

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Scott (No 2)* [2009] LPT 9

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
GARRY WAYNE SCOTT
(respondent)

FILE NO: 3033 of 2007

PROCEEDING: Costs Application

ORIGINATING COURT: Legal Practice Tribunal

DELIVERED ON: 29 April 2009

DELIVERED AT: Brisbane

HEARING DATE: 27 March 2009

TRIBUNAL: Fryberg J assisted by Mr M Woods and Dr M Steinberg

ORDER: **1. The respondent pay the applicant's costs to the extent to which they were incurred in relation to matters upon which the application was successful;**
2. Such costs be determined as if incurred in a Supreme Court trial and assessed on the standard basis.

CATCHWORDS: Profession and trades – Lawyers – Complaints and discipline – Disciplinary proceedings – Queensland – Proceeding in tribunal – Practitioner found guilty of professional misconduct and unprofessional conduct – Costs payable to Commissioner
Legal Profession Act 2007 (Qld) s 462
Baker v Legal Services Commissioner [\[2006\] QCA 145](#), applied
A-G (Qld) v Francis [\[2008\] QCA 243](#), referred to
Legal Services Commissioner v Scott [\[2009\] LPT 7](#), related

COUNSEL: Applicant: B W Farr SC
Respondent: R S Ashton

SOLICITORS: Applicant: Deacons Lawyers
Respondent: Trilby Misso

- [1] **FRYBERG J:** The parties have made submissions in writing regarding costs pursuant to leave granted when judgment was delivered by the Tribunal on 27 March 2009.
- [2] The Commissioner has submitted that because Mr Scott has been found guilty of unprofessional conduct on two occasions and professional misconduct on two other occasions, and because there are no exceptional circumstances in the case, the Tribunal is obliged by s 462 of the *Legal Profession Act 2007* to order costs in his favour. He has made no alternative submission regarding the proper exercise of any discretion.
- [3] Mr Scott has submitted that there is a proper basis for an order for costs in his favour; and that in the light of the other orders which have been made, the imposition of the costs order would result in a very heavy impost which is neither necessary nor reasonable in the circumstances.
- [4] Section 462 provides:
- “(1) A disciplinary body must make an order requiring a person whom it has found guilty to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.
- ...
- (4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that –
- (a) the Australian legal practitioner or law practice employee is not guilty; and
- (b) the body considers that special circumstances warrant the making of the order.
- ...
- (7) In this section –
guilty means guilty of unsatisfactory professional conduct or professional misconduct, or of misconduct in relation to a relevant practice, as mentioned in section 456(1) or 458(1).”
- [5] The application was filed on 10 April 2007. It related to events which occurred between 1999 and 2004, most of them before the *Legal Profession Act 2004* came into force. The evidence does not disclose when a complaint was made to the Commissioner. The application contained what were apparently intended to be eight charges which were particularised over 17 pages. A large number of affidavits were filed in support of the application. Mr Scott contested the application and filed affidavits in support of his position.
- [6] The first charge was headed “Misleading the Federal Court of Australia and others”. It related to representations in documents filed in that Court.¹ All but one of the allegations were admitted. The allegation not admitted was that the representations “were intended to mislead members of the AGS [*sic*]”.

¹ The circumstances are more fully set out in my reasons for judgment in [2009] LPT 007.

- [7] The second charge was headed “Acting for Theresa Tate in conflict with his duties to former clients”, a heading which sufficiently describes its nature. That is also true of the third charge, headed “Acting for Theresa Tate in proceedings in which he had reason to believe he was likely to be a witness”. The fourth, headed “Misleading the Queensland Law Society -- ceasing to act for Tate”, contained an assertion that information provided by Mr Scott to the Society was misleading and deceptive. Mr Scott did not admit any of these charges.
- [8] The fifth charge was headed “Misuse of privileged and/or confidential information”. It alleged that Mr Scott provided Ms Tate with five classes of such information. He did not admit providing any information to Tate.
- [9] The sixth charge was headed “Misleading Clewett Corser & Drummond -- preservation of client privilege and confidentiality”. It alleged that a statement in a letter written by Mr Scott to that firm was misleading and deceptive. That was not admitted by Mr Scott.
- [10] The seventh charge alleged that Mr Scott procured Tate and her partner Mr Moore to establish and maintain a website to which he posted material of an unprofessional character, for the purposes of recovering legal fees and disbursements claimed by his firm. The eighth, headed “Misleading the Queensland Law Society -- www.asglies.com”, alleged that he misled the Society regarding his procurement or encouragement of Tate and Moore to set up the website and regarding the fact that he substantially drafted or assisted to settle the material posted to the website. Mr Scott did not admit these allegations.
- [11] When the application came on for hearing in August 2008 the Commissioner sought and was granted leave to file an amended application. The main amendments were the deletion of the third charge and a major scaling back of the allegations relied on in support of the second. In charge six an alternative allegation of encouragement was added to the charge of procurement. At the outset Mr Scott successfully applied for the sixth charge to be struck out. That left in substance five of the original charges and one greatly scaled back charge. In two of those five, further particulars were ordered.
- [12] The Commissioner then opened his case. In the course of the opening a number of deficiencies in his case were identified and counsel undertook to examine these as soon as possible. Five witnesses were required by Mr Scott for cross-examination. The first witness was still under cross-examination when the Tribunal adjourned for the day. Counsel expected cross-examination to continue for some time.
- [13] When the Tribunal resumed the next day, counsel for the Commissioner informed it that following discussions between the parties, an amended application would be prepared and filed, no further evidence would be called and the matter would proceed by way of a plea of guilty to the amended charges. The parties sought the adjournment of the application until the following day to enable this to be done. That adjournment was granted.
- [14] On the third day the Commissioner sought leave to file and serve the amended application and leave was granted. As amended the application contained only four charges. In the first (misleading the Federal Court) the former allegation of

intention to mislead members of ASG² was withdrawn. In the second (misuse of privilege and/or confidential information) the classes of information the subject of the charge were reduced from five to two. In the third (maintaining the asglies website) the allegation that Mr Scott procured the establishment and maintenance of the website was withdrawn, leaving only the allegation (first made only two days earlier) of encouraging those activities; and an allegation that he did so for the purpose of recovering his fees and disbursements was also withdrawn. In the fourth (misleading the Queensland Law Society regarding that website) corresponding amendments were made and an allegation that Mr Scott substantially drafted or assisted in settling material on the website was also withdrawn.

