



Transcript of Proceedings

LEGAL PRACTICE TRIBUNAL

MOYNIHAN J

MR K HORSLEY
DR S HAYES

No BS 9619 of 2004

LEGAL SERVICES COMMISSION

Applicant

and

MICHAEL VINCENT BAKER

Respondent

BRISBANE

.. DATE 13/10/2005

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MR A MacSPORRAN (instructed by Brian Bartley and Associates) 1
for the applicant

MR J C BELL QC, with him MR P DAVIS (instructed by Russell and
Company) for the defendant

HIS HONOUR: Mr MacSporran, we've all had a look at your 10
outline and I take it, Mr Bell, you have had a look at Mr
MacSporran's outline.

MR BELL: Yes, thank you, your Honour.

HIS HONOUR: Yes. And I haven't seen anything from you.

MR BELL: No, I've got one. Should I-----

HIS HONOUR: Yes, I'm not saying that critically. I'm 20
just-----

MR BELL: No, no, I understand. I will hand up my bundle,
your Honour. May I tell your Honour what is in it. We've got
the outline of submissions which we prepared. Annexed to it
is an alternative which we submit might be appropriate and in
it we have a proposed regime. We have a letter dated the 11th
of October 2005 in the nature of a letter of reference from Mr
Johnson who's mentioned in the reasons so far, an affidavit of
Mr Russell - Steven Charles Russell - sworn the 13th of 30
October which relates to the regime, and a copy of one case,
your Honour, which is Bax our learned friend refers to too.

HIS HONOUR: Yes, I've looked-----

MR BELL: You may already have it. Yes, I'm just handing up
three sets of the same thing, your Honour.

HIS HONOUR: Well, what should we do, go and read this 40
material or hear from - have you seen this before now, Mr
MacSporran?

MR MacSPORRAN: I saw it this morning, yes.

HIS HONOUR: Just wait until I see what is here. Well,
perhaps we should go and read it before we go any further. Is
that-----

MR MacSPORRAN: I'm happy with that, certainly.

HIS HONOUR: Well, I mean, it shouldn't take us long----- 50

MR BELL: No.

HIS HONOUR: -----but it's better to go and read it rather
than you sitting here looking at us while we read it.

MR BELL: Yes, of course.

HIS HONOUR: So don't go too far in other words.

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MR BELL: Thank you, your Honour.

THE TRIBUNAL ADJOURNED AT 10.05 A.M.

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THE TRIBUNAL RESUMED AT 10.37 A.M.

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HIS HONOUR: Yes, Mr MacSporran.

MR MacSPORRAN: Your Honour, as you've indicated, the Tribunal has the written outline and has read that. I will just summarise some aspects of that briefly.

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It seems to be common ground that the two most serious charges are those where findings of dishonesty have been made and that is charge 1 in respect of Mr Nutley and charge 10 in respect of Ms Robertson.

Another aspect of that is that the conduct actually constituting the charges of professional misconduct in those respects amounts to dishonesty in itself. That conduct is in turn compounded by the failure of the respondent to acknowledge the wrongdoing, firstly in his dealings with the client and then in his dealings with the Law Society and finally to maintain the lies that were in the conduct of the hearing before this Tribunal.

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All of those factors are, in my submission, aggravating factors with respect to sanction in the sense that if there's a finding that he was unfit to practice by virtue of the conduct found against him, it would be difficult to be satisfied that that unfitness would dissipate over time such that a suspension would be adequate to deal with the matter here.

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The other charges are referred to briefly in the outline because they are not as serious, but they're still, of course, relevant to an overall assessment or appropriate sanction should be imposed. In particular charges 2 and 9 relate to the complainants Jorgensen and Ms Robertson again, involve charging fees where none were properly chargeable, so they're serious matters and your Honour has found, of course, that the conduct there amounts to professional misconduct as opposed to unprofessional conduct.

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Those charges are also relevant to indicate that the respondent's conduct was engaged in over a period and that contrary to what his outline here says, the dishonesty matters are not simply isolated incidents but can be dealt with in that way. The conduct generally extends over a period of time with not only respect to dishonesty, in respect to those two charges.

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Could I deal very quickly with some of these cases. I hand up - I only have two of these bundles, I apologise. The first case is Bass, which you have, I think. This copy is the print out from Austlii, but I have identified the passage by reference to the reported case that you have, I think.

HIS HONOUR: Yes.

