SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Walter* [2011] QSC 132
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **DAVID JOHN WALTER** (respondent)
FILE NO:	13468 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 January 2011
JUDGE:	Daubney J
ORDER:	**Pursuant to s 703 of the *Legal Profession Act* 2007 (Qld) ("the LPA"), the respondent is restrained from engaging in legal practice in the State of Queensland, when not an Australian legal practitioner, in contravention of s 24(1) of the LPA, and in particular is restrained from:** **(a) providing legal advice in relation to proceedings or potential proceedings;** **(b) corresponding or communicating on behalf of litigants or potential litigants;** **(c) drawing documents on behalf of, or as agent of, litigants, including pleadings, affidavits and submissions; and** **(d) appearing in court on behalf of litigants to proceedings.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – UNQUALIFIED PERSONS AND DISQUALIFIED PRACTITIONERS – GENERALLY – where the applicant

applies for an injunction to restrain the respondent from engaging in legal practice in the State of Queensland when not an Australian legal practitioner – whether the respondent has engaged in legal practice.

Legal Profession Act 2007 (Qld), ss 5, 6, 12, 22, 23, 24, 85, 703
Legal Practice Act 1996 (Vic)
Legal Profession Practice Act 1958 (Vic)

Burns & Ors v Cassowary Coast Regional Council (unreported, Supreme Court, Cairns, P Lyons J, 27 April 2010) , cited
Burns v State of Queensland & Croton [2007] QCA 240, cited
Cornall v Nagle [1995] 2 VR 188, considered
Downey v O'Connell [1951] VLR 117, considered
Felman v Law Institute of Victoria [1998] 4 VR 324, considered
In re Sanderson; ex parte the Law Institute of Victoria [1927] VLR 394, cited
Lade and Company Pty Ltd v Finlay & Ors [2010] QSC 382, cited
Legal Services Commissioner v Bradshaw [2009] LPT 21, considered
Re Foster (1950) 50 SR (NSW) 149, cited
Wilson v Raddatz [2006] QCA 392, cited

COUNSEL: J J Allen for the applicant
No appearance for the respondent

SOLICITORS: Legal Services Commission for the applicant
No appearance for the respondent

[1] The Legal Services Commissioner ("the applicant") has applied pursuant to s 703 of the *Legal Profession Act* 2007 (Qld) ("the LPA") for an injunction to restrain David John Walter ("the respondent") from engaging in certain conduct, namely engaging in legal practice in the State of Queensland when not an Australian legal practitioner.

[2] The respondent was served with the application, but did not appear on the hearing.

[3] Section 703 of the LPA provides:

> "**703 Injunctions**
>
> (1) This section applies if a person (the ***subject person***) has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute –
>
> (a) an offence against a relevant law; or

(b) attempting to contravene a relevant law; or

(c) aiding, abetting, counselling or procuring a person to contravene a relevant law; or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene a relevant law; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, an offence against a relevant law by a person; or

(f) conspiring with others to contravene a relevant law.

(2) On application by the commissioner or the relevant regulatory authority for the subject person, the Supreme Court may grant an injunction, on terms the court considers appropriate –

(a) restraining the subject person from engaging in the conduct; and

(b) if the court considers it desirable to do so – requiring the subject person to do any act or thing.

(3) If an application under subsection (2) has been made, the Supreme Court may, if the court decides it to be appropriate, grant an injunction by consent of all the parties to the proceeding, whether or not the court is satisfied that subsection applies.

(4) If the Supreme Court considers it desirable to do so, the court may grant an interim injunction pending its decision of an application under subsection (2).

(5) The Supreme Court may discharge or vary an injunction granted under subsection (2) or (4).

(6) The Supreme Court's power to grant an injunction restraining the subject person from engaging in conduct may be exercised whether or not –

(a) it appears to the court that the subject person intends to engage again, or to continue to engage, in conduct of that kind; or

(b) the subject person has previously refused or failed to do that act or thing; or

(c) there is an imminent danger of substantial damage to anyone if the subject person refuses or fails to do that act or thing.

> (7) The Supreme Court must not require the commissioner or another person, as a condition of granting an interim injunction, to give an undertaking as to damages."

[4] The applicant's case is that I should be satisfied on the material before me that the respondent has engaged in conduct that constituted "an offence against a relevant law".[1] The term "relevant law" includes the LPA.[2] It is contended the respondent contravened s 24(1) of the LPA, which provides:

> "(1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.
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> Maximum penalty – 300 penalty units or two years imprisonment."

