

# SUPREME COURT OF QUEENSLAND

CITATION: *Markan v Legal Services Commission* [2011] QSC 338

PARTIES: **PETER MARKAN**  
(applicant)  
v  
**LEGAL SERVICES COMMISSION**  
(respondent)

FILE NO/S: SC No 3983 of 2011

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 18 August 2011

JUDGE: Atkinson J

ORDER: **The application is dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant made various complaints about his solicitor to the respondent, the Legal Services Commissioner – where the applicant sought a statutory order of review of a decision of the respondent – where the applicant alleged that the respondent had failed to investigate the allegations fairly and that he was biased towards members of the legal profession – whether the grounds of review were made out – whether the decision was judicially reviewable

*Judicial Review Act* 1991 (Qld), s 20, s 23  
*Legal Profession Act* 2007 (Qld), s 447, s 435(2)

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, cited  
*Greenwood v Winsor* [2008] QCA 415, cited  
*Kioa v West* (1985) 159 CLR 550, cited  
*R v Markan* [2009] QCA 110, cited  
*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165; [2003] HCA 30, cited

COUNSEL: The applicant appeared on his own behalf  
S A McLeod for the respondent

**SOLICITORS:** The applicant appeared on his own behalf  
Crown Law for the respondent

- [1] The applicant, Peter Markan, commenced proceedings in the Supreme Court on 12 May 2011 seeking a statutory order of review pursuant to the *Judicial Review Act 1991 (Qld)* (“the Act”) of a decision of the respondent, described in the application as “John Briton – Legal Services Commission”.

### **Background**

- [2] The applicant made a complaint to the Queensland Law Society (“QLS”) dated 10 May 2010 concerning the conduct of his solicitor. By letter dated 12 May 2010, QLS advised the applicant that it had no jurisdiction to receive complaints and had referred the matter to the Legal Services Commissioner (“the Commissioner”).
- [3] Upon receipt of the applicant’s complaint, the Commissioner, Mr Briton, determined to refer the matter to QLS for investigation pursuant to s 435(2) of the *Legal Profession Act 2007 (Qld)*. He indicated in a letter dated 27 May 2010 to QLS that, on his analysis, the complaint raised conduct issues including allegations that:
1. the solicitor withdrew trust funds without authority (the first allegation); and
  2. the solicitor failed to follow the applicant’s instructions regarding obtaining certain advice from counsel (the second allegation). This related to obtaining counsel’s advice on the prospects of success of an appeal to the High Court against the applicant’s conviction of one count of grievous bodily harm following a trial in the District Court which had previously been dismissed by the Court of Appeal.<sup>1</sup>
- [4] On 16 August 2010, QLS advised the applicant and the solicitor that it had completed its investigation and forwarded its report and recommendation to the Commissioner. The Legal Services Commission (“the Commission”) then embarked upon a review of QLS’s investigation in order to determine whether any action should be taken and subsequently sought further information from the solicitor.
- [5] This application for review arises from the Commissioner’s decision, conveyed to the applicant by letter dated 11 April 2011 after the Commission had finalised its investigation, whereby it was determined:
- “Having considered all the relevant evidence, I am satisfied that there is a reasonable likelihood of a finding by a disciplinary body that [the solicitor’s] conduct in this matter amounts to either unsatisfactory professional conduct or professional misconduct.  
I am also satisfied that it is in the public interest to commence disciplinary proceedings based on the matters identified in the final investigation report. Accordingly, I will shortly be filing a discipline application with QCAT ... [and] a copy of the discipline application will be forwarded to you in due course.”
- [6] The investigation report relied on by the Commissioner was prepared in relation to the first allegation only as the investigation report supported the findings made by QLS that the second allegation could not be substantiated. Part of the applicant’s complaint before this court arises out of the Commissioner’s decision to commence disciplinary proceedings in relation to the first allegation but not the second.

<sup>1</sup> See *R v Markan* [2009] QCA 110.

### **Legislative framework**

- [7] The applicant relied on s 20 of the Act which provides that a person aggrieved by a decision to which the Act applies may apply to the court for a statutory order of review. In particular, the applicant based his application on the grounds found in ss 20(2)(a), (b), (e) and (f) of the Act which are:
- “(a) that a breach of the rules of natural justice happened in relation to the making of the decision;
  - (b) that procedures that were required by law to be observed in relation to the making of the decision were not observed;
  - ...
  - (e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
  - (f) that the decision involved an error of law (whether or not the error appears on the record of the decision); ...”
- [8] Section 23 provides that an “improper exercise of power” under s 20(2)(e) includes:
- “(a) taking an irrelevant consideration into account in the exercise of a power; and
  - (b) failing to take a relevant consideration into account in the exercise of a power; and
  - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
  - (d) an exercise of a discretionary power in bad faith; and
  - (e) an exercise of a personal discretionary power at the direction or behest of another person; and
  - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and
  - (g) an exercise of a power that is so unreasonable that no reasonable person could so exercise the power; and
  - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - (i) any other exercise of a power in a way that is an abuse of the power.”

### **Applicant’s submissions**

- [9] The applicant’s submissions are contained in the written application filed 12 May 2011, the outline of argument filed 14 June 2011 and the oral submissions he made on the hearing of the application. It is convenient to deal with the applicant’s submissions together as the documents and oral submissions covered similar ground. The applicant’s key submissions were as follows:
- The Commissioner failed to investigate the matter fairly.
  - The Commissioner took only limited action in relation to “the secondary, relatively minor issue” of the withdrawal of money from the trust account without authorisation.
  - In making his decision not to pursue the second allegation, the Commissioner failed to consider the nature of the advices. The advices provided by counsel and his solicitor were “rubbish”. The first advice did not have any reference to the issues he requested legal advice on and the subsequent advices contained merely unclear, vague and ambiguous naming of those issues. There was no plausible or rational explanation for the Commissioner’s decision other than that he was biased towards lawyers and wanted to protect their image. As a result the lawyers were entitled to keep his money even though he was not provided with the legal advice he sought.

