Transcript of Proceedings

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LEGAL PRACTICE TRIBUNAL

MOYNIHAN J

No BS9619 of 2004

LEGAL SERVICES COMMISSION Applicant

and

MICHAEL VINCENT BAKER Respondent

BRISBANE

..DATE 13/10/2005

REASONS

HIS HONOUR: On 27 September 2005 I found, for reasons which were then published, charges of professional misconduct and of unprofessional conduct by the practitioner had been proved. It is now well settled, see cases such as Klein v. The New South Wales Bar Association (1960) 104 C.L.R. 86, The Attorney-General v. Bax [1999] 2 Qd.R. 222, Law Society of New South Wales v. Foreman (1994) 34 N.S.W. Reports 408, and other cases which were cited in the course of submissions, that the predominant consideration in dealing with the consequences of such findings is the public interest in having legal practitioners who are competent, aware of their obligations to clients and, I might interpolate, staff, and who observe those obligations.

Dealing with such cases is designed to take into account the need to set standards and deter practitioners from departing from them. It publicly marks disapproval of a departure from proper professional standards, so reinforcing the basis of public confidence in the profession.

It is submitted on behalf of the Legal Services Commissioner that as a consequence of the findings the practitioner is unfit to practise and an order should be made recommending that his name be removed from the local roll pursuant to section 280 subsection (2)(a) of the Legal Profession Act.

It is submitted on behalf of the practitioner that an order should be made imposing conditions on the practitioner's practising certificate pursuant to the provisions of section

280 of the Act. The conditions proposed are contained in Exhibit A. They involve that the respondent not personally interview or confer with clients in circumstances when they are present at the same place, other than in the company of designated practitioners - designated practitioners or practitioners satisfying certain requirements. It is also proposed that the respondent practitioner engage a senior solicitor to be able to be available for consultation by staff in respect of aspects of his conduct and conditions are proposed as to regular consultations with a psychologist who has been treating the practitioner for some time now. As I say, the details of the conditions are set out in the Exhibit and it is unnecessary for me to repeat all of them here.

I note that the practitioner was admitted on the 10th of December 1971, was a principal in the firm referred to in the reasons for over 30 years, is now, or in the last couple of years been a consultant to the firm. The practitioner is to be dealt with on the basis of the charges which have been proven.

I say that among other reasons because the point is made by counsel for the practitioner that during his professional life the practitioner has dealt with many clients. There was extensive publicity about the firm, complaints of treatment of clients, an invitation to clients, or former clients to come forward. It is then pointed out, correctly, that the charges dealt with by the Tribunal appear to be the only outcomes of

that process and that the practitioner has not previously been dealt with for disciplinary matters.

It is difficult to know how much further those considerations take the matter without, for example, a detailed consideration of the outcome of the process of inviting complaints.

The practitioner's conduct was found to constitute professional conduct on five occasions, two of them involving findings of dishonesty; unprofessional conduct was found to have occurred on two occasions. I don't propose canvassing the details of the findings that were made and published but it is useful to refer to a number of aspects of them.

One of the charges of unprofessional conduct, charge 14, related to failure to supervise a letter sent to the Law Society in response to a call for explanation in respect of a client's complaint. That is a serious matter for a legal practitioner to consider and respond to accurately and completely.

The letter in question was patently incorrect in a number of respects and I concluded that had the practitioner properly discharged his obligations to the Society and hence to his client and the public, it was at least improbable that he would have allowed the letter to go forward.

Another of the unprofessional conduct charges made out related to the use of language to staff, and for reasons that are

canvassed and published on the 27th of September, the implications of that are quite serious from the perspective of clients and the public perception of the profession and indeed the proper functioning of the profession.

The point is made in those reasons that the clients whose affairs, or the conduct of whose affairs have led to the charges were in poor financial circumstances, not sophisticated people experienced in legal matters and who were particularly reliant on the practitioner and the firm to act in their interest. The findings reflect that a number of them were treated shamefully and that their interests were either ignored or subordinated to the firm and hence the practitioner's interest.

For example, in the case of Nutley, with whom the practitioner directly dealt, a term subsequent to the making of the retainer was introduced in an apparent attempt to justify what was otherwise unjustifiable. The practitioner, having denied his involvement in a letter of demand to Nutley, it emerged in cross-examination that he had endorsed a draft. Nutley was pursued to enter into an agreement to pay fees that he was not obliged to pay.

That persistence and other factors are echoed in the case of Jorgensen and in Robinson.

In Jorgensen's case, although charge 3 relating to dishonesty was not made out, the practitioner was involved in her being, in my view, remorselessly pursued for fees in circumstances where McGill DCJ dismissed the firm's appeal from an unsuccessful attempt to recover fees from her in the Magistrates Court and properly described her as having been vexed by litigation in circumstances where she had done nothing wrong.

Ms Robinson was in much the same position and there is a finding of dishonesty made in respect of her. It is a small insight but nevertheless, in my view, a significant one that the practitioner made improper use of his position as a solicitor to instruct the secretary to ring Robinson's employer representing that she remained a client of the firm and they had not been able to contact her with a view to getting an address so that the proceedings could be served on her.

It is, of course, impossible to ignore the cumulative effect of the findings and of the charges which it has been found were made out.

The practitioner has been slow to recognise that the conduct engaged in was unacceptable. The affidavit of the 29th of March, for example, maintains the position that he understood

but did not share the view of practitioners who thought that conduct of the kind involving the use of language, which is the subject of two of the charges, was unprofessional.

The practitioner has taken steps described in the various affidavit material to seek counselling and assistance in dealing with the issues that have given rise to the charges, reorganising his practice and seeking professional help. These steps were, in the context of this conduct, somewhat belated.

The favourable view of the practitioner put forward by the various references, including one by Mr Johnson tendered today, has to be evaluated in the light of the findings that were made and the reasons for making them. Those findings and the reasons cast an unfavourable light on aspects of the practitioner's account of events in a number of respects. He was, to put it shortly, not accepted as a credible witness in respect of a number of aspects.

The points made, and it is true, that the case proceeded on the basis of the affidavits and the deponent clients and other deponents were not called to give evidence. I have taken that into account, but that, as I say, in the end it is the public interest, in the sense that I have previously explained, which has to be taken into account.

I also acknowledge, as I have said, that the practitioner has taken steps to address the issues which arise. In the end, however, the position seems to me to be that the practitioner determinedly persisted in the conduct reflected in the charges which were proven, ignored his professional obligations to clients who were in need of proper professional detachment and service and sought to justify, what I have described as the unjustifiable.

The findings reflect a serious failure in a number of respects to observe proper professional standards and of appreciation of the consequences for the client and for the legal profession in general and hence the public interest.

In my view of the evidence, a serious question remains as to whether the practitioner has a genuine appreciation of the impropriety of his conduct and the consequences to which I have referred. In taking into account the various considerations, in my view, the position is that the evidence in the findings establishes that the practitioner is unfit to practice and I recommend that his name be removed from the local role.

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