[5] Before referring to the evidence on which the applicant relies in support of the allegations of contravention, it is necessary to say something about the interpretation of s 24(1).

[6] Under the LPA, an "Australian legal practitioner" is an Australian lawyer who holds a current local (i.e. Queensland) practising certificate or a current interstate practising certificate.[3] By s 5(1), an "Australian lawyer" is a person who is admitted to the legal profession under the LPA or a corresponding law (which, in general terms, is a reference to the corresponding laws relating to the legal profession in other Australian jurisdictions[4]).

[7] Section 24 falls within Part 2.2 of the LPA. The main purposes of Part 2.2 are stated in s 22 to be:

> "(a) to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so;
>
> (b) to protect consumers by ensuring the persons carrying out legal work are entitled to do so."

[8] There are a number of categories of persons excluded from the operation of s 24. For example, s 23 provides that Part 2.2 does not apply to a person authorised to engage in legal practice under a law of the Commonwealth or a "government legal officer engaged in government work".[5]

[9] Section 24 itself contains provisions which exclude the application of s 24(1) to certain specific practices, lawyers and other persons.

[10] There is nothing in the evidence to suggest that the respondent falls within any of the categories or classes of person to whom s 24(1) does not apply. The evidence also reveals that the respondent does not, and did not at the time of the impugned conduct, hold a practising certificate in Queensland or interstate. He was not, and is not, an "Australian legal practitioner" within the meaning of that term in the LPA.

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1 Section 703(1)(a).
2 See definition of "relevant law" in Schedule 2 to the LPA.
3 Section 6(1).
4 See definition of "corresponding law" in Schedule 2.
5 As to the meaning of which, see s 12.

[11] In order to prove the contravention of s 24(1), therefore, the applicant must satisfy me that the respondent engaged in legal practice. There is no general definition of the term "legal practice" in the LPA (only a specific definition for the purposes of Part 2.5 relating to "suitability reports" – see s 85). Schedule 2 to the LPA relevantly provides that "**engage in legal practice** includes practice law".

[12] The noun "practice" and the verb "practise" are, in my view, terms of art when used in the context of the professions. The *Macquarie Dictionary* relevantly defines "practice" as: "6. the exercise of a profession or occupation, especially law or medicine", and "practise" as: "7. to pursue a profession, especially law or medicine".

[13] In *Felman v Law Institute of Victoria* [1998] 4 VR 324, the Victorian Court of Appeal considered the term "engage in legal practice" in the *Legal Practice Act* 1996 (Vic). Kenny JA said, at 352:

> "In my opinion, the expression to "engage in legal practice" in s. 314 and elsewhere signifies "to carry on or exercise the profession of law". Reference to the definitions of "engage" and "practice" in the *Oxford English Dictionary* supports the view that this is the ordinary and natural meaning of the expression. The carrying on of the profession of law is done by none other than a "legal practitioner". Accordingly, in my view, the expression "engage in legal practice" means "engage in legal practice as a *legal practitioner*", the italicised words being implicit in the notion of legal practice."

[14] This relatively broad approach to construing the term "engage in legal practice" is consistent with traditional notions of legal practice (i.e. those which were in place prior to the introduction of the LPA and similar legislation in other jurisdictions). In *Downey v O'Connell* [1951] VLR 117, Gavan Duffy and O'Bryan JJ said at 122:

> "The common conception of a practising barrister or solicitor is that of a legally qualified barrister and solicitor who holds himself out to the public in general as willing to act as a direct and responsible personal confidential legal adviser, and to do, and be directly responsible for, legal work generally and who has clients for whom he does legal work in that way."

[15] More recently, in *Cornall v Nagle* [1995] 2 VR 188, J D Phillips J, in construing the *Legal Profession Practice Act* 1958 (Vic), identified that a person who was neither admitted to practice law nor enrolled as a barrister and solicitor may be regarded as acting or practising as a solicitor in one of three ways:

1. By doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor;[6]

2. By doing something that is positively proscribed by legislation or rules of court unless done by a duly qualified legal practitioner;

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[6] His Honour adopted the test stated in *In Re Sanderson; ex parte the Law Institute of Victoria* [1927] VLR 394 at 397: "What I do decide is that if a person does a thing usually done by a solicitor and does it in such a way as to lead to the reasonable inference that he is a solicitor – if he combines professing to be a solicitor with actions usually taken by a solicitor – I think he then does act as a solicitor."

