

LEGAL PRACTICE TRIBUNAL

de JERSEY CJ

MR P MURPHY SC  
DR S DANN

No BS1877 of 2006

LEGAL SERVICES COMMISSIONER

Applicant

and

PETER WILLIAM HACKETT

Respondent

BRISBANE

..DATE 12/12/2006

JUDGMENT

THE CHIEF JUSTICE: The respondent is a 42-year-old barrister who has practised actively since the year 1992 in Queensland. He is charged with professional misconduct.

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The charge is that on the 18th of July 2002 he swore a misleading affidavit used in District Court proceedings. The charge is formally amended as sought. The issue arose in an appeal brought in the District Court against the determination of an adjudicator under the Body Corporate and Community Management Act 1997. The respondent was the chair of the management committee of the body corporate of Golden Sands, a unit building at the Gold Coast. The respondent's wife owned one of the units.

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At a meeting held on 15 September 2001 chaired by the respondent a motion was defeated by one vote, the vote cast by a Mr Bilston. The motion concerned common property and would, if passed, have benefited a number of unit owners including the respondent's wife. But it could pass only were there no dissenting vote. There was a subsequent application to the adjudicator by the body corporate which was unsuccessful, and the body corporate then appealed to the District Court. The respondent indemnified the body corporate in respect of costs.

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Mr Bilston in fact voted at the meeting on the 15th of September 2001 in his capacity as nominee of his company. It was the company which owned the unit, Lot 4. Yet the minutes of the meeting recorded Mr Bilston as having voted in his personal capacity. In the proceeding before the adjudicator

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Mr Bilston asserted that he had voted as "nominee for the Don Bilston Family Trust". In the outline the respondent prepared for the purposes of the District Court appeal there was acceptance that Mr Bilston had voted as "nominee of the owner of Lot 4". It was never part of the body corporate appellant's case that Mr Bilston's vote should not have been counted. The body corporate's appeal was based on other grounds, essentially concerning the reasonableness of opposition to the motion.

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In his outline Mr Bilston said that he voted as the "authorised representative" of his company being the owner of Lot 4. That led counsel for the body corporate in the District Court appeal to request the respondent to prepare affidavit material dealing with that aspect, apparently because of a concern whether the appropriate respondent had been joined as the party to the appeal. The respondent to the appeal was Mr Bilston himself.

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The respondent, in turn, enquired of the body corporate management company why the minutes of the 2001 body corporate management meeting referred to Mr Bilston as owner rather than as corporate nominee. In response on the 8th of July 2002 the management company sent the respondent a letter which included a document entitled "information for body corporate roll" and a copy of a document entitled "general meeting quorum calculation". The latter document indicated that the owner of Lot 4 had not appointed a company nominee for the 2001 meeting, and it was that, presumably, which led the writer of

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the letter, Ms Bender, to say in her letter that "If that was  
the case then he (Mr Bilston) shouldn't have voted - very  
odd!!!"

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In the affidavit which the respondent prepared and which forms  
the basis of the present charge the respondent said this:

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"Because of the discrepancy between what Mr Bilston  
swears and the minutes of the annual general meeting held  
on 15 September 2001 I caused the body corporate managers  
(Body Corporate and Community Management Service Pty Ltd)  
to search of (sic) the working papers for the annual  
general meeting held on 15 September 2001 to ascertain  
why the minutes reflect Mr Bilston voting in person and  
not as a company nominee. Exhibit B hereto is a copy of  
the relevant working paper kept in the records of the  
body corporate for that annual general meeting which  
records that no company nominee had been received in  
respect of Lot 4 (the lot owned by Mr Bilston's company).  
As a consequence Mr Bilston's vote should not have been  
recorded at the meeting and the resolution in question  
passed without dissent."

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Exhibit B to that affidavit, as referred to in that passage,  
was the copy document entitled "general meeting quorum  
calculation" which listed Lot 4 in Part B, the listing of  
"corporate owners who have not appointed company nominees".

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Documents in the respondent's possession, however, attached to  
the letter dated 8th July 2002 received from the management  
company in response to the respondent's enquiry plainly  
indicated that the relevant company had nominated Mr Bilston  
for this purpose.

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Those documents were the material entitled, "Information by  
body corporate roll" which identified the company as the  
registered owner of Lot 4 and a document entitled, "Nominee of

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a corporation" under the seal of the relevant company  
identifying Mr Bilston as its nominee.

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Hence the misleading nature of the affidavit, especially  
emerging, of course, from the last sentence of the passage  
just quoted:

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"As a consequence Mr Bilston's vote should not have been  
recorded at the meeting and the resolution in question  
passed without dissent."

But it would have been misleading, even had the passage from  
the affidavit not included that sentence, because of the  
selective presentation of only one of the documents received  
from the management company.

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The respondent, as an officer of the Court, was in a position  
where he should have disclosed all of those documents,  
including, of course, the ones which indicated plainly,  
contrary to the document which was exhibited, that the  
relevant company had made a nomination.