MR MacSPORRAN: There's then a comment referred to in the respondent's outline from Justice Pincus at page 20, I think it is, of the reported case, page 8 of the photocopy, where in his Honour's opinion, it's not every proved act of dishonesty on the part of a practitioner which justifies a substantial penalty of strike off. 1

I suppose it's not hard to imagine cases where there might be a truly isolated act of dishonesty which was committed in circumstances which were significantly mitigating where the penalty imposed, or a sanction imposed may not involve an actual strike off, but outside those confined circumstances, it's my submission it would be difficult to imagine a case of dishonesty where such a sanction is not imposed. 10

And of course here it's not a case of an isolated act committed in significantly mitigating circumstances. It's a course of conduct persisted in even here before the Tribunal. And that of course brings into focus the remarks of his Honour at - further in the judgment, page 22 or page 10 of the copy which is quoted in the applicant's outline. It refers to, in effect, the significantly aggravating feature of the persistence in the lie through the entire process. 20

Could I take you to the case of Foreman. That should be the next in the bundle, I think.

HIS HONOUR: Yes.

MR MacSPORRAN: You see there in the judgment of Justice Mahoney at page 438 - it's the passage between - about----- 30

HIS HONOUR: Which page is that?

MR MacSPORRAN: Page 438.

HIS HONOUR: Yes.

MR MacSPORRAN: It refers to the conclusions of the Tribunal of first instance in respect of that practitioner and has this to say, referring to the Tribunal's reasoning. It concluded that what Ms Foreman did involved an extremely serious instance of professional misconduct. It concluded that she had failed to conduct herself before this Tribunal in a completely open and forthright manner and any display by her of contrition was minimal. It concluded that her original misconduct was isolated but her evidence disclosed a serious flaw in her character and that her demeanour throughout the hearing was not consistent with the regret experienced in her statutory declaration. It did not feel that she had expressed the appropriate acknowledgment and remorse in respect of what she had done, nonetheless the Tribunal decided that the appropriate order to be made that she pay a fine of \$20,000" and so on. 40 50

The decision in this case, of course, was ultimately the Court of Appeal overturned the Tribunal's findings and imposed a strike off, in effect for the reasons that are advanced there.

Thence page 440. It's right at the bottom of that page, paragraph (g). It talks there about the purposes of the disciplinary proceedings. That's in effect the passage that's marked in the outline submitted here today, the dual purpose being not to punish the practitioner but to protect the public, and as part of that, to mark the seriousness of the conduct by imposing the appropriate sanction to act as a deterrent.

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At page 444 between paragraphs (e) and (f), the passage:

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"It was also, I think, relevant for the Court to take into account the effect which its order will have upon the understanding in the profession and amongst the public of the standard of behaviour required of solicitors. The Court will no doubt where appropriate articulate the standards required and that they are high. However the Court must, I think, also take into account the effect upon what it has said of, for example, a decision to allow a solicitor guilty of a serious infringement of those standards, to continue to practice."

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And finally in respect to Foreman, at page 448, two passages between paragraphs (b) and (c) and then (c) and (d) which just referred to the personal circumstances of the practitioner in that case in the sense that the conduct was committed in circumstances of extreme pressure on her, which the Court of Appeal judged not to be a sufficient mitigating circumstance to warrant other than a strike off. In other words, the pressure she was under didn't justify her behaviour in the way that she had behaved.

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I move to Roche, the Queensland and Roche case, judgment of the Chief Justice at paragraph 38. That's dealing with penalty. Your Honour may recall that was a case where the Tribunal at first instance had imposed a suspension of the order of 12 months.

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The society appealed and his Honour was dealing with the question of penalty in that context. At 38 he refers to the submissions of the society by Mr Jackson and he remarks on the findings there of the Tribunal at first instance which were, in effect, having seen the practitioner over a lengthy period give evidence, that the Tribunal had concluded that the practitioner was basically honest and the practitioner's integrity was intact. On that basis the Court went on to not interfere with the Tribunal's assessment of the appropriate sanction which involved the suspension referred to.

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Again, that is not this case. The Tribunal here has had that opportunity to observe the practitioner and has made, what it is submitted very damaging findings about his honesty generally. So it is clearly distinguishable from the case of Roche for those reasons alone.

His Honour goes on at paragraph 40 and between 40 and 42 to compare an contrast the case of Roche and the Australian Capital Territory which is referred to there starting at paragraph 40. That case involved a suspension of 18 months. His Honour there distinguishes the Queensland case of Roche with the Australia Capital Territory case again principally on the basis that the Queensland case involved a failure to accept the wrongdoing and a challenge to the society's case at hearing. His Honour says finally at paragraph 44:

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"The Court is in this case constrained to acknowledge the Tribunal's view, apparently reasonable, that the respondent has the substantial capacity to work beneficially in the public interest and that the ultimate objective is not in this case to condign severe punishment of the errant practitioner. It is the protection of the public. That should, on the Tribunal's supportable findings, be adequately served by the penalty imposed."

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Again, of course, the reference to the Tribunal's supportive findings are that the practitioner's honesty and integrity were intact after the hearing, again unlike this case. Could I finally refer to the case of Carberry, which is the last in the bundle I think, judgment of Justice Pincus, firstly at paragraph 7. It is a case where the practitioner was not candid and cooperative in his dealings with - in answering the complaint. His Honour there said:

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"This is, in my opinion, an important factor in determining that the circumstances associated with the loan using Mrs David's money considered a loan and without regard to other charges warrant a striking off order."

