SUPREME COURT OF QUEENSLAND

CITATION:	*Fradgley & Anor v Property Agents and Motor Dealers Tribunal* [2003] QSC 107
PARTIES:	**JOHN WILLIAM FRADGLEY** (first applicant) **and** **GEOFFREY STEPHEN SMITH** (second applicant) **v** **PROPERTY AGENTS AND MOTOR DEALERS TRIBUNAL** (respondent)
FILE NO/S:	SC No 4497 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2003
JUDGE:	Mackenzie J
ORDER:	**Application dismissed** **No order as to costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – POWERS AND DISCRETIONS OF COURT – DECLARATORY AND INJUNCTIVE RELIEF – where application before Tribunal for contravention of *Auctioneers and Agents Act* – where applicants not respondents in those proceedings – where Tribunal made statements and findings against law firm of which applicants were partners – where statements and findings had adverse effect on applicants and reputations – where no opportunity given to comment or reply prior to publication – where applicants would have brought evidence refuting the findings – where Tribunal exercised adjudicative and judicial function not inquisitorial function – where applicants sought a judicial declaration that there had been a denial of natural justice – whether applicants had a right to have allegations put to them for comment before conclusively published – whether denial of natural justice *Defamation Act* 1889 (Qld), s 16

Judicial Review Act 1991 (Qld), s 43
Property Agents and Motor Dealers Act 2000 (Qld), s 448, s 451, s 466, s 508, s 512, s 518, s 533, s 534, s 536, s 540

Ainsworth & Anor v Criminal Justice Commission (1991-2) 175 CLR 564, applied
British American Tobacco Australia Services Ltd v Cowell [2002] VSCA 197, distinguished
Flower v Hart (a firm) v White Industries (Qld) Pty Ltd (1999) 87 FCR 134, distinguished
Kioa v West (1985) 159 CLR 550, applied
Queensland Police Credit Union v Criminal Justice Commission (2000) 1 Qd R 626, cited
Re: Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 84, cited
Stead v State Government Insurance Commission (1986) 161 CLR 141, cited

COUNSEL: W Sofronoff QC, with him D Rangiah, for the applicant
S McLeod for the respondent

SOLICITORS: Bell Legal Group for the applicant
Crown Law for the respondent

[1] Section 43(2)(b) of the *Judicial Review Act* 1991 (Qld) permits an application for a declaration to be made by way of application for review. The present application invokes that procedure for the purpose of obtaining a declaration that the rules of natural justice were not observed when the Property Agents and Motor Dealers Tribunal made what are described as statements and findings adverse to the applicants as former partners of Bells Solicitors in its reasons for decision in proceedings between Craig and Fiona Gordon as applicants and National Asset Planning Corporation Pty Ltd (NAPC) and Christopher Bilborough as respondents. The Tribunal did not make submissions except as to costs and, at my invitation, as to the characterisation of the function performed by the Tribunal.

[2] The application before the Tribunal was for payment of a sum from the Claim Fund under the *Property Agents and Motor Dealers Act* 2000 (Qld) in consequence of alleged contraventions of the then repealed *Auctioneers and Agents Act* 1971 (Qld). The Tribunal is established under s 448 of the Act and was exercising its jurisdiction to hear and decide a claim other than a minor claim against the fund at the relevant time. Section 466(1) gives to individual members the same protection and immunity in the performance of the member's duties as a member as a Supreme Court judge has in carrying out the function of a judge. The Tribunal has power pursuant to s 451 to do all things necessary or convenient to be done for or in relation to exercising its jurisdiction.

[3] Section 508(1) provides that the procedure for a proceeding is at the discretion of the Tribunal, subject to the Act and the rules of natural justice. Section 508(3) provides that the Tribunal is not bound by the rules of evidence but may inform itself in any way it considers appropriate. Right of audience is governed by s 518. An entitlement to appear is given to, *inter alios*, a person to whom the Tribunal gives leave to appear. The Tribunal is a statutory tribunal with adjudicative functions and has no function of determining matters beyond those in respect of

which it is given jurisdiction under the Act. There is a right to appeal to the District Court on a question of law (s 540).

