

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Sheehy* [2018] QCAT
422

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
RHONDA BERYL SHEEHY
(respondent)

APPLICATION NO/S: OCR125-14

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 3 December 2018

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Justice Carmody

Assisted by:
Dr Julian Lamont, Lay Panel Member
Ms Megan Mahon, Practitioner Panel Member

ORDERS:

- 1. The Commissioner's costs application is allowed.**
- 2. The practitioner is ordered to pay the Commissioner's costs of the disciplinary proceeding as agreed within 90 days or to be assessed on the standard basis in the manner and on the scale that the costs would be assessed in the Supreme Court of Queensland under the *Uniform Civil Procedure Rules*.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the tribunal dismissed the discipline application and compliance with filing submissions on costs was suspended pending the outcome of the appeal – where the Queensland Court of Appeal (QCA) set aside the tribunal's finding and declared the practitioner had engaged in prescribed conduct – where costs of the appeal followed the event but no application or order was made for the tribunal costs in issue – where s 462(1) *Legal Profession Act* makes an order requiring a defaulting practitioner to pay the Commissioner's costs prima facie mandatory when a

disciplinary body finds prescribed conduct was engaged in – where the tribunal must infer whether Parliament intended the Commissioner to be awarded his costs where a positive conduct finding is declared on appeal – where awarding the Commissioner costs of the disciplinary proceeding accords with the object and underlying policy of s 462 – where the Commissioner’s application for costs is allowed

Legal Profession Act 2007 (Qld) ss 418, 419, 420, 462, Schedule 2

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 161, 165, Schedule 3

Legal Services Commissioner v Jensen [2018] QCAT 264
Legal Services Commissioner v Sheehy [2018] QCA 151

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

REASONS FOR DECISION

- [1] The issue in this application is whether the tribunal has a structured statutory discretion to award the Commissioner’s costs of a discipline proceeding against a defaulting practitioner where the misconduct “finding” was made by the Queensland Court of Appeal (QCA) and not by the tribunal itself.

The context

- [2] On 8 August 2017 the tribunal dismissed the discipline application and gave directions for filing submissions on costs.
- [3] Costs of a practitioner found not (or not found) to have engaged in prescribed conduct are payable in special circumstances.¹
- [4] Conversely, costs against a practitioner cleared by the tribunal of prescribed conduct are recoverable where the proceedings were due to the person’s lack of cooperation or “there is some other reason” warranting it in the particular circumstances.²
- [5] The Commissioner appealed to the QCA before reserved costs issues were disposed of by the tribunal.
- [6] Appeals from decisions of disciplinary bodies to the QCA are governed by s 468 *Legal Profession Act 2007* (Qld) (LP Act) not s 149 QCAT Act. They are decided by way of rehearing either on the original or additional evidence. The scope of the remedial power of the court on appeal however is not explicitly stated; nor is its authority to order costs either of the appeal or original hearing.

¹ *Legal Profession Act 2007* (Qld) s 462(4) (LP Act).

² LP Act s 462(2).

- [7] The QCA found that the tribunal had made mixed errors by not applying the proper statutory test of prescribed conduct defined in s 418 LP Act to the practitioner's conduct.³
- [8] It overruled the tribunal and held that a reasonably competent legal practitioner would have known or ascertained that she was not entitled to take steps to complete the contract over the (co-vendor's) objection and her conduct (in doing so) fell short of the standard of competence and diligence to be expected of a reasonably competent legal practitioner.
- [9] Accordingly, the QCA set aside the tribunal's findings, declared that the practitioner had engaged in unsatisfactory professional conduct, ordered the practitioner to be publicly reprimanded and pay a \$1000 penalty plus costs of the appeal.⁴
- [10] No application or order was made for tribunal costs during the appeal to the QCA.

Regulatory costs

- [11] The costs power has no common law source; it derives solely from statute.
- [12] Although the tribunal has a general discretion under s 102 QCAT Act to order costs where the interests of justice require it, there are specific and exclusive costs provisions in the LP Act governing disciplinary matters.
- [13] Where a disciplinary body finds prescribed conduct was engaged in by a practitioner, s 462(1) LP Act mandates an order requiring the defaulting practitioner to pay the Commissioner's costs (or part of them)⁵ except in exceptional circumstances.
- [14] The tribunal awarded reserved first instance costs to the Commissioner after a successful appeal by the practitioner against severity in *Legal Services Commissioner v Jensen*⁶ but its discretion to do so derived from the positive finding of prescribed conduct it had made at first instance and the success of the practitioner's characterisation and penalty appeal was not regarded as an exceptional circumstance relieving the practitioner from the usual liability for costs.
- [15] It is reasonably arguable that s 462(2) provides a clear source of power for the tribunal to make a costs order against a practitioner not found to have engaged in prescribed conduct but regrettably neither party argued the point and the applicability of the provision is, at least, questionable where the negative finding was not made for a reason involving any fault analogous to lack of cooperation.
- [16] The LP Act is silent about whether the tribunal has any power (or obligation) to give the Commissioner his costs of the proceeding where the positive finding was substituted on appeal and the negative finding was not due to any specific reason warranting it.