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Then there is the joint judgment of your Honour and Justice Atkinson at paragraphs 37 to 41 starting at 37.

"The facts face the respondent with the same dilemma that confronted the practitioner in Bolster and the Law Society of New South Wales. The more he ought to extricate himself by advancing an innocent explanation or justification the more he entangled himself in a failure to appreciate elementary the critical important obligations of a solicitor to a client."

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At 38:

"As was pointed out in the Attorney-General and Bax there is a subsidiary purpose in the public interest and that is to deter other practitioners who might otherwise engage in professional misconduct."

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And then at 40 the question of a suspension is dealt with and found to be inadequate in the circumstances. And at 41 that conclusion is expressed clearly. So, in summary, the applicant's position on sanction is that, accepting the findings of the Tribunal and the seriousness of them, there is only one sanction that is appropriate and that is a recommendation that the name be removed.

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HIS HONOUR: Yes, Mr Bell?

MR BELL: Thank you, your Honour. It is recognised that that is the only issue for the Tribunal, whether the Tribunal ought make that recommendation, and the test we'd respectfully submit is whether it has been shown that the respondent lacks character such that he is not fit to practice as a solicitor in the future.

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Your Honour, it is essential for me to speak shortly about two of the findings and could I try and refresh your Honour's memory about the two charges Nutley and Robertson and the findings that you have made about them. I want to speak in general terms and not descend to the particular because we're trying - obviously the issue for you is to try and assess whether there is evidence sufficient of a lack of character that this man can't go on practising.

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And to say this, that there is no doubting that what occurred in relation to Nutley has similar elements of that which happened on Robertson and you found, in the end, that there was dishonesty shown. What happened in each case, it seems, is that unjustifiably charges were rendered to those clients, that is to Nutley and to Robertson.

In the scheme of things in a Tribunal like this, experienced in this sort of case, considering such action as striking off the sort of charges involved here were at a lower end of the scale in relation to monetary terms. That is you will recall that in relation to Robertson the charging that later came to be the subject of the charge wasn't an amount of money that a Tribunal like this might come upon more regularly when considering strike-offs. And the same can be said in relation to Nutley.

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Now, that doesn't take away for a moment the seriousness of what you have found. But can I say that to properly frame what happened here is that the respondent charged Nutley and Robertson a fee that was unjustified and where the real error occurred such that dishonesty arose was in trying to justify it. There is no doubt that it happened similarly in both cases.

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In the first case you will recall that there was justification for the charge made relating to the condition suggested that medical evidence was required and the practitioner relied upon a clause. He said that it was agreed that the instructions had to be accurate and they weren't. And, in relation to Roberson, the same in the sense that the practitioner you found try to justify the charging of fees on that occasion by giving evidence of the fact that he wasn't aware of cretin cautions given by the taxing officer and the employed solicitor.

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Now, bearing those two things in mind, and accepting the force of finding of dishonesty, there is no doubt that the Tribunal will accept that the authorities say that dishonesty is at the serious end of the sort of considerations for practising as a solicitor and for applications of this type, but it is not every occasion that dishonesty is found that a practitioner ought be truck off. The question is in relation to the protection of the public in the future and you will recall in reading our outline we have suggested a regime which, with respect, covers that adequately, that is covers the protection of the public in the future from any risk that the Tribunal might feel remains with the practitioner continuing in practice.

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But secondly, a consideration is the standing of the profession. In relation to that, one must bear in mind that this practitioner has been in practice for 35 years or more. These charges arise out of an unprecedented inquiry of the conduct of nine, or this practitioner but other partners in the firm, and these charges are the fruit of that very wide inquiry that we refer to in the outline.

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So what comes of that? We'd respectfully submit that there is foundation for the Tribunal to conclude that over 35 years of practice, these are the occasions which show where a practitioner's conduct has fallen below the line, they're not examples of it.

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I accept immediately one must proceed, bearing in mind other parts of your findings, in relation to the conduct and management of the practice, but this practitioner is now a consultant, he's not a partner, he plays no role and intends to play no role in the future in the management and the regime that we suggest would adequately protect for the future in that regard.

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So therefore in testing the final question of whether the respondent ought be struck off, we'd respectfully submit that you would conclude that there is sufficient character in Mr Baker to proceed as a solicitor albeit as a supervised solicitor, in the terms that we suggest.

In the end, one matter which is before you that really has resounding importance, in my respectful submission, is something that came this morning and it is the statement given by Mr Johnson, his former partner. In reading that statement, one comes to get an inside glimpse of the character of the respondent a little more closely and it's that character that you're judging.