[4] The hearing before the Tribunal was conducted on the basis of the statements of witnesses, written submissions and other documents. No party was required for cross-examination. Neither Bells Solicitors nor its former members, including the applicants, were parties to the proceeding. Nor were they invited to appear before the Tribunal or to respond to any allegation made against them or to any possible adverse findings which the Tribunal proposed to make.

[5] The application had its origin in a two-tier real estate marketing transaction. The Tribunal found in favour of the applicants, being satisfied that NAPC had contravened the Act and that the second respondent as its sole director was jointly and severally liable with NAPC to compensate the Fund in respect of payments to be made from it to Mr and Mrs Gordon.

[6] After making the necessary findings to award payment of the sum sought by Mr and Mrs Gordon from the Fund the decision proceeded to deal with "other matters". It is this section which has led to the present proceedings. The paragraphs of the findings of the Tribunal which have caused particular concern to the applicants are the following:

> "73. It is clear from the evidence that NAPC and Coral Reef were part of an elaborate marketing network which included Investlend, Mr Yarwood, Bells Solicitors and possibly the Bank of Melbourne where lucrative undisclosed commissions were being obtained by the marketeers at the expense of people such as the Gordons.
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> …
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> 77. The Tribunal notes that Mr Yarwood's initials are on the Joint Venture for Development and Marketing agreement between Coral Reef and Silvergrove which was drawn up by Bells Solicitors. The Tribunal also notes that, according to the company searches, Bells Solicitors were the solicitors for both NAPC and Coral Reef.
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> 78. For Mr Yarwood and Bells Solicitors to act as solicitors for the Gordons and, in particular, to advise them that Investlend and NAPC were of good repute without disclosing the relationship appears, in the opinion of the Tribunal, highly unethical.
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> 79. The Tribunal accepts the Gordons' evidence that Mr Yarwood, while he purported to act on their behalf, repeated the statements of Mr Quinlivan that the bank would never loan them any more than the property was worth and that the Bank of Melbourne would do a valuation. These are the representations which the Tribunal has found to be false and misleading concerning the town house. The Tribunal considers that Bells Solicitors carefully worded disclaimer letter of 7 April 1997 about not being qualified to advise on

commercial or financial aspects of this transaction may not excuse their behaviour in relation to the Gordons.

80. The Tribunal considers that the behaviour of Mr Yarwood and Bells Solicitors in this matter should be referred to the Queensland Law Society for investigation and to give them an opportunity to be heard."

[7] There is no specific reference to either of the applicants but Bells Solicitors is referred to as well as an employed solicitor of that firm at the time, Mr Yarwood, who had been the solicitor involved in the particular transaction involving Mr and Mrs Gordon.

[8] The present applicants were members of Bells Solicitors at the material time. Subsequently, after retirements of other partners from that firm it merged with another firm and the amalgamation operated under the name Steindl Bell. Since then, that firm has demerged and the applicants are now partners in Bell Legal Group. Bells Solicitors had been in business since 1955 on the Gold Coast. It is deposed that it is well known in legal and business circles and in the general community that the applicants were partners in Bells Solicitors. It is also deposed that prior to the opinions being expressed in the reasons for decision of the Tribunal neither of the applicants had been accused of any professional misconduct. It is deposed that the reputations of the applicants have been severely damaged by the statements and findings of the Tribunal and the ensuing publicity. A number of clients who are aware of the association of the applicants with Bells Solicitors have expressed concern about the respondent's statements and findings as have people at social occasions. There is also evidence that a prospective employee was actively discouraged from joining Steindl Bell by reference to the adverse publicity.

