[47] Moreover, the conduct was not protracted, and did not involve others in the deception.

[61] The charges in *Smith* involved neglect and delay, not dishonesty or misleading conduct. *Bussa* also involved a failure to pursue a matter competently and diligently, as well as failure to respond to notices under the LP Act. Again there was no allegation of misleading conduct or dishonesty. These cases are of only limited assistance.

[62] The respondent's conduct is significantly less serious than that considered in *Bax*. Although there are analogies with *Wheeler*, other charges were involved as well.

[63] In *Legal Services Commissioner v Voll*,[48] the practitioner had given a false account of the absence of his clients from a hearing in the Queensland Building Tribunal. He was also found guilty of neglect and incompetence. The false account was given when

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41 [2011] QCAT 388.
42 [2014] QCAT 518.
43 At [80].
44 See *Bevan* at [7].
45 At [15].
46 At [19].
47 At [20].
48 [2008] QCA 293.

the respondent was in a state of panic and anxiety.[49] He had "substantially refined his practice since".[50] There was no personal benefit to him, but his conduct potentially caused a serious loss to his clients. He had been uncooperative in the investigation, and some of his evidence had been rejected (with a recommendation that this be the subject of a separate investigation). A penalty of $20,000 was imposed, and he was publicly reprimanded. His appeal against these orders was unsuccessful.

[64] The penalty in *Voll* was struck with reference to *Legal Services Commissioner v Mullins*.[51] In that case, a barrister representing a party at a mediation relied on calculations of future loss based on life expectation assumptions which, at the time of the mediation, were no longer sound, as his client had been diagnosed with cancer. The barrister did not disclaim the assumptions. He was found to have intentionally deceived his opponent and his opponent's client. The case settled, but the other party took steps to recover the settlement sum, resulting in a further settlement on confidential terms. Prior to the mediation, the barrister undertook his own research, and sought the advice of senior counsel, on his ethical obligations; but posed the wrong questions. He was publicly reprimanded, and a penalty of $20,000 was imposed.

[65] In the present case, there is a degree of deliberation and protractedness not present in *Voll*. Nor did the present respondent make any attempt to identify his ethical obligations. Although the respondent has deposed to the real risk of substantial loss to his clients had he disclosed the true reason for the assignment, it has not been submitted in the proceedings as heard between the applicant and the respondent[52] that the respondent's conduct deprived the body corporate of an opportunity for significant financial gain. Nevertheless it is apparent from the respondent's affidavit that there was a significant likelihood that the body corporate would have had the right to terminate the agreements with Limrock, had the respondent given the true reason for the proposed assignment. Whether the other party to the mediation in *Mullins* ultimately suffered financial loss is unclear. In neither *Mullins* nor *Voll* did the practitioner involve others in the dishonest conduct.

[66] There has been no suggestion of any similar conduct by the respondent on any other occasion; nor have findings been previously made against him by a disciplinary body. The respondent's conduct, while serious, is not amongst the most serious examples of dishonesty by a member of the legal profession. It appears to have been the product of his failure to find a means of dealing with a situation of some difficulty without resorting to dishonesty. There is no reason to think that the respondent could not, with some care and greater attention to ethical standards, avoid similar conduct in the future. His affidavit indicates that he has taken steps to achieve this. In the circumstances, it is proposed to order the respondent to pay a penalty of $30,000. This amount broadly reflects the penalty in *Voll* and *Mullins*, with some allowance for inflation over time, and the fact that there are some aspects of the respondent's conduct which are more serious than in those cases, particularly his initiation of a

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49 At [48].

50 Referring to the findings of the Legal Practice Tribunal at [30], which findings were not disturbed by the Court of Appeal, see [53].

51 [2006] LPT 12.

52 The body corporate has given notice of an intention to seek compensation, but that matter has not yet been the subject of a hearing.

course of dishonest conduct, which continued over a period of time, and involved others.

[67] The respondent's conduct also warrants a public reprimand. Given the passage of time, and the steps taken by the respondent to maintain ethical standards, there does not seem to be any utility in requiring the respondent to undergo ethics training.

[68] There has been no opposition to an order for costs in the applicant's favour.

Conclusion

[69] The following orders are made:

1. The respondent is publicly reprimanded;

2. The respondent is ordered to pay a penalty of $30,000;

3. The respondent is to pay the applicant's costs of the application to be assessed on the standard basis.

[70] A Notice of intention to seek compensation order was filed in the Tribunal by Atrium Resort CTS 4043 on 14 July 2017. Accordingly, it is further ordered that:-

4. Atrium Resort CTS 4043 shall advise the Tribunal and the respondent as to whether it wishes to pursue its notice of intention to seek compensation order within 14 days of the publication of this decision;

5. If Atrium Resort CTS 4043 advises that it wishes to pursue a compensation order, then the matter will be listed for directions on a date to be advised by the Tribunal.