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Obviously there's aspects of the respondent's character that one doesn't get to see on an application like this, on a hearing like this. Aspects of his character over 35 years, where many clients are satisfied, many clients are thankful, many clients' rights have been advanced and it's in that regard that one would reflect upon Mr Johnson's report closely because I see that he was mentioned in your Honour's reasons as somebody not involved in any of these events and after the inquiry that I mentioned earlier involving him too, no complaints against him came to the fore.

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So what we're left with is somebody who's known him for a long time having great regard for him in many respects and then trying to put the two things together, your Honour. Frankly, looking at Johnson's assessment of him if you take it at face value, which I would submit you would, and bearing in mind the findings you've made, it comes down to this, does it not.

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Baker proceeded in a bullish way to defend an unjustifiable charging on two occasions in relation to the dishonesty. And it was bullshiness and stupidity in prosecuting that reason that really has brought him into this position. Yet if he had

acted in the way Johnson says he has acted over many years, to his knowledge, one would think that this conduct would have been different. So I'd respectfully submit that in the end in the final judgment, you would balance in favour of concluding that under supervision in the regime that we suggest, or one like it, Baker is fit to practice in the future as a consultant to the firm and in that regard all of the interests of the public for protection are covered and yet his contribution to the community and the legal community continues for the short time in the future that it should occur being the age he is.

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HIS HONOUR: Mr Bell, where - Jorgensen was - the charge was not made out on a fairly narrow ground - there are findings made about his conduct towards - in the Jorgensen case which are not - which was not dissimilar from the conduct that arose in the two cases we've just talked about.

MR BELL: Yes.

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HIS HONOUR: And on one view of it, one of the significant considerations is that nowhere does the interest of the client appear to have any consideration in his conduct.

MR BELL: In these examples which have been the fruit of the inquiry, your Honour's right. Obviously they were selected by the Commissioner and by the Law Society earlier and by those who conducted the inquiry as demonstrating exactly that. I think the thrust of the complaint really was that as between the client and the solicitor were not balanced in the way they ought to have been, as you, your Honour, stated in the first part of your reasons.

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There's no doubt about that and I don't think I can take anything away from what you've just said, that Jorgensen demonstrates more. But balancing that, I thought that really the inference that your Honour might have thought ought be drawn from that is that yes, there are two findings of dishonesty but it was more before me, I couldn't go as far as dishonesty in relation to Jorgensen, but it was there.

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Now, I respectfully submit that your Honour's right. There was question in Jorgensen, but there's obviously been millions of other clients, or should I say thousands of other clients over 35 years, there were obviously many many files investigated where the evidence isn't before you, but likely it is that those clients were treated with the balance that ought to have been given.

This overcharging and charging on an agreement of no win, no fee, is one in which the respondent ought to have balanced a client's interests more heavily than he did. There's no doubt about that.

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I suppose a slant on what I've just said, your Honour, is this, that in each case, your Honour is involved in a consideration of charging for work done. This isn't a case where the investigation involved the work that was in fact

done, namely a situation where there was dishonesty in relations with the client in respect of the work being done, or there was incompetence, and of course one must recognise it's about the charging, it is the focus of the findings of dishonesty and the serious finding in Jorgensen, but as you say, they're three files out of many files. So yes, I accept that, your Honour-----

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HIS HONOUR: What do you say about the question of a cumulative effect. I mean, the three matters that we've been talking about, we've got the finding about the response to the letter from the Law Society and we've got the - oh, call it the treatment of staff issue with the ramifications of that which are found - which are within the reasons. So in other words, of course he's not to be dealt with on the basis that there might have been other offences and certainly there was an investigation which apparently the outcome of which was to bring these offences, but one can't say much more than that, really. I mean, there might be a whole range of issues that would come into play if one knew the decision making processes which led to these. He's pretty uncompromising in the way that he was lying. I mean, even, I think, in one of the late affidavits, he goes so far as to acknowledge that other practitioners mightn't see the way he treated staff as an appropriate way to do it.

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But he didn't accept that - that period. And I suppose, what - what I'm saying is that it seems to me you can't ignore the cumulative effect of considerations such as that.

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MR BELL: No. No, you can't, your Honour. I suppose in a sense it might be described this way. I'm referring to the width of the charges. Your Honour's referring to the depth of the charges that have been bought and I-----

HIS HONOUR: Yes and it's - it's a question of balance.

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MR BELL: Yes. But do understand that and of course it would be wrong not to take into account the way in which he conducted himself in the hearing. I accept that. I suppose the focus of my submission is to recognise that but balance it against the practitioner having conducted himself in such a way that he's not a man where he has a history of charges being bought against him or any other findings of dishonesty in the past.

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One would think after 35 years if he had practiced dishonestly in charging clients there would have been systemic problems arisen and been before the Law Society. I accept that, your Honour. I suppose in the end that your Honour's judgment of the practitioner in the way in which he conducted himself about these charges is important but of course I know that in proceeding in the role that you have one has to balance it with a man - with "the" man generally, and this man has been obviously conducting his practice a long time and doesn't have any history of dishonesty.