[9] The two applicants first became aware of the allegations against Bells Solicitors and the reasons for the decision when a front page article about the decision was published on 7 March 2002 in the Gold Coast Bulletin. Following that, Mr Smith sought further information from the Queensland Law Society (QLS) and was told that the QLS would be writing to the former partners of Bells Solicitors that day seeking an explanation in relation to the findings of the respondent. A response was promptly made by the applicants to QLS.

[10] The explanation given appears in full in Ex GSS4 to the affidavit of Mr Smith. It is too lengthy to reproduce in full. However what follows is a summary of it.

[11] Bells Solicitors' connection with the particular scheme began when Mr Smith was contacted by an accountant in Sydney who acted for Coral Reef and NAPC. The accountant had come to the Gold Coast expecting to confer with another lawyer but due to a misunderstanding about dates, the solicitor was unavailable. He requested assistance in setting up unit trust deeds and Mr Yarwood was assigned to that task. In addition to the documents relating to the unit trust scheme, a pro forma document was drafted to enable NAPC to secure its negotiation fee. No evidence could be found that Bells Solicitors had subsequently been involved in the execution of the joint venture for development and marketing agreement referred to in para 77 and earlier paragraphs of the Tribunal's reasons.

[12] This initial contact with the accountant led to corporate work for the companies, such as employment and taxation matters, being referred to the firm. Mr Smith believed that there were at least three other firms which also received referrals of this kind. Mr Yarwood began to receive referrals to act in cases where people who had decided to purchase a property and who wished to have legal advice were referred by NAPC or Investland for that purpose. Mr Smith believed there was a panel of about six firms on the Gold Coast to which such referrals were made. Mr Yarwood was instructed to act in the transaction concerning the Gordons.

[13] Mr Yarwood ceased working at Bells Solicitors in April 1998. He took the majority of his files with him to his new employment and Bells Solicitors did not seek to retain the kind of work done by him. However the firm continued to get corporate work for NAPC and Coral Reef. Until publication of the Tribunal's reasons, the applicants were unaware that the pro forma document prepared by Mr Yarwood had been used, completed and executed by the developer.

[14] Addressing passages quoted above from the decision, the applicants denied that they were part of an "elaborate marketing scheme". They said they were not aware of the joint venture for development and marketing at the time of the Gordon transaction. Mr Yarwood's initials were on the document only because they had been placed there as part of the process of producing the pro forma document.

[15] Reference was made to a policy included in the firm's office manual of informing clients of the source of the referral and the possibility of conflicts of interest. The finding that there had been a "carefully worded disclaimer" was refuted on the basis that the records showed that Mr and Mrs Gordon had been told verbally more than once of the need to get independent advice on tax and other financial aspects of the transaction because the firm was not qualified to give such advice.

[16] That was essentially the information placed before the QLS. No proceedings have been instituted against either of the applicants in the 12 months or so that have passed since the reply was made. Other articles referring to and commenting on the decision followed in the Gold Coast Bulletin and the Courier Mail in the period after the decision, and even until recently have been published from time to time.

[17] The applicants wrote to the Tribunal expressing concern over the terms of the findings and received a letter of 30 April 2002 in which the Secretary of the Tribunal said the following:

> "The Tribunal is aware that the *Property Agents and Motor Dealers Act 2000* required it to observe the rules of natural justice. For this reason, you will have noted the very careful wording of the paragraphs of the reasons for decision to which you refer and the fact that findings were not made by the Tribunal in relation to Mr Yarwood or your client's then firm of Bells Solicitors.
>
> The Tribunal has no jurisdiction to hear discipline matters against solicitors and for that reason it referred the matter to the Queensland Law Society which does have an appropriate jurisdiction to conduct such hearings.
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> For these reasons the Tribunal said:

> "The Tribunal considers that the behaviour of Mr Yarwood and Bells Solicitors in this matter should be referred to the Queensland Law Society for investigation and to give them an opportunity to be heard".
>
> The Tribunal has no control over what the media might publish in relation to its decisions and it is not appropriate for the Tribunal to publish a media release as you suggest.
>
> What action you care to take in relation to what was published in the media is a matter for your clients. The Tribunal does not intend comment further in relation to its published decision."

