

CITATION: *Legal Services Commissioner v Puryer (No 2)*
[2013] QCAT407

PARTIES: Legal Services Commissioner
(Applicant)
v
Terrance Robert Puryer
(Respondent)

APPLICATION NUMBER: LPD011-09

MATTER TYPE: Occupational regulation matters

HEARING DATE: 22 April 2013

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**

DELIVERED ON: 30 July 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Legal Services Commissioner's costs of and incidental to the second and third charges be assessed by Graham Robinson.**
- 2. Order 4 of the orders made by the Tribunal on 2 February 2012 be amended to read:**
It is further ordered that the respondent pay the applicant's costs of and incidental to the second and third charges as assessed by Mr Graham Robinson, costs assessor.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – COSTS – COSTS ASSESSOR – where Tribunal found respondent guilty of professional misconduct – where Tribunal ordered that the respondent's name be removed from the roll of practitioners – where Tribunal ordered that the respondent pay the Legal Service Commissioner's costs – where Tribunal ordered parties to file and exchange submissions on costs – where respondent appealed decision – where Court of

Appeal dismissed the respondent's appeal – where s 107 of the *Queensland Civil and Administrative Tribunal Act 2009* provides that the Tribunal may make an order that costs be assessed – where Tribunal directed parties to file and exchange a notice nominating a panel of not less than two costs assessors – where Tribunal has unqualified power to nominate costs assessor – whether costs assessor nominated by parties appropriate

Legal Profession Act 2007 (Qld), s 462(1), s 462(5)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 62, s 100, s 107

Queensland Civil and Administrative Tribunal Rules 2009 (Qld), r 87
Uniform Civil Procedure Rules 1999 (Qld), r 743L

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Ms P Prasad on behalf of the Legal Services Commissioner.

RESPONDENT: Mr T R Puryer on his own behalf.

REASONS FOR DECISION

- [1] Mr Puryer was the subject of legal disciplinary proceedings brought by the Commissioner in 2009 which were heard and determined by this Tribunal in 2011/12. In a decision delivered, with reasons, on 2 February 2012 the Tribunal found that two of three disciplinary charges brought against Mr Puryer were established, and ordered that his name be removed from the roll.
- [2] It was also ordered that Mr Puryer pay the Commissioner's costs of and incidental to those two charges and that, for the purpose of determining those costs, the parties exchange submissions about them under a timetable contained in the order.
- [3] Mr Puryer subsequently appealed the Tribunal's decision. The Court of Appeal refused that appeal, with costs, on 2 November 2012.¹
- [4] The costs of the proceedings in QCAT remain to be resolved. Although the QCAT Act² turns its face against costs in proceedings before the

¹ *Puryer v Legal Services Commissioner* [2012] QCA 300.

² *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

Tribunal³ the *Legal Profession Act 2007* (Qld) (LPA) (under which the proceedings against Mr Puryer were brought) requires that a costs order *must* be made unless the disciplinary body (here, QCAT) is satisfied that exceptional circumstances exist. In its original decision concerning the charges against Mr Puryer the Tribunal held that no exceptional circumstances existed in his case, and proceeded to make the costs order mentioned earlier.

- [5] That order was framed in terms reflecting s 107(1) which requires that the Tribunal must fix costs, if possible. It directed that the Commissioner file and serve written submissions about costs, and an affidavit showing their method of calculation, within 28 days; and, that Mr Puryer respond with any submissions and affidavits in reply within 28 days thereafter.
- [6] The Commissioner obtained what is called a '*short form assessment*' from a costs assessor, Mr Kerr, and an affidavit from him. Mr Puryer responded, not by filing submissions about the costs assessment but, rather, by demanding that the Commissioner produce its file to him for inspection. Later, he asked the Commissioner to produce its file for inspection by another firm of costs assessors, Hickey & Garrett but, also, that when the file had been returned by that firm to the Commissioner, he be '*... afforded the opportunity to inspect the file*'.
- [7] On 1 June 2012 the Tribunal wrote to Mr Puryer seeking his submissions in compliance with the order made by the Tribunal. He replied on 8 June 2012 by copying, to QCAT, his letter of that date to the Commissioner asking, again, that it produce its file for inspection by Hickey & Garrett. In the last paragraph of that letter he said: '*I may also wish to inspect the file but I undertake to do so under separate arrangements with you*'.
- [8] The matter lay in abeyance pending the determination of Mr Puryer's appeal to the Court of Appeal.
- [9] Then, on a date earlier this year which is unclear Mr Puryer wrote again to the Commissioner asking that it produce its file to another costs assessor, Hartwell's Legal Cost Consultants – and, again, that '*... [o]nce Mr Stephen Hartwell has returned the file that I be afforded the opportunity to inspect the file*'.
- [10] Further correspondence ensued. Eventually, I directed the matter be relisted for a directions hearing on 22 April 2013. At that hearing Mr Puryer was asked whether or not he disagreed with the short form cost assessment previously obtained by the Commissioner. He said that because he had not seen the file and it was his wish to do so; and, that he thought the most expeditious way to proceed would be if the Commissioner's file could be sent to the costs assessor latterly nominated by him (Mr Hartwell) who would, in effect, review the assessment obtained by the Commissioner and advise Mr Puryer whether or not it should be accepted.