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But as I say I think, your Honour, it's fair to - to make the submission that he did stick to the line and he was bullish in the way he conducted himself before your Honour and in the letters to the Law Society. It was that, in a sense, that really bought him undone rather - and I suppose bullish even with the client, the three clients that we've mentioned: Jorgensen, Robertson and Nutley.

A little reflection which might be bought about by the supervision as we've suggested in the regime would not bring him into this position but may I respectfully submit, your Honour, that the way in which the respondent conducted himself throughout in relation to these three relevant charges and also the - the swearing charges was a way in which, had he had somewhat more reflection, he may not have proceeded in the way he did. And so, therefore-----

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HIS HONOUR: He - well, one infers that he for a long time operated on the basis that this is the way it was. This was his strength. He was the-----

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MR BELL: Yes.

HIS HONOUR: He was the hard man.

MR BELL: Yes, yes.

HIS HONOUR: He was entitled to and succeeded in carrying on in this way. 1

MR BELL: Yes, absolutely right and I think Mr Johnson's letter reinforces what you've just said.

HIS HONOUR: Yes, it does but I'm not sure what the extent to which that's for you or against you.

MR BELL: No, no, I understand. 10

HIS HONOUR: It has to go in.

MR BELL: Well, at least it's the truth we're talking and we can develop that rather than pretending it doesn't exist but there's no doubt that Mr Johnson, that seems to have, would have a better insight into this man than anybody else, says exactly what you've said. That's why I think Mr Russell, Mr Davis and I thought to construct a regime where that - the public would be protected against that reaction, that bullish reaction rather than being more reflective as would be expected of a solicitor. 20

HIS HONOUR: While it reminds me. I'll just formalise the record. In other words, I'll give you leave to file and read Mr Russell's affidavit. The proposal as to the conditions in, I'll call Exhibit A in this proceedings.

ADMITTED AND MARKED "EXHIBIT A" 30

HIS HONOUR: And Mr Johnson's letter, I'll call Exhibit B.

ADMITTED AND MARKED "EXHIBIT B" 40

MR BELL: Thank you, your Honour.

HIS HONOUR: And the references to which you referred of course were tendered at the - at the previous hearings-----

MR BELL: Yes, yes.

HIS HONOUR: -----and have been available and looked at, yes. 50

MR BELL: Just to finish, your Honour. You raised with me one point and this is only a small thing to add what I have said - to what I have said. You referred to him maintaining the line in relation to his attitude on the swearing issue and what your Honour said is right. Just reflecting on your Honour's judgment.

You referred in paragraph 2 - 214 to the practitioner's attitude disposed to and you recall that what he said was that "I accept that some practitioners regard conduct of that kind as unprofessional conduct which might be sufficiently serious to justify the attention of this Tribunal." In the way in which the affidavit was advanced, it was trying to demonstrate that he recognised that the standards in the profession, he'd fallen before.

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So, I accept what your Honour says about that. He did maintain his line but he did at the time of swearing that affidavit proceed to demonstrate that he - he had appreciation of what he had done, that it was too low. Excuse me, your Honour. Yes, thank you, your Honour.

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HIS HONOUR: Anything in reply, Mr MacSporran?

MR MACSPORRAN: No, thank you, your Honour.

HIS HONOUR: Okay. We - we will withdraw for the moment and sort out where we go from here and how long - how long it will take to do it. Okay.

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THE TRIBUNAL ADJOURNED AT 11.13 A.M.

THE TRIBUNAL RESUMED AT 11.15 A.M.

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HIS HONOUR: We will determine the matter at 2.30. So that what I'm going to do now, I'll adjourn the tribunal till 2.30 and we'll come back then and we'll dispose of it.

MR MacSPORRAN: Thank you, your Honour.

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THE TRIBUNAL ADJOURNED AT 11.16 A.M. TILL 2.30 P.M.

THE TRIBUNAL RESUMED AT 2.31 P.M.

TAKE IN REASONS

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HIS HONOUR: I think, Mr MacSporran, that's the appropriate order in terms of the----- 1

MR MacSPORRAN: Of the section, your Honour, yes. 282, yes.

MR BELL: Your Honour, before I raise something about an appeal, no doubt you will want to deal with costs.

HIS HONOUR: Yes.

MR BELL: I did some thinking about it and in the events that you have now found, I thought that there's three categories of costs. May I hand up the proposal? 10

HIS HONOUR: Yes.

MR BELL: Three categories are divided up between those charges that were withdrawn-----

HIS HONOUR: Yes. 20

MR BELL: Allan Lowther's - I think it was lost.

HIS HONOUR: Yes.

MR BELL: So they would be costs paid to the practitioner.