³ *Legal Services Commissioner v Sheehy* [2018] QCA 151 [41], [44].

⁴ Pursuant to the *Legal Profession Act 2007 Act* (Qld) ss 418, 420.

⁵ Cf. LP Act s 462(5); *Legal Services Commissioner v Bone* [2014] QCA 179.

⁶ [2018] QCAT 264.

- [17] The respondent argues that as a disciplinary body has never made a finding that the practitioner has engaged in prescribed conduct an indispensable statutory precondition to the discretion is not met.
- [18] The Commissioner contends,⁷ by contrast, that the:
- ... Tribunal should take the position in deciding costs, that the declaration by the Court of Appeal is the decision of the Tribunal.
- [19] The term *disciplinary body* for LP Act purposes means either: (a) the tribunal or (b) the committee.⁸ The QCA is not included.
- [20] Schedule 3 of the QCAT Act defines *the tribunal* to mean QCAT established under s 161 QCAT Act and includes "...a reference to the appeal tribunal constituted, or to be constituted, for the appeal proceeding".⁹
- [21] The QCA is neither the committee nor the tribunal and was not constituted under the QCAT Act for the appeal proceeding.
- [22] Because s 462 does not cater for the current situation the tribunal must infer whether what the Commissioner contends for is what was intended to happen where the QCA disturbs an erroneous negative finding in a discipline matter and makes a contrary "declaration".
- [23] Laws are interpreted and applied not made in courtrooms.¹⁰
- [24] The modern approach to statutory interpretation and construction accordingly is to give the words used in a provision their intended meaning and effect.¹¹ The legal meaning generally corresponds with the literal meaning but not always. However sometimes the subject matter, context, consequences or functional purpose suggest a different construction.
- [25] It is permissible to read additional or omitted words into the text of a statutory provision under the necessary implication doctrine to produce a construction conforming to the statutory scheme but not merely to make the provision more congruent or workable.¹²
- [26] In *Taylor v The Owners – Strata Plan No 11564* Gageler and Keane JJ (in dissent as to the result but not the principles) emphasised that statutory construction is to "expound the meaning of the statutory text not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair".¹³
- [27] The Commissioner's position that the prima facie legislative intention is that defaulting practitioners be made to replenish the public purse for the cost of disciplining them seems to accord with the general object and underlying policy of s

⁷ Further written submissions at [11].

⁸ *Legal Profession Act 2007* (Qld) Sch 2.

⁹ QCAT Act s 165(3).

¹⁰ *Ian Street Developer Pty Ltd v Arrow International Pty Ltd and Anor* (2018) VSCA 294 [63]-[64] (Maxwell P).

¹¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹² *Norton v Long* [1968] VR 221, 223.

¹³ (2014) 253 CLR 531 [65].

462 and despite nothing much in the text or context of the provision really supporting the conclusion, it seems to me that the Commissioner is intended to have his costs (or some of them) irrespective of whether the positive finding that triggers the discretion was made by the tribunal at first instance or declared by the QCA on appeal to remedy a tribunal error in not doing so in the first place.

- [28] I think it is safe enough to assume that Parliament simply overlooked the eventuality of costs in disciplinary matters being reserved pending appeal to correct a negative finding that should never have been made.
- [29] On this basis s 462(1) should be read as if it included extra words that I have no doubt that Parliament itself would have used if its attention had been drawn to the omission to the effect that for the purposes of costs a declaration by the QCA is taken to be a finding of a disciplinary body that prescribed conduct was engaged in.
- [30] If my interpretation is wrong the QCA will, no doubt, fix it. Perhaps it won't have any practical significance beyond this particular case because s 462(2) is thought to adequately cover the situation if it ever rises again. Otherwise, it is up to Parliament to put the matter beyond doubt.
- [31] The application is allowed. The practitioner is ordered to pay the Commissioner's costs of the disciplinary proceeding as agreed within 90 days or to be assessed on the standard basis in the manner and on the scale that the costs would be assessed in the Supreme Court of Queensland under the *Uniform Civil Procedure Rules*.