³ QCAT Act s 100.

- [11] Shortly before the hearing on 22 April 2013 Mr Puryer filed an application seeking an order that the Tribunal '*... refuse to assess and fix the costs of the applicant*' or, in the alternative, that it produce its file to Mr Hartwell for independent assessment '*... AND that I be afforded the opportunity to examine and take a copy of the documents on the file*'.
- [12] That application reveals a change in Mr Puryer's position from that disclosed in his correspondence with the Commissioner last year: in particular, he no longer says that he may wish to see the file after a costs assessor nominated by him has examined it and, rather, specifically seeks an order to that effect.
- [13] In oral submissions at the hearing on 22 April Mr Puryer took yet another position: he argued for an order, firstly, that the Commissioner's file be delivered to an assessor nominated by him for assessment and, if that assessment did not agree with the one already obtained by the Commissioner, then the whole question of costs might be referred to another assessor, to be chosen by a panel nominated by the parties.
- [14] The Commissioner's position was that if QCAT could not itself determine a figure for costs, then the Tribunal should appoint an assessor for that purpose. I reserved my decision on these matters but, in the interim, ordered that the parties file and exchange a notice nominating a panel of not less than two costs assessors within 14 days. Each did so.
- [15] Firstly although his written application seeks an order that QCAT '*refuse*' to assess and fix costs and, also that there should be '*... no order as to costs*' no cogent written or oral submissions were made in support of that application. Indeed, none could be. The Commissioner's right to seek and obtain a costs order arises under s 462(1) of the LPA. The Tribunal ordered costs against Mr Puryer in early 2012. The Court of Appeal did not interfere with that order. On any view, the Commissioner is entitled to costs and the only question, now, is the proper way to measure them.
- [16] It is appropriate to deal, secondly, with Mr Puryer's submission that he be allowed to inspect the Commissioner's file. He relies upon s 62 of the QCAT Act which allows the Tribunal to give a direction requiring a party to produce a document. The only argument raised by Mr Puryer in support of his contention that he should be allowed to personally inspect the Commissioner's file appears to be that his views should be taken into account by any costs assessor attempting to assess the Commissioner's costs, but he is unable to advance an informed view unless he has seen the file itself.
- [17] The argument ignores the nature of costs assessment and the role of costs assessors. They are appointed under r 743L of the *Uniform Civil Procedure Rules 1999* (UCPR) and, under Chapter 17A Part 5 of the UCPR, must have satisfied the Principal Registrar that they have the necessary experience and qualifications

- [18] If I understand Mr Puryer's submissions correctly they are based upon a proposition which is both superfluous to the exercise of costs assessment and, indeed, inimical to the principle that the exercise of costs assessment should be undertaken with a high degree of independence, by an experienced and registered costs assessor. His application to be allowed to inspect the Commissioner's file must, then, be refused.
- [19] Under s 462(5) of the LPA, an order for costs in disciplinary proceedings may be for a stated amount or, if for an unstated amount, state the basis upon which the amount is to be decided.
- [20] Under the QCAT Act if the Tribunal cannot fix costs it may order that they be assessed.⁴ In light of the size of the Tribunal file and the complexity of the matter – and, the fact that Mr Puryer has made it clear he is not prepared to accept the short form assessment already obtained by the Commissioner – an order of that kind seems to me to be appropriate. There is no apparent benefit or advantage in the course suggested by Mr Puryer during oral submissions – that an assessor nominated by him also conduct a short form assessment and, if that assessment does not accord with the one already obtained by the Commissioner, a third assessor be asked to undertake the same exercise.
- [21] Under r 87 of the QCAT Rules costs can be assessed by an assessor appointed by the Tribunal. That, in view of the impasse the parties have reached here, is obviously the sensible course. The Commissioner nominates Mr Kerr, and Mr Graham Robinson. Mr Puryer nominates, again, Mr Hartwell and Mr Garrett and, also, Mr Skuse who is a solicitor and costs assessor practicing at Mudgeeraba. All have the necessary appointment under the UCPR and, by implication, competence and experience to undertake the task.
- [22] It is disappointing (but unsurprising, in light of the history of this matter) that the parties have been unable, themselves, to settle on one of these duly qualified persons. The Tribunal's power to nominate a costs assessor is unqualified and I have no reason to doubt the competence of, or distinguish between, any of the five names advanced. Three of them have, however, already been put forward by the parties and I am inclined to look to choose one whose name has not previously been advanced. Mr Robinson is a barrister who has specialised in costs matters for some decades now, and I am happy to accept him as an appropriate choice in this instance.
- [23] It will be ordered that the Commissioner's costs of and incidental to the second and third charges be assessed by Mr Robinson. For the sake of clarity it will be also ordered that order 4 of the orders made by the Tribunal on 2 February 2012 be amended so that it reasons:

⁴ QCAT Act s 107(2),(3).

It is further ordered that the respondent pay the applicant's costs of and incidental to the second and third charges as assessed by Mr Graham Robinson, costs assessor.