HIS HONOUR: So in other words one category is charges that weren't persisted in. Another category is charges which were unsuccessfully pursued. Yes, I can see what you're----- 30

MR BELL: Well, what I've done, your Honour, is the ones that the practitioner lost, of course he must pay the costs.

HIS HONOUR: Yes.

MR BELL: The ones where they were related to the ones he lost, there'd be no order because I think in the end it was found that they weren't established, but that's - no order should be in favour of us because of that. And in the ones that weren't prosecuted in that they were withdrawn or - and Allan Lowther where it just wasn't established at all, those costs ought to be awarded in his favour. That's the proposal I advance. 40

HIS HONOUR: Has Mr MacSporran seen this?

MR BELL: I hope he has.

MR MacSPORRAN: Only just recently but I'm content to proceed on the basis that I've had enough time to consider it. 50

HIS HONOUR: Yes. I mean, the only comment, Mr Bell - I can see what you're saying and it's - the only comment is whether in terms of three-----

MR BELL: Yes.

HIS HONOUR: I mean, it's going to give rise to a very complex assessment exercise and, as I am sure you appreciate, what sometimes is done in those cases is to make an arbitrary - an informed apportionment of the overall costs that might relate to those things.

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MR BELL: Yes, I understand that, your Honour.

HIS HONOUR: But, I mean you people are better equipped to deal with that that I am, but in other words if this is the way - the best way to achieve it, then I'm happy to make an order in those terms.

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MR BELL: Well, I'm not sure what our learned friend says. I thought in relation to this case it was one in which a deal of the evidence that was advanced was able to be segregated into the different files.

HIS HONOUR: Yes, I can see the point.

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MR BELL: Well, I'll leave it for our learned-----

HIS HONOUR: I mean, having raised the point I'm not pressing it.

MR MacSPORRAN: Your Honour, the difficulty with that approach is that it is hard to make any sort of sensible calculation as to how much additional cost was caused by defending the ones that have - he's been successful on. The reality, as your Honour would appreciate during the hearing was, that the whole thing was conducted very much on a global basis, a global defence, and in those circumstances - and bearing in mind that the applicant has succeeded on the most serious amended charges by and large, in my submission, there shouldn't be an apportionment. It would be-----

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HIS HONOUR: But what, leave it for the assessor?

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MR MacSPORRAN: No, there should be an order that the applicant has his costs of bringing the matter to the Tribunal. The Act contemplates that, ordinarily, the applicant will have his costs-----

HIS HONOUR: Yes, but of course, but I mean that's - I mean, all costs provisions contemplate. The question is how you give effect to it in circumstances such as this.

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MR MacSPORRAN: Yes.

HIS HONOUR: And I mean, it's not at all unusual for, where you have succeeded on some issues but not on others, for that to be - I'm not - I mean, in other words, at the moment I need to be - I can understand what the difficulty is but I'm not persuaded that it's such as to accede to your submission.

MR MacSPORRAN: Well, perhaps, it could be done in the way of some assessment of the additional costs occasioned to the respondent in defending the ones he was successful on.

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HIS HONOUR: Yes.

MR MacSPORRAN: I don't know whether that's a possibility or whether it can be done mathematically but that would be one way of achieving a fair result.

HIS HONOUR: Yes.

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MR BELL: Your Honour, I don't know that the word "additional" will help the taxing officer much.

HIS HONOUR: No, I don't think it will either.

MR BELL: The reason I have done it this way is - I did think about it before coming up here, thinking that in respect of a number that weren't prosecuted - but if he finds that the evidence was necessary for the ones that were won, it's just going to have to-----

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HIS HONOUR: I agree with you. I mean, to me, the choice is either as you suggest or to make an arbitrary apportionment and say that, for example-----

MR BELL: Three-quarters.

HIS HONOUR: -----they're to have two-thirds - pluck a figure out of the hat.

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MR BELL: Understood.

HIS HONOUR: And if that's not agreed, and I'm not suggesting it should be - I'm not suggesting you should agree - if it's not agreed, then even to do that would require some sort of evidence. In other words, if the parties couldn't agree on an apportionment, then there would have to be some sort of

evidence and argument about where the costs went. So I mean, what I'm inclined to do subject to what you both say is make an order in terms of the document that you handed up. of course, it's open to the parties-----

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MR BELL: To discuss-----

HIS HONOUR: -----to agree, and I'll put in a liberty to apply provision-----

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MR BELL: Yes, thank you, your Honour.

HIS HONOUR: -----if people want to come back and work it out once the nature of the problem is clearer.

MR BELL: Yes, thank you, your Honour. Your Honour, there was the other matter relating to appeal. Could I raise that now, please?

HIS HONOUR: Yes, of course.

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MR BELL: I come here, having traversed with the respondent, the possibility of this happening-----

HIS HONOUR: Of course.