3. By doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law.

[16] In the case before him, J D Phillips J considered it unnecessary to go beyond an example of the giving of legal advice as part of a course of conduct and for reward as an example of the third category of conduct, but said, at 208:

> "In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of law, and hence the notion of acting or practising as a solicitor ... If the public is to be adequately protected from those lacking relevant qualifications, then, in the context of a regulated legal profession, the giving of legal advice professionally is, I think, to be regarded as exclusively the province of those properly trained in the law and having the necessary expertise. It is thus something required to be undertaken only by the legally qualified, and not by those not properly qualified. Nor, if the protection of the public is to be adequate, can that protection be left to depend (as does the Sanderson test) upon whether the unqualified one declares that he has no legal training ... [B]y prohibiting any unqualified person "acting or practising as a solicitor" s90 should be taken to encompass the giving of legal advice, at least in circumstances where there is a course of conduct involving the giving of that advice for reward. I go no further than that, only because it is unnecessary to do so in this particular case."

[17] In *Legal Services Commissioner v Bradshaw* [2009] LPT 21, Fryberg J expressed the view that the expressions "engage in legal practice" and "practise law" under s 24 of the LPA are "the professional equivalent of the expression 'carry on business' which is used in relation to activities other than professional activities" and that "practising law is an activity which has the characteristics of carrying on the business of being a lawyer". His Honour explained:

> "One would look for evidence of continuity, of repeated acts; one would look for evidence of payment for those acts; one would look for evidence of seeking business from members of the public, or at least from other lawyers; one would look for evidence of a business system; one would look for evidence of maintaining books and records consistent with the existence of a practice; one would look for evidence of a multiplicity of clients. None of those things is in evidence before me."

[18] For my part, I would respectfully disagree with the equation of practising law with the carrying on of a business. I prefer the formulation of Kenny JA, and would hold that the terms "engage in legal practice" and "practise law" in the LPA invoke the notion of carrying on or exercising the profession of law, not the "business" of law.

[19] There is a palpable difference between carrying on or exercising the profession of law, on the one hand, and carrying on the business of a lawyer, on the other. At least one of the hallmarks of a profession, apart from special skill and learning, is that the profession has public service as its principal goal.[7] The distinction between a trade, business or occupation and a profession was described by Street CJ in *Re Foster* (1950) 50 SR (NSW) 149 at 151:

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[7] See, generally, the discussion of "professionalism" in GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, NSW, 2010, 4th ed) at [1.20] f/f.

> "A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose."

[20] The factors listed by Fryberg J are, it seems to me, indicia of a person carrying on a professional business. Some or all of those indicia, if present in a particular case, will be relevant to determining whether the person, by carrying on that business, has carried on or exercised the profession of law. But those indicia are not, in my view, determinative. The fact that a person carries out legal work (to use the phraseology of the purposes of Part 2.2, as expressed in s 22) for reward is indicative of a person engaging in legal practice, but is not a necessary pre-condition to a finding that a person has engaged in legal practice.

[21] In short, the fact that a person is engaged in the business of providing legal services is indicative of that person practising law, but a person may be practising law without being in business. It is clear, for example, that an Australian legal practitioner can exercise the profession of law for clients without any entitlement to or expectation of reward or remuneration from those clients. But an Australian legal practitioner who habitually acts pro bono for needy clients can hardly be said to be not engaged in legal practice because he or she provides professional legal services without reward from those clients.

[22] In my view, therefore, the proper approach to s 24 requires a consideration of the impugned conduct to ascertain whether it amounts to the person carrying on or exercising the profession of law, and has thereby practised law.

[23] Turning to the present case, the evidence before me discloses that the respondent has been closely involved in the preparation and prosecution of no less than ten actions in the Supreme Court at Cairns which have been brought by various plaintiffs against the chief executives of a number of local government authorities, a State Government Minister and a number of other defendants. The material also discloses that the respondent's involvement in this litigation has included providing advice to the plaintiffs to commence those proceedings, drafting correspondence, pleadings and submissions in the proceedings, at times corresponding on behalf of the plaintiffs with other parties to the litigation, and purporting to act as the agent of one of the plaintiffs, Mrs Burns. The extent of the respondent's involvement in, and control of, that proceeding on behalf of Mrs Burns led to P Lyons J ordering on 27 April 2010 that the respondent pay the costs of the other parties to that litigation.[8]

[24] Each of these proceedings has been based upon identical, peculiar notions of the law, which have also been unsuccessfully espoused by the respondent himself in previous litigation.[9]

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[8] *Burns & Ors v Cassowary Coast Regional Council* (unreported, Supreme Court, Cairns, P Lyons J, 27 April 2010).