[18] It was submitted on behalf of the applicants that if the Tribunal had a relevant concern about the conduct of any person in connection with the transaction then before the Tribunal it could have accorded natural justice by using the power (s 512(1)(b)) to order that the person be joined as a party to the proceeding if the Tribunal considered that the person's interests were affected by the proceeding. Alternatively, there was power to order that a person be joined as a party to the proceeding if the Tribunal considered for another reason it was desirable that the person be joined as a party (s 512(c)). I have reservations whether it would have been appropriate to follow either of those courses in this case, since what is complained of is that the Tribunal, in the passages of the reasons for judgment quoted, went beyond what was necessary to decide the application before it by referring to its perception of the conduct of the firm of solicitors collectively by extrapolation from the perceived conduct of one employed solicitor. In those circumstances, making the partners a party seems inappropriate.

[19] The intention of the Tribunal appears at least to have been to bring to the notice of the QLS the Tribunal's opinion of the propriety of the kind of conduct it believed had been engaged in during the transaction. If that was its only intention, it could have adequately achieved the purpose intended by communicating its concerns to QLS without publicity, relying on the qualified protection available in such a case under s 16(1)(e) of the *Defamation Act* 1889 (Qld). On the other hand, making the comments in the reasons was bound to attract publicity. If its intention was to publicise its view that, in its opinion, Bells Solicitors collectively, in addition to the employee directly involved in the application before it, had a case of unethical conduct to answer before the appropriate regulatory body, that is where the present complaint comes into focus.

[20] The focal point of the inquiry is whether in making the observations quoted in [6] above the applicants were denied natural justice or, as it is often called nowadays, procedural fairness. As far as can be inferred from what was said in the passage of the judgment and the letter of 30 April 2002 the Tribunal seems to have taken the view that it should express its conclusion in the reasons for decision to bring the issue to the notice of the QLS, and that, once it had done that, it was for the QLS to investigate and give those alleged to be implicated in the conduct an opportunity to be heard.

[21] One of the uncertainties about the existence of an adequate basis for substantiating the comments complained of is that there are implications in the decision that there may be at least some evidence extending beyond the particular transaction

concerning the marketing scheme under which the property was sold to the Gordons. However it is not elaborated on in detail in the reasons and, since the transcript of the hearing is not in evidence, the extent of that evidence cannot be established with any confidence. The reasons for the decision focus principally on the particular transaction with which the Tribunal was concerned. Another issue raised in submissions was whether the drawing of a conclusion, from "company searches", that Bells Solicitors were the solicitor for both NAPC and Coral Reef was based on a misunderstanding of the information from ASIC.

[22] There are references in the reasons to Mr Yarwood who was at that time employed by Bells Solicitors but no reference to either of the applicants. One possibility is that Mr Yarwood's involvement was treated as indicative or representative of the firm's involvement. Whether there was a basis to support the conclusion that "Mr Yarwood and Bells Solicitors" were "part of an elaborate marketing network" depends on the extent of the evidence before the Tribunal, which is something that cannot be determined from the reasons alone.

[23] The reasons record, in the paragraphs quoted in para [6], matters which seem to have suggested to the Tribunal that there was a close involvement between Bells Solicitors and the marketeers. The applicant's case is that those conclusions are based on misapprehensions, misunderstandings and incorrect inferences, the nature of which are elaborated on in detail in the letter of 25 March 2002 in reply to the request for the QLS for a sufficient and satisfactory explanation of the various matters referred to in the Tribunal's decision (summarised above).