MR BELL: -----that which, of course, has now occurred, as a consequence of which I have asked for his instructions as to whether he wants to appeal and he tells me he does. I thought about what should happen and may I hand up an application for each of the members of the Tribunal my short outline only telling you the power and suggested draft order recognising that you have already made an order now-----

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HIS HONOUR: Yes.

MR BELL: -----the recommendation your Honour has made. The thinking was that you may prefer in the meantime to issue a stay.

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HIS HONOUR: Mr Bell, can you tell me what - as you know, the notion of a recommendation flows from the fact that previously the Court had the power and that was it.

MR BELL: Yes.

HIS HONOUR: But I mean who - it's not quite - I haven't analysed it to see who's going to act on the recommendation or does it flow automatically?

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MR BELL: I had Mr Davis look at that to give me the answer and the answer at the end of the discussion wasn't plain but the effect of it, I think, is this: that your Honour's recommendation has the force of an order of the Court.

HIS HONOUR: Yes.

MR BELL: And therefore I think it's sensible to assume that the minute you make that recommendation it will go to the Registrar and the Registrar will make the act - carry out the act, I suspect. I think that would-----

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HIS HONOUR: I'm not inclined to disagree with you.

MR BELL: That would be the way it should happen, I think.

HIS HONOUR: Yes.

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MR BELL: Because, of course, the public benefit comes into play. Here you would be concerned, I know, that having found the unfitness to practice it's not that the Tribunal would wish to see somebody practising who's not fit, however with the balancing of rights, therefore if a person in his position undertook to the Court to prosecute diligently, and we could with the other side make application to the Court for an urgent hearing, you may put in place for a short period a program.

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The program we've suggested may not be as you wish. You may prefer just to make it for a period of two months or a month or something with-----

HIS HONOUR: Well, I mean, I think that - I mean, if there is to be a stay it ought to be - on the terms of diligent prosecution, there should always be an option for the Legal Services Commissioner to come back and seek to have it lifted and as to whether there should be further conditions I'll hear what Mr MacSporran has to say.

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MR BELL: Yes. Well, we've suggested that the regime we had in mind be put in place so that you could at least be comfortable that there's somebody supervising this man in the meantime.

HIS HONOUR: Yes. No, that's an obvious consideration.

MR BELL: And I thought one thing to add to your Honour's thinking is that even though we - he undertakes to prosecute diligently, you may prefer to make a period, an outer limit, like come back in a month or something and tell us how you're going or something like that.

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HIS HONOUR: I would be content, subject to what Mr MacSporran says - I would be intent to have a provision to say that the Legal Services Commissioner could come back at any time-----

MR BELL: Yes, I'm sure-----

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HIS HONOUR: -----if anything arises rather than put a finer time limit.

MR BELL: No submissions to be made against that, your Honour.

HIS HONOUR: Mr MacSporran?

MR MacSPORRAN: Your Honour, there are - it's not clear in the legislation whether, your Honour the Tribunal, has power to order a stay.

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HIS HONOUR: No, I-----

MR MacSPORRAN: It seems to be silent. As you've seen from the outline, it would depend upon some interpretation of the width of the jurisdiction.

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HIS HONOUR: Yes, I know it's a curious - yes.

MR MacSPORRAN: What is clear, though, is that there's a right of appeal to the Court of Appeal provided in section 292.

HIS HONOUR: So that if there is - if there's any question about whether the Tribunal's got it, then the Court of Appeal-----

MR MacSPORRAN: Yes. Well, the Court of Appeal undoubtedly, once it sees that the appeal has power and jurisdiction to order a stay on application, and then of course arguments arise as to why it should.

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HIS HONOUR: Yes.

MR MacSPORRAN: But it can - once it's seized of the appeal it can determine those things reasonably quickly. That's not unheard of. In fact, it's quite a common occurrence where the Court of Appeal is asked to grant a stay.

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HIS HONOUR: Yes, quite.

MR MacSPORRAN: In those circumstances, in my submission, it not being clear at all that this Tribunal has the jurisdiction your Honour should decline to order.

HIS HONOUR: Just answer one other thing for me. Is Mr Bell right about the operation of the recommendation?

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MR MacSPORRAN: Your Honour, I don't have my Act with me but this morning I looked - there is a, as I remember it, a machinery provision in the Act that says that once the recommendation is made it's either the Governor-in-Council goes ahead and puts it in place, or someone does, and I'll just see if I can turn it up - excuse me a moment.

HIS HONOUR: Well, I will just look at Mr Bell's material that he handed up while you're doing that.

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MR MacSPORRAN: Yes. Your Honour, it's section - the one I was thinking of is section 285(3) of the Act:

"If the Tribunal makes an order recommending that the name of an Australian legal practitioner be removed from the local role, the Brisbane Registrar must remove or arrange with another Registrar for the removal of the name from the local role."

It still doesn't stipulate a time-frame but presumably it would be done immediately following your Honour's order.

