IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 13 of 1981

FULL COURT

BEFORE:

Mr Justice Lucas S.P.J.

Mr Justice Kelly

Mr Justice Connolly

BRISBANE, 10 DECEMBER 1981

THE QUEEN

v.

B.M. WILSON

D.H. PHILLIPS

T.H.A. CROSS

ex parte: NOEL ROBINSON (Prosecutor)

JUDGMENT

MR JUSTICE LUCAS: In this case the Court was constituted by my brother Kelly, my brother Connolly and myself.

The Court is of the opinion that the order nisi should be discharged with costs, and that will be the order of the Court.

I am authorised by my brother Connolly to publish his reasons, which I do. I am authorised by my brother Kelly to say that he agrees with the reasons which have been published by my brother Connolly. I also agree with those reasons.

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THE QUEEN

v.

B.M. WILSON, D.H. PHILLIPS and T.H.A. CROSS

Ex parte: NOEL ROBINSON

LUCAS S.P.J.

KELLY J.

CONNOLLY J.

Judgment delivered by Connolly J. on 10th December, 1981.
Lucas S.P.J. and Kelly J. concurring with those reasons.

"ORDER NISI DISCHARGED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 13 of 1981

THE QUEEN

v.

WILSON & ORS.

Ex parte: ROBINSON

JUDGMENT - CONNOLLY J.

This is the return of an order nisi for prohibition directed to the members of the Disciplinary Committee of the Royal Australian Institute of Architects Queensland Chapter. The prosecutor was until 25th November 1980 a member of the Institute. In May 1978 he was retained by a Dr. McKay and his wife as their architect in relation to the erection of a house at Carina. He swears that his retainer was in accordance with the Institute's conditions of engagement. The McKays terminated his commission on 14th May 1979. On 11th April 1979 Dr. McKay submitted a report to the Institute alleging misconduct on the part of the prosecutor and plainly enough the misconduct intended was miscondui within the meaning of that expression as defined by article 54 of the Articles of Association of the Institute. For the purposes of that article it means "conduct contrary to the Code of Professional Conduct as approved and published by the Institute Council from time to time or conduct likely to bring the Institute or the Architectural Profession into disrepute." Article 54 requires such a report when received by the Institute to be considered by the Institute's Standing Committee Complaints. The same article requires the Standing Committee Complaints, if it is satisfied that the report does allege facts and circumstances which if proven would amount to misconduct by a member to forward a copy of the report to the member and call for a reply in writing. This was done and the prosecutor replied saying that as the matter was the subject/of pending civil proceedings he had been advised not to answer the allegations. Article 54 requires the Standing Committee Complaints if satisfied after considering the report and the reply in writing that there is a prima facie case of misconduct to forward the report and the reply to the Disciplinary Committee. The Disciplinary Committee in turn is required to consider the report and the reply and to appoint a time for a hearing to determine whether or not the member against whom any allegation is made in the report is guilty of misconduct. The member against whom any allegation is made is entitled to be represented by a solicitor and counsel at the hearing before the Disciplinary Committee. The powers of the Disciplinary Committee are set out in article 54 in the following terms:—

> "The Disciplinary Committee will hear the matters complained of and after so doing if it finds misconduct proven award any one of the following punishments either singly or in combination: (a) reprimand (b) suspension for a stated period not exceeding two years (c) expulsion.
>
> The Disciplinary Committee may also order that the costs of the Institute in respect of the matter be paid by the member or members provided that costs payable by the member must not exceed the sum of $500.00."

The Disciplinary Committee is also required to report to the President its finding and the punishment awarded. The fact of any reprimand, suspension or expulsion and such other information as the President decides shall be recorded in any publication as may be directed by the President, and the member concerned "shall be deemed to have consented to such record and publication." One of the consequences of suspension and expulsion is that the member becomes disentitled to use words or letters or other indication of membership of the Institute and that his name is not to be printed in any list of members in any publication of the Institute.

On 16th July 1980, the Disciplinary Committee appointed 9.30 a.m. on Wednesday, 20th August 1980 for the hearing and determination of the allegation against the prosecutor. The hearing was subsequently adjourned from time to time. The prosecutor now seeks a prerogative writ of prohibition prohibiting the present members of the Disciplinary Committee and any other persons appointed to sit on that Committee from taking any further step or entertaining any further proceeding upon Dr. McKay's complaint. The ground upon which the order nisi was obtained was that the Disciplinary Committee has no jurisdiction, the prosecutor being no longer a member of the Institute. There was also a ground setting up real likelihood of bias on the footing that one member of the Disciplinary Committee had given certain professional advice to the prosecutor during the course of construction of the building in respect of which the complaint was made. This ground was not persisted in before us.

The first question is whether the prerogative writ of prohibition lies to a body such as the Disciplinary Committee of the Royal Australian Institute of Architects. It is to be borne in mind that membership of the Institute is in no sense a licence to practice as an architect and that loss of membership entails no consequences of a legal character. The Institute is thus in marked contrast with a statutory body, the Board of Architects of Queensland, to which Board indeed Dr. McKay made a complaint upon which the Board took no action. The Disciplinary Committee is thus a domestic tribunal which owes its authority to the contract among the members of the Institute constituted by its articles of association. The following statement from Whitmore and Aronson “Review of Administrative Action” at pp. 422-423 is, in my opinion, not open to question:—

> “First, it is clear that a person who, although he has authority to determine questions, owes that authority solely to a private contract, is not exercising “legal” authority for present purposes. So private clubs, unincorporated associations and companies are beyond the reach of certiorari and prohibition (although they can be controlled by injunctions and declarations).”