- The Commissioner’s decision indicated leniency and tolerance towards the “callous, fraudulent, unethical characters” in the legal profession and a failure of his statutory duty to maintain the high standard of integrity within the legal profession.
- The Commissioner could be seen as actively protecting these individuals in spite of their “treacherous, dishonest and disgraceful conduct”.
- These were matters of public interest.
- The Commissioner did not follow the required procedures as set out in the prosecuting guidelines of the Legal Services Commission and had chosen not to prosecute breaches of important rules by the conduct of his solicitor.

### **Respondent’s submissions**

- [10] In oral submissions on the hearing of the application, the respondent submitted that the allegations made by the applicant were embarrassing, not founded on any proper legal basis and mere assertions. The respondent submitted that the applicant had not been denied natural justice or procedural fairness through the investigation process and that the applicant had failed to identify any such breach. It was further submitted that there was no substance to any of the applicant’s contentions that the required procedures were not followed. The respondent submitted that the applicant was entitled to think that the advice he received from counsel and his solicitor was rubbish, however that he had not properly articulated how this demonstrated a ground of review was made out and that the respondent’s decision was reviewable. Accordingly, it was submitted that the application should be dismissed with costs.

### **Discussion**

- [11] To be successful in his application for review of the respondent’s decision, the applicant must show that one of the grounds of review in s 20(2) of the Act is made out. The grounds of judicial review are concerned with the lawfulness of administrative decisions and do not otherwise constitute a general review of the “merits” of an administrative decision. As Kirby J said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* at [114]:<sup>2</sup>

“Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.” [footnotes omitted]

- [12] On the hearing of the application, it became clear that the applicant wished the court to examine the substance of the legal advices that he had received from counsel and the merits of the Commissioner’s decision not to pursue that particular allegation. As he was informed at the hearing, it is not the court’s role to determine whether or not the respondent has made the correct decision.
- [13] The applicant relied, *inter alia*, on the grounds of review found in s 20(2)(a) and (b) of the Act which encapsulate the fundamental requirement to ensure “procedural fairness”<sup>3</sup> is accorded in the making of administrative decisions. This includes that a person affected by a decision be given an adequate opportunity to prepare and

<sup>2</sup> (2003) 77 ALJR 1165; [2003] HCA 30.

<sup>3</sup> See for example *Kioa v West* (1985) 159 CLR 550 at 583-584 per Mason J.

present their case and have their submissions heard. On the hearing of the application, the applicant was specifically asked whether he was prevented by the respondent from making any submissions that he wanted to make, to which he replied, “No. I was not.” He was also asked whether he had the opportunity to make every submission he wanted to make to the respondent, to which he also replied, “Yeah.”

- [14] There was no evidence to suggest that the respondent’s investigation was carried out in any way other than in accordance with the requisite processes and procedures. It was thorough and afforded natural justice to all affected parties. The steps taken in the investigation process were detailed in the Commission’s investigation report. Mr Robert Brittan, who gave evidence on behalf of the Commission in his capacity as Director of Investigations, under cross-examination from the applicant confirmed this when he said, “I’m satisfied that that investigation was carried out in accordance with the Commission’s policies and guidelines.”
- [15] Nor did the applicant tender any evidence to support his allegations that the respondent acted with lenience and tolerance towards people of the legal profession or in a way to protect such people. As McMurdo P said in *Greenwood v Winsor* [2008] QCA 415,<sup>4</sup> the test of bias is whether a fair minded, properly informed member of the public might reasonably apprehend that the decision-maker might not bring an impartial mind to bear on the decision. This is not the case here. When, out of an abundance of caution, the applicant’s allegations were put to Mr Brittan he stated that “the Commission treats all people equally and there is no leniency shown to any persons.” Of course the applicant’s contentions of bias were somewhat undermined by the fact that the respondent found the applicant’s first ground of complaint against his solicitor made out and decided to pursue disciplinary action against him. This does not lend itself to the suggestion that the respondent has a tendency to protect members of the legal profession.
- [16] With respect to the grounds found in s 20(2) (d) and (e) of the Act, the applicant has not established that the respondent’s decision involved any improper exercise of power or error of law. The applicant has not articulated that the respondent failed to take a relevant consideration into account, acted in bad faith, failed to have regard to the merits of his complaints, did not act in accordance with a rule and/or policy or reached a decision that is unreasonable in the *Wednesbury*<sup>5</sup> sense. As the respondent submitted, there was adequate material before the Commissioner where he could form the view based on his own Commission investigation report and the QLS reports that the respective advices sought from counsel were appropriate in the circumstances and involved no potential misconduct, and thus reach the decision he did. Indeed as noted, the Commissioner’s decision to institute proceedings against a legal practitioner is a discretionary one<sup>6</sup> to be exercised in accordance with the Commission’s role as the independent regulator of the legal profession.
- [17] For these reasons, the applicant has not established that a statutory order of review of the respondent’s decision is warranted. The application should be dismissed. I will hear submissions as to costs.

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<sup>4</sup> At [5].

<sup>5</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>6</sup> Section 447, *Legal Profession Act 2007* (Qld).