HIS HONOUR: And who's the Registrar? Is it-----

MR MacSPORRAN: I imagine it's the Registrar of the Supreme Court but I-----

HIS HONOUR: Is that right?

MR BELL: Yes, your Honour.

HIS HONOUR: Yes. All right. Mr Bell, what do you say about the power issue?

MR BELL: Yes, your Honour, the power, frankly your Honour, isn't complicated. If I could take you to section 280-----

HIS HONOUR: I didn't bring mine down.

MR BELL: It's okay, I can read it, your Honour. It's not big. Section 280(2) is the subsection under which you make this order recommending. It says:

"The Tribunal may under this subsection make one or more of the following in a way it considers appropriate."

Those words giving you wide scope.

HIS HONOUR: Yes.

MR BELL: And then 280(6) says:

"Also, the Tribunal may make ancillary orders including an order for payment by the Australian legal practitioner of expenses associated with the order, as assessed, in or under the order or as agreed or any ancillary order."

And then section 432(1) says:

"The Tribunal may do all things necessary or convenient to be done for exercising its jurisdiction."

HIS HONOUR: Yes, right. So what you're saying is that you can make as a condition of the order that it not be put into effect until-----

MR BELL: You could certainly do that and that's why we're saying maybe you would prefer to put a time limit on it and we had to come back to extend it, like for example you might say, "Remove the role after two months" or something, but the way we did it there was-----

HIS HONOUR: Look, I don't know that that's - as I say, subject to what either of you say, I think that position is adequately safeguarded by Mr MacSporran's client having-----

MR BELL: Yes, yes, being able to come in-----

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HIS HONOUR: -----the option, yes.

MR BELL: So, your Honour, and as I say, against myself I thought that you would prefer that there be supervision in the meantime even.

HIS HONOUR: No. Certainly if you hadn't raised that, I certainly wouldn't-----

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MR BELL: Yes. So that order - I can add to that draft order that we proposed, your Honour, an order - sorry - a further paragraph relating to the liberty to apply for the Commissioner to come at any time for any reason before the Tribunal, which I do, and so I would add 5. May I propose "liberty to apply to the Commissioner" - "to the applicant on one day's notice" - two days' notice, your Honour?

HIS HONOUR: Yes.

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MR BELL: "On two days written notice" - so I added that as paragraph number 5 to the draft order.

HIS HONOUR: Yes. I mean, what I am proposing - I put to liberty to apply in general terms.

MR BELL: Yes, your Honour.

HIS HONOUR: I mean, you might want to come back-----

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MR BELL: Yes.

HIS HONOUR: -----in relation to the working out of some aspects of it.

MR BELL: Yes, your Honour.

HIS HONOUR: Now, nothing else?

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MR BELL: No, thank you, your Honour.

MR MacSPORRAN: Your Honour, could I just say one further thing about the costs issue. Your Honour did postulate before the possibility of making an apportionment split up. From my client's point of view that would be preferable. It would save costs of - well, further costs being incurred in trying to sort out the costs issue. If we had something of the order of 75 per cent to the applicant and 25 per cent to the respondent to reflect a fair split up of the costs, that would then be just a mathematical exercise in large part and-----

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HIS HONOUR: Well, I'm sure that that's a much simpler way to do it but you've got to be able to agree on it, really. That's-----

MR MacSPORRAN: Well, unless your Honour ordered that just as a fair distribution of costs on the - the total costs that are incurred by the parties.

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MR BELL: I don't think we want to incur the costs either, your Honour. The point being made by Mr Russell to me is we will immediately speak with Mr Barton and try and work out a better program on this.

HIS HONOUR: Yes.

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MR BELL: And would you-----

HIS HONOUR: Well, if you like, what I can do for the moment is to say costs reserved. If you people can't come up with an agreed regime, then it will have to be dealt with.

MR BELL: Yes, we could put in some written submissions or something, your Honour.

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HIS HONOUR: Yes. The only thing I should say to you that I'm taking leave in the not too distant future so-----

MR BELL: Yes. Well, we'll do this immediately and I'm just thinking about it-----

HIS HONOUR: But I mean, I must say I think the most sensible course by far is if you can agree-----

MR BELL: Yes.

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HIS HONOUR: -----on some percentage distribution.

MR BELL: We will try and do that, your Honour.

HIS HONOUR: Yes. Okay.

MR BELL: So-----

HIS HONOUR: Well, your draft order is now in - yes. Yes, all right. I'll just - there's nothing else on any of these points?

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MR BELL: No, your Honour.

HIS HONOUR: No. Yes, all right. Well, the orders - those are the orders that have been made. Now, we've taken care of - and we've taken care of the costs of the application for a stay and that itself, haven't we?

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MR BELL: Yes, your Honour.

HIS HONOUR: Yes. So there being nothing else we can adjourn.

THE TRIBUNAL ADJOURNED AT 3.08 P.M.