[9] See also in that regard the observations of Jerrard JA in *Burns v State of Queensland & Croton* [2007] QCA 240 at [5] ff.

[25] He has also sought to advance these mistaken notions in other forums. In the judgment to which I have already referred, P Lyons J found that the proceedings were fundamentally misconceived and lacking in any legal merit. The same, or similar, mistaken notions were relied on by the plaintiff in proceedings which came on before McMeekin J in *Lade and Company Pty Ltd v Finlay & Ors* [2010] QSC 382. His Honour gave summary judgment for the defendants in that case, adopting counsel's description of the plaintiff's statement of claim as "unintelligible". McMeekin J found that the cases sought to be advanced by the plaintiff were so devoid of merit that it was an appropriate case for summary judgment for the defendants. Relevantly for present purposes, his Honour noted, at [27]:

> "Mr Lade initially sought an adjournment so that his case could be argued by a Mr Walter who for personal reasons could not attend the hearing. There is no point. The end result is plain. I note that Mr Walter had conducted similar arguments in some of the cases I have mentioned and failed: see *Burns* (supra); *Wilson* (supra); and *Glasgow* (supra). See also the decision of P Lyons J in *Burns & Ors v Cassowary Coast Regional Council* (Unreported, Cairns, 27 of 2010, 27 April 2010). Costs orders have been made against Mr Walter in some cases. The applicant made Mr Lade aware of this history well prior to the hearing."

[26] Whilst there is no evidence that the respondent received remuneration for providing advice and other services to the plaintiffs in the ten actions to which I have already referred, there is evidence that he has solicited financial donations from members of the public to fund litigation of this nature. Moreover, it appears that he received remuneration to draw written submissions for the applicant in another proceeding in the Court of Appeal.[10]

[27] In short, the evidence makes it clear that this respondent has engaged, over a significant period of time, in a practice of:

(a) advising parties to litigation in respect of matters of law and procedure;

(b) assisting parties to litigation in the preparation of cases for litigation;

(c) drafting court documents on behalf of parties to litigation;

(d) drafting legal correspondence on behalf of parties to litigation; and

(e) purporting to act as a party's agent in at least one piece of litigation.

[28] To adapt the words of J D Phillips J, each of these matters can be said to lie near the very centre of the practice of litigation law. Taken in combination, and recalling that the evidence discloses that these services have been provided by the respondent for numerous parties over numerous years, it is clear to me that the respondent thereby carried on or exercised the profession of law, and accordingly can be said to have practised law.

[29] It follows, therefore, that I am satisfied that, in contravention of s 24(1) of the LPA, the respondent engaged in legal practice in Queensland at a time when he was not an Australian legal practitioner. I am therefore satisfied, for the purposes of

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[10] *Wilson v Raddatz* [2006] QCA 392.

s 703(1), that it has been demonstrated that the respondent engaged in conduct that constituted an offence against the LPA.

[30] Having been satisfied of that, the question then becomes whether it is appropriate to exercise the discretion conferred by s 703(2) to restrain the respondent from engaging in this conduct. It is notable that s 703(6) confirms, inter alia, that the power to grant the injunction may be exercised whether or not it appears that the respondent intends to engage again, or to continue to engage, in conduct of the kind in question.

[31] The material before me demonstrates that:

(a) the respondent has repeatedly sought, in many different proceedings, to ventilate a fundamentally misconceived legal argument, and

(b) he has done so indirectly by advancing these arguments through the cases brought by other parties.

[32] It is one thing for the respondent himself to run these misconceived arguments in proceedings to which he personally is a party – if necessary, appropriate orders can be made to circumscribe that conduct. It is quite another thing, however, for him to use other parties effectively as stalking horses to enable him to continually repeat these contentions. Having regard to his conduct in having acted in contravention of s 24 of the LPA, I consider this to be an appropriate case for the grant of an injunction.

[33] There will therefore be the following order:

> Pursuant to s 703 of the *Legal Profession Act* 2007 (Qld) ("the LPA"), the respondent is restrained from engaging in legal practice in the State of Queensland, when not an Australian legal practitioner, in contravention of s 24(1) of the LPA, and in particular is restrained from:
>
> (a) providing legal advice in relation to proceedings or potential proceedings;
>
> (b) corresponding or communicating on behalf of litigants or potential litigants;
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> (c) drawing documents on behalf of, or as agent of, litigants, including pleadings, affidavits and submissions; and
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