



## Transcript of Proceedings

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State Reporting Bureau  
Date: 7 November, 2005

LEGAL PRACTICE TRIBUNAL

MOYNIHAN J

No BS 9619 of 2004

LEGAL SERVICES COMMISSIONER

Applicant

v.

MICHAEL VINCENT BAKER

Respondent

BRISBANE

..DATE 28/10/2005

ORDER

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The issue which remains for determination in these proceedings is as to costs. The proceedings were commenced by an originating application of the 5th of November 2004. It sought that the respondent (he is referred to as "the practitioner") be found guilty of unsatisfactory professional conduct or professional misconduct in terms of section 280 of the Legal Practice Act 2004 (the Act).

The originating application contained what it described as "particulars of charge". Those particulars commenced by a statement that the Commissioner alleged that "the following charges" constituted professional misconduct or alternatively unsatisfactory professional conduct.

The "following charges" were then organised in terms of individual clients, a specific charge or charges; the specific charges were then particularised.

In the event, the matter proceeded on the basis that a number of specific charges were withdrawn - in some cases replaced by fresh particularised charges. The matter was disposed of on the basis that the applicant succeeded in making out a number of the particularised charges. Although the Commissioner was unsuccessful in making out a number of others the practitioner was unfit to practise.

Against that background, I turn to the question of costs. There is a specific provision in the Act to deal with costs; s.286. Section 286(1) prescribes that a disciplinary body -

and the Tribunal is such a body - must make an order requiring a person who it has found guilty to pay costs including costs of the Commissioner and the complainant "unless the disciplinary body is satisfied exceptional circumstances exist".

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The reference in s.286(1) to "a person found guilty" is to a person found guilty of professional misconduct or unprofessional conduct as the respondent was. This was in respect to a number of specific charges with the overall consequence that he was found to be unfit to practise.

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It is submitted for the practitioner that there ought to be an apportionment of the costs, taking into account two circumstances. First, the Commissioner failed to prove a number of the specific charges. Secondly that the Commissioner was aware, before the hearing commenced, that the charges ultimately withdrawn or found not proven were likely to fail.

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These considerations, it was submitted, constituted exceptional circumstances and justified an approach of apportionment of costs which took into account the Commissioner's success in respect of making out individually particularised charges on the one hand and the practitioner successfully resisting some, and the Commissioner having determined not to pursue others on the other hand.

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Reference was made to the decision of the Full Court of this Court in *Thiess v TCN Channel Nine Pty Ltd* (5) [1994] 1 QdR 156. In that case, there was an apportionment of costs reflecting success or failure on issues which had arisen in the course of the proceedings. To my mind, that decision, while indicating circumstances in which apportionment might be undertaken, is of little assistance here because of the specific provision of s.286 of the Legal Profession Act.

In this case the practitioner was found guilty of unprofessional conduct and professional misconduct and unfit for practice.

Even if I was incorrect in saying that the Commissioner has succeeded in terms of s.286(1) in having the practitioner found guilty, to my mind what has occurred in these proceedings does not constitute exceptional circumstances which would justify departure from the general principle that costs follow the event.

Essentially, that is because, if the matter is approached on the basis of issues, the overall effect of the outcome is that what occurred constituted unprofessional conduct in a number of instances and professional misconduct in others with the cumulative effect that the practitioner was, as was found and reflected in the order of the Tribunal of the 5th of November 2004, guilty of conduct which justified a recommendation that his name be removed from the local roll on the basis of unfitness to practise.

It is true that the practitioner succeeded, or the Commissioner did not succeed, in making out a number of the particularised charges. But overall, the findings made, even in respect of aspects of those charges, were not exculpatory of the practitioner in terms of the effect of his overall conduct.

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It is clear from a reading of the published reasons that the credibility of the practitioner was in issue in a number of respects. The outcome of that issue was, by and large, unfavourable to the practitioner.

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A number of the charges which did not succeed were either in the alternative or in respect of clients concerning whom other charges were made out. In the overall scheme of things, the charges which were not made out were quite a small component of the overall conduct which was relied on to found findings of unprofessional and professional misconduct.

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Section 286 does not provide any guidance as to what may constitute exceptional circumstances. The authorities to which I have been referred by counsel for the practitioner, such as *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148 and the decisions there referred to, and the decision of the Court of Appeal of this Court in *Re Lynch's Bill of Costs* [2001] 1 QdR 267, found the conclusion that it is not possible to lay down in advance guidelines or a definition of what might constitute exceptional circumstances justifying departure from the general rule.

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It is essentially a question of context both in terms of the particular statute and of the circumstances in which it is to be given effect. Ultimately, the findings that were made were sufficient to justify the conduct as being either professional misconduct or unprofessional conduct.

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The particularised charges not made out were essentially a failure of proof or connection in circumstances where the overall conduct of the practitioner was unsatisfactory and did little credit to the profession.

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I am not persuaded that exceptional circumstances exist so as to found the occasion for the exercise of the discretion which is given by section 286(1).

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There is one other matter to be dealt with. The events which gave rise to the charges were strongly contested from the beginning by the practitioner. Before the Legal Services Commissioner became involved there was an exchange of correspondence with the Law Society.

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The circumstances emerged over a period of time and a process and I am not persuaded that there is any justification provided for regarding the Commissioner's persistence with the charges up to the point of withdrawal as constituting a exceptional circumstance in terms of subsection (1).

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Therefore it seems to me that the appropriate order is to  
order that the respondent pay the applicant's Commissioner's  
costs to be assessed on a standard basis.

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