[24] The applicants further submit that had the Tribunal given them notice that it proposed to comment on the firm's conduct the same explanations would have been advanced to it and that they would have cast a different light on the issues that were of concern to it. It is submitted that the applicants, as partners of the firm, were denied natural justice or procedural fairness because the Tribunal did not afford them that opportunity.

[25] It is not the function of the present proceedings to resolve contentious issues of fact. It will remain, so far as these proceedings are concerned, an unresolved controversy whether the Tribunal's comments were soundly based on all the evidence now available, which has been summarised above. The purpose of these proceedings is restricted to deciding whether the applicants had a right to have the allegations proposed to be levelled at them by the Tribunal put to them for comment before the Tribunal expressed a concluded view about them in its decision. The related question is whether failure to do so was a breach of natural justice or procedural fairness in respect of which the applicants can be vindicated by a declaration to that effect.

[26] The applicants based their case on the proposition that reputation is an interest protected by the procedural fairness aspect of the principles of natural justice. In *Ainsworth & Anor v Criminal Justice Commission* (1991-2) 175 CLR 564 at 578 it is said:

> "It has long been accepted that reputation is an interest attracting the protection of the rules of natural justice. Thus, over a century ago, Jessel M.R. said in *Fisher v. Keane* [(1879) 11 Ch. D 353, 362-363]:

> "according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, [they ought not] to blast a man's reputation for ever – perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct."

And, as recently as 1990, Brennan J. said in *Annetts* [v *McCann* (1990) 170 CLR 596, 608] that:

> "Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made."

The same is true of business or commercial reputation [In re *Pergamon Press Ltd* (1971) Ch 388, 399-400; *Mahon v Air New Zealand* [1984] AC 808, 820]. And it matters not that, instead of an express finding, there is, as here, an adverse recommendation based on the reports of other bodies or authorities. That being so, the appellants were entitled to procedural fairness."

(See also *Queensland Police Credit Union v Criminal Justice Commission* (2000) 1 Qd R 626 at 629-630 (*QPCU*)).

[27] It was submitted that it did not matter that the partnership comprising Bells Solicitors no longer exists. The individual reputations of the former partners were affected because their identities and their association with Bells Solicitors were well known among the legal and general community on the Gold Coast and clients of Steindl Bell and Bell Legal Group. In any event it was not necessary to prove that there has been actual damage to reputation although it was submitted that damage was clearly proved in this case. It was submitted on the basis of *Ainsworth* at 575-6 and *QPCU* at 629-630 that damage may be inferred from the publication of the adverse findings.

[28] It was submitted that the principles of natural justice were not observed. Reliance was placed on *Kioa v West* (1985) 159 CLR 550, 582 where it is said that it is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest he is entitled to know the case to be made against him and to be given an opportunity of replying to it. It was submitted that the rule must also apply where a recommendation or statement was intended to be published by a statutory body that may harm the reputation of a person, in reliance on *Ainsworth* at 577-8.

[29] Reliance was placed on the fact that the former partners of Bells Solicitors were not informed of the allegations against them. They were given no opportunity to answer the allegations. They were not informed of the Tribunal's intention to make adverse comments with respect to them. They were thereby denied procedural fairness. The fact that the Tribunal recommended that the behaviour of Bells Solicitors be referred to the Queensland Law Society for investigation and "to give

them an opportunity to be heard" did not affect the proposition that they had been denied procedural fairness by the Tribunal. Reliance was placed on a statement in *Ainsworth* at 579 where it is said:

> "It may be that, in a particular case and as an incident to the discharge of its own functions and responsibilities, the Parliamentary Committee will redress an unfairness perpetrated by the Commission. But that is not its function. And certainly it is under no obligation in that regard. It may be that the Parliamentary Committee has redressed or will redress the unfairness involved in this case – at least in the sense of giving the appellants an opportunity to answer what was put against them in the report. But, if so, that cannot alter the fact that their reputation was blackened in circumstances in which the Commission should have given, but did not give, them an opportunity to put their side of the matter."