The reference to “legal” authority is of course to the classical passage in the judgment of Atkin L.J. in <u>R. v. Electricity Commissioners</u> (1924) 1 K.B. 171 at p. 205 where his Lordship said that certiorari and prohibition lie against any body of persons having legal authority to determine questions affecting the rights of subjects.

Reliance was placed by the prosecutor on the decision of the Divisional Court in Reg. v. Criminal Injuries Compensation Board Ex parte Lain (1967) 2 Q.B. 864. The Board in question was not statutory but had been constituted under the prerogative power. Although the determinations by the Board led to ex gratia payments and not to legally enforceable rights to compensation, it was held that neither that fact nor the fact that the Board was not constituted by statute excluded the supervisory jurisdiction of the Court exercised by prerogative writ. The reason given by the Court was that the Board was a body of a public as opposed to a purely private or domestic character having power to determine matters affecting subjects and a duty to act judicially. It does not appear to assist the prosecutor but it was relied upon as indicating some relaxation of the earlier requirements in relation to tribunals amenable to the prerogative jurisdiction. So much is true though it may be doubted whether it is indeed a recent development. In the judgment of Lord Parker C.J. at p. 882 the following passage appears:—

> "The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned."

And at p. 884 Diplock L.J. said:—

> "The jurisdiction of the High Court as successor of the Court of Queen's Bench to supervise the exercise of their jurisdiction by inferior tribunals has not in the past

> been dependent upon the source of the tribunal's authority to decide issues submitted to its determination, except where such authority is derived solely from agreement of parties to the determination. The latter case falls within the field of private contract and thus within the ordinary civil jurisdiction of the High Court ..."

Lain's case was applied by this Court in Reg. v. Wedley Ex parte Burton (1976) Qd. R. 286. It was there held that prohibition lay to the committee of the Queensland Turf Club which although a domestic tribunal had been clothed by the legislature with the duty of disciplining persons subject to the rules of racing as defined by the Racing and Betting Act 1954-1972. The Disputes Committee of the Royal Australian Institute of Architects has had no such statutory function conferred upon it. It is true that the legislature has recognised the existence of the Institute and that the President is a member of the Board of Architects but there is nothing resembling a legislative endorsement of the functions of the Disciplinary Committee.

The situation is really analogous to a private arbitration of which Lord Goddard C.J. said in Reg. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) Ex parte Neate (1953) 1 Q.B. 704 at p. 708:—

> "There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom by statute the parties must resort."

Nearly thirty years later the same question arose in Bremer Vulkan Schiffbau v. South India Shipping Corporation Ltd. (1981) 2 W.L.R. 141. At p. 148 Lord Diplock inquired whether during the centuries long history of English arbitration, there were any instances of the Court of Queen's Bench before the Judicature Act or the High Court thereafter asserting a jurisdiction to control the conduct of a consensual private arbitration by the issue of prerogative writs or orders. His Lordship then referred to the judgment of Lord Goddard C.J. cited above and denied the general supervisory power over the conduct of arbitrations contended for in recent decisions of the Court of Appeal. This view accords with two decisions in Canada re McComb and Vancouver Real Estate Board (1960) 32 W.W.R. 385 a decision of the Supreme Court of British Columbia and Re Ness and Incorporated Canadian Racing Associations (1946) 3 D.L.R. 91 a decision of the Ontario Court of Appeal. In my view it is clear to the point of demonstration that the prerogative writs do not lie to the Disciplinary Committee of the Royal Australian Institute of Architects.

However, if the prosecutor had made out a clear title to relief he would not necessarily be defeated in this Court by having chosen the wrong remedy. The Queen v. Fine Rivers Shire Council Ex parte Raynbird (1967) Qd. R. 384 is authority in a proper case for the making of an appropriate declaration where a prosecutor has ventured unwarily into the quick sands of the prerogative jurisdiction. I am however, not persuaded that there is any substance in the submission that the authority of the Disciplinary Committee, as a matter of contract came to an end with the prosecutor's resignation from the Institute. The short statement which I have given above of the procedure provided by article 54 shows that it is initiated by the submission to the Institute of a report alleging misconduct by a member. The subsequent steps provided by article 54 are imperative requirements of the contract between the prosecutor and his fellow members and the Institute. It is natural that the draftsman when referring to the person the subject of the report should refer to him as the member. It is therefore natural that as a matter of drafting the right to representation is conferred upon “the member” and that a discretionary power in the Disciplinary Committee to order the payment of costs should refer to their payment by the member. So far as publication of the determination of the Disciplinary Committee is concerned, the article provides that “the member” shall be deemed to have consented. However in my judgment it is to read too much into the reiteration from time to time of the word member to say that on the proper construction of article 54 the provisions made for the successive steps of this consensual arbitration ceased to operate because he has resigned. If this was so, as was pointed out in argument he might sit through the hearing as a member and avoid the ultimate determination by resigning at the last moment or could even hear a determination of misconduct and avoid an order for costs by then resigning. It may be as Mr. Dowsett contended that the operation of article 54 is conditional/only upon the person the subject of a complaint of misconduct having been member at the time of the alleged misconduct. It is not necessary for the purpose of this decision to go so far. It is clear in my judgment that a person who is a member when the report which initiates the disciplinary machinery is received by the Institute has contracted that he will submit to the progressive steps provided for by the article and that his subsequent resignation can have no effect upon that contractual submission.

In my opinion the order nisi should be discharged.