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In an affidavit filed on 8th December 2006 in this proceeding  
the respondent said that he prepared the misleading affidavit,  
"in some haste". He denies any intention to mislead the Court  
or to promote a submission that Mr Bilston's vote should not  
have been counted. He accepts that he should have included  
all of the material received from the management company.

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He says that:

"In hindsight it is inexplicable ... why (he) paraphrased Ms Bender's view at all as there was never any issue before the adjudicator or on the appeal as to Mr Bilston's entitlement to vote at the 2001 annual general meeting."

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As mentioned during Mr Mulholland's submissions it is indeed inexplicable why the respondent would have included that last sentence especially in the passage quoted earlier.

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The applicant Commissioner pursues the matter on the basis there is no suggestion of dishonesty on the part of the respondent, who has been guilty of gross carelessness. When the matter first came on for hearing on the 15th of November this year the Tribunal was dissatisfied with the extent of the respondent's treatment of the circumstances in which he received the material from the management company and subsequently dealt with it. The affidavit filed on the 8th of December 2001 deals more comprehensively with those matters.

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The present application derives from a complaint by Mr Bilston by letter of 25th February 2003. Mr Bilston directed that complaint to the Bar Association of Queensland. The respondent responded to the complaint on the 7th of March 2003. Then on the 12th of November 2004 the Bar Association informed the respondent that its counsel had determined to refer the matter to the applicant Commissioner. Ten days later the applicant Commissioner informed the respondent that he had referred the matter back to the Bar Association so that it might investigate the complaint.

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It was not until the 31st of August 2005 that the Council of the Bar Association resolved to recommend to the applicant that the respondent be charged. The present proceeding was commenced on the 7th of March 2006. On the 11th of August 2006 the applicant confirmed in effect that it would not be pursuing any case that the respondent had intended to mislead the Court.

It is significant in the Tribunal's ultimate disposition of this matter that the respondent has been under a cloud for a prolonged period. The respondent now pleads guilty to the charge and accepts that his conduct constitutes professional misconduct and the applicant seeks an order that the respondent be publicly reprimanded and subjected to a pecuniary penalty.

The applicant also seeks an order that the respondent pay the applicant's costs. The respondent accepts that he should be reprimanded in that way and that a pecuniary penalty should be imposed. As to costs, the respondent has submitted there are exceptional circumstances which mean that he should not have to bear the costs of the applicant. They are essentially the substantial delay in the progressing of the matter to this point and that the applicant has accepted that the respondent was not acting dishonestly.

It remains to mention, as to the respondent's past history, that on the 19th of May 1997 the Committee of the Bar Association of Queensland resolved that charges of

unprofessional conduct were established in relation to the respondent and administered a formal reprimand.

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When the relevant events embraced in that conduct occurred, the respondent had been in practice for approximately two years. The relevant conduct arose from the respondent's misinterpretation of the effect of Section 11 of the Sub-Contractors Charges Act 1974. The respondent conceded to the Committee that his interpretation of the statutory provision had been erroneous.

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Turning to the characterisation of this misconduct, it was plainly professional misconduct, though not characterised by dishonesty. It was a case of gross carelessness or sloppiness, dereliction which has no place in the preparation of any affidavit, but especially one to be sworn by an officer of the Court. That is was prepared in haste is in the end irrelevant.

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Yet this misconduct nevertheless falls well short, in gravity, of that recently dealt with by the Tribunal in the case of Mr Mullins, where the errant practitioner was fined the sum of \$20,000. Another distinguishing feature of the present case is that there was no financial loss suffered by any party. There will, in this case, be a finding that the charge as amended is established and the respondent has consequently been guilty of professional misconduct.

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The appropriate response from the Tribunal is the administration of a public reprimand and the imposition of a pecuniary penalty. The applicant has suggested that penalty be of the order of \$3,000 to \$4,000. Because of the distinction between this case and the decision in Mullins, the fine imposed here should be substantially less than \$20,000.

It should, nevertheless, be an amount which reflects the Tribunal's view of the completely unsatisfactory character of this misconduct. The amount selected here should however also reflect the burden the respondent has borne over some years because of the delay, almost four years of it, in the investigation and prosecution of the complaint.

The appropriate amount is \$5,000. There will be an order that the respondent pay to the Legal Practitioner Interest on Trust Accounts Fund a pecuniary penalty in the sum of \$5,000 by-----

MR MULHOLLAND: One month, your Honour.

THE CHIEF JUSTICE: -----by the 12th of January 2007. The Tribunal administers a public reprimand of the respondent in respect of these matters.

There is nothing sufficiently exceptional about the case to warrant excusing the respondent from the prima facie statutory provision under section 286(1) of the Legal Profession Act 2004 that he should bear the applicant's costs.

The respondent may have been in a stronger position in that regard had it not been necessary for the Tribunal to require the filing of more comprehensive material from him, which led to the affidavit filed on the 8th of December.

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The respondent has relied on delay and the amendment of the charge determined upon in August this year, but such features will not unusually arise. There will accordingly be an order that the respondent pay the applicant's costs of the application, fixed in the amount of \$2,000.

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