[30] It was pointed out that the present case was even more in favour of the applicants than *Ainsworth* in that the Tribunal had finalized its decision-making process by publishing its reasons for decision. The process of investigation, if undertaken by the QLS, was not part of the same proceedings. Such functions and responsibilities were separate and distinct and served a different purpose.

[31] The applicants accepted as correct the following proposition in *QPCU* at 635:

> "As a matter of caution, it should perhaps be added that it is not every criticism or adverse comment on collateral matters or events which arise in the course of proceedings that will attract the need for procedural fairness of this kind. The function of judicially hearing, investigating, reporting or deciding would be effectively stultified if nothing in the least degree adverse could legitimately be said without first affording the opportunity to be heard to anyone who supposed himself or herself to be in some way detrimentally affected by it. In the present instance, however, the criticism implicit in the Commissioner's observations had a real potential to prejudice the plaintiff's reputation and business interests and to do so in a way that was plainly bound to become a matter of public interest and concern."

[32] However it was submitted that, in the present case, the findings and statements made by the Tribunal were gratuitous since it was unnecessary to make them in order to decide the claim before it. It was further submitted that criticism in the terms expressed was bound to attract publicity and to prejudice the reputations and business interests of the former partners of Bells Solicitors.

[33] A declaration is an appropriate remedy in a case where natural justice has been denied (*Ainsworth* 582; *QPCU* 635). It was submitted that while the remedy is discretionary, this was a case where the granting of a declaration would serve a practical purpose of redressing some of the harm done to the reputations of the former partners of Bells Solicitors. It was submitted that the proper view to be taken was that once it was shown that there is a right to natural justice in the form of an opportunity to be heard in a proceeding, the person aggrieved is ordinarily entitled to relief against the adverse consequences of being denied that right without having to establish in detail how the opportunity would have been made use of (*QPCU* 635). It was submitted that it was sufficient to show that the result might

have been different had the opportunity been given. *Re: Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, and *Stead v State Government Insurance Commission* (1986) 161 CLR 141 were relied on as authority for this proposition.

[34] *Ainsworth* and *QPCU* were both cases where a body performing inquisitorial functions was involved. The Tribunal in this case is not precisely of the same kind. Its function, in so far as is relevant to the present proceedings, is to hear and decide claims against the Fund. Section 488 requires the Tribunal to make certain findings after a hearing. These include findings as to the occurrence of an event entitling a person to make a claim against the fund; the fact that the claimant has suffered financial loss because of the happening of the event; the amount of financial loss, taking into account any reduction in the sum to be paid from the fund because of neglect or default of the claimant in protecting his own interests; and naming the person liable for the claimant's loss. Certain consequences ensue for the last mentioned person by way of reimbursement to the fund.

[35] The application in question is commenced by a person making a claim. Overall the procedure has more elements of adjudication than inquisition. Section 533 requires the Tribunal order to state its findings. Section 534 requires written reasons for the decision to be provided. Section 536 permits the Tribunal to publish its decision in any way it considers appropriate. This in my view is a reference to the manner in which it is published rather than the content of the decision. It does not give permission to go beyond what would otherwise be permissible with regard to the contents of the decision. In that kind of situation, it is desirable that the decision maker have the concept referred to in paragraph [26] firmly in mind before making wider comments than are necessary to decide the question before it.

[36] The problematical issue in the case is whether particular individuals who are known to be members of the organisation, believed by the decision maker to have acted unethically and who say they have been unfairly accused and have suffered damage by reason of what was said are entitled to a declaration that they were denied natural justice. In some cases, such as *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 and *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197, redress against a damning finding can be obtained in an appeal by virtue of a finding as to the sufficiency of evidence to support the original finding. In a case where a person who is alleging that they were denied natural justice were not parties in the proceedings or subject to a specific order, and the right of appeal is limited to the Chief Executive or parties (s 540), and in any event to a question of law, the mechanism is likely to be of no practical utility.