- [15] In consequence the ambit of the evidence was reduced. I have set out in my earlier judgment the evidence which was ultimately relied on.³
- [16] I reject Mr Scott's submission that there is a proper basis for an order for costs in his favour. The power to make such an order depends upon a finding of not guilty. No such finding has been made.
- [17] Section 462(1) requires the Tribunal in unexceptional circumstances to make an order requiring the guilty person to pay costs. It does not specify the amount of costs which must be ordered nor the basis on which the amount must be decided. Those matters are left to the discretion of the Tribunal: s 462(5). Nor does the section identify in respect of what the costs must be ordered. However in *Baker v Legal Services Commissioner*,⁴ McPherson JA, with whom Jerrard JA and Douglas J agreed, wrote:

“In my view ... the criterion adopted in s 286(1) is whether the practitioner has been found guilty of one or more of the forms of misconduct specified in s 286(7). If he has, then an order requiring him to pay costs must be made against him unless the Tribunal is satisfied that ‘exceptional circumstances’ exist. It is true that s 286(1) refers simply to ‘costs’ and not to all the costs of the proceedings; but the latter is I consider its primary meaning in this context. Section 286(1) is not designed to confer or preserve the broad discretion over costs commonly found in statutory provisions conferring power to award costs. If it had been intended to do so, it could and would have been expressed to that effect. On the contrary, the mandatory rule imposed by s 286(1) is designed to follow unless the Tribunal is satisfied that exceptional circumstances exist that call for some other order to be made, either generally or in terms of an amount under s 286(5)(a) or (b) or against the Commissioner under s 286(4).”⁵

- [18] That passage was technically obiter dictum. Moreover it is not completely clear what his Honour meant by “its primary meaning”, nor what other meanings might be available. It is unlikely that this passage represents the last word of the Court of Appeal on this question. The section could quite naturally be read in such a way

² For more detail see *Legal Practice Commissioner v Scott* [2009] LPT 7 at paras [14] to [27].

³ *Ibid* at para [2].

⁴ [2006] QCA 145.

⁵ *Ibid*, at para [56].

that “costs” did not cover costs incurred in relation to charges not proceeded with and, perhaps, charges substantially transformed at a late stage of proceedings. Nonetheless, it covers the present case and I do not consider that, sitting as the Tribunal, I should not apply it.

- [19] The Act does not identify what is meant by “exceptional”. The Commissioner relied on a passage from *Attorney-General for the State of Queensland v Francis*:⁶

“The issue of what are exceptional circumstances in a particular case is one that depends on judicial determination. It is fruitless to attempt to define what exceptional circumstances might be but a practical working approach to it is to be found in the following passage from *R v Kelly (Edward)* [2000] QB 198 at 208, where Lord Bingham of Cornhill CJ had to construe the term in a statutory context. He said:

‘We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered’.”⁷

Although that was said in relation to different legislation, I am prepared to apply it in the present context.

- [20] In this case, at a very late stage, the Commissioner withdrew three of the eight charges, and a fourth was struck out. Of the four charges which remained, the allegation of intentional misleading was withdrawn from the first; the nature and amount of information misused was substantially reduced in the second; in the third, the allegation of procurement was replaced by an allegation of encouragement and the allegation that Mr Scott acted for the purpose of recovering fees and disbursements was withdrawn; and in the last, reference to procurement was withdrawn and the allegation relating to drafting or settling material was replaced by one relating to reviewing it.

- [21] No evidence was placed before me which would enable me to make an evidence-based finding about whether such circumstances form an ordinary part of proceedings in the Tribunal. My own experience in the Tribunal is too limited for me to take judicial notice of the frequency of any such circumstances. However it is I think reasonable for me to apply a presumption of regularity. I presume that a change of tack on the part of the Commissioner of the nature and magnitude as occurred in this case is an extraordinary event in proceedings in the Tribunal, and is not something which “is regularly, or routinely, or normally encountered”.⁸ In my judgment the present proceedings fall within the exception to s 462(1).

- [22] That does not mean that no order for costs should be made against Mr Scott. It simply means that the Tribunal is not bound to order him to pay all of the Commissioner's costs of the whole proceedings. In my judgment he should pay the

⁶ [2008] QCA 243.

⁷ *Ibid*, at para [92].

⁸ *Ibid*.

Commissioner's costs to the extent that they were incurred in relation to matters upon which the application was successful. That would include the costs of preparing and filing the further amended application upon which the case ultimately proceeded, costs relating to the evidence used on that amended application, costs of the third day of the hearing and costs of the supplementary submissions sought by and made to the Tribunal. Those costs should be assessed as if incurred for a Supreme Court trial on the standard basis.

Order

[23] The orders of the Tribunal will be:

1. Order that the respondent pay the applicant's costs to the extent to which they were incurred in relation to matters upon which the application was successful.
2. Order that such costs be determined as if incurred for a Supreme Court trial and assessed on the standard basis.