[37] In a somewhat different context The Honourable J. B Thomas QC says, in *Judicial Ethics in Australia*, 1997, second edition, pp 27 and 28, the following:

> "Judges deal daily with highly charged events and troublesome social issues. They are expected to express their reasons openly. …
>
> In its promotion of tolerant attitudes, our society has in recent times tended to discourage "judgmental" attitudes. This perhaps encourages members of the public to see our judgmental behaviour as inherently arrogant and insensitive. It is our job to make judgments. We *have* to be judgmental. But we should not abuse our rights to do so by going further than the case requires. …

…

> There are however some areas where controversial statements can usefully be made from the Bench, and they should not be suppressed even if they are politically damaging to someone. … There is nothing wrong with judges making *relevant and accurate* statements in the course of a hearing in open court when something that the public should know is revealed."

[38] Despite the contextual difference one of the points that the passage suggests is that it is important to be sure that there is a clear basis for making an adverse comment on wider issues which may damage someone's reputation. Another is that it may sometimes be unfair to extrapolate from the conduct of an individual in an organisation to blame the organisation as a whole. Whether an inference can properly be drawn about the quality of conduct of other individuals in the organisation will depend on the particular facts. In the case of an organisation the issue is further complicated because there may be an expectation that systems for minimising the risk of questionable conduct by individual subordinate members will exist and operate to prevent such occurrences.

[39] Unlike an inquisitorial process, an adjudicative process is not open ended. It is usually limited by the content of the issue to be decided. Given the general tendency to avoid opening up collateral issues in adjudicative proceedings there are practical problems about imposing an obligation to give anyone whose conduct is called into question, especially a non-party, a right to be heard. On the other hand, because of this, particular care should be taken by the Tribunal to be circumspect about making comments that may be interpreted (or perhaps misinterpreted) as suggesting that there is an undesirable corporate culture, or as a generalised allegation of unethical behaviour on the part of all individuals involved in the body.

[40] In the present case, as has already been observed, I do not have all the evidence before me to enable a judgment to be formed whether there was any justification in that evidence for making the comments complained of. There is no positive basis in the material before me for making a finding that there was. The explanation given to the QLS raises issues that seem not to have been taken into account by the Tribunal.

[41] The applicants were not parties, and were not afforded the opportunity to test the material upon which the Tribunal expressed the view concerning the firm of which they were partners. What was said no doubt affected the applicants' reputations. Its resulted from an expression of opinion that suggested that there was prima facie evidence of unethical conduct, subject to the right to prove otherwise. However, in proceedings of the kind with which the Tribunal was concerned, the issue seems to be more a case of a Tribunal with specific functions expressing views beyond what was necessary to resolve the particular issue before it than a typical case where a question of denial of natural justice arises. The passage quoted earlier from *QCPU* in para [31] has some resonance in this context.

[42] A declaration is a discretionary remedy. There is authority derived from cases involving investigatory bodies supporting the right to be accorded natural justice before a finding or recommendation affecting a person's reputation is made, and the proposition that the possibility that the result might have been different had the right

been given is sufficient to permit relief to be given. The Tribunal does not have principally investigatory functions. Its hearing focused on a specific issue of whether, on a particular set of facts, conduct entitling the claimants to be paid from the Fund was established. There is room for argument that the Tribunal may have gone further in its reasons than necessary or appropriate on the evidence before it. There are explanations given that may have affected what was said in the Tribunal's reasons had there been an opportunity to put them before it in a timely way. There is an inference open that the QLS did not find that there were grounds to take action against the applicants. However, in the absence of a record of the evidence before the Tribunal, it cannot be said confidently whether the matter can be put higher than that.

[43] In the circumstances, I am not satisfied that the case is one where granting the discretionary remedy in the form of a declaration in the terms sought by the applicants ought to be made. The application is therefore dismissed with no order as to costs.