

CITATION: *Legal Services Commissioner v Laylee & Devlin*
[2017] QCAT 184

PARTIES: Legal Services Commissioner
(Applicant)
v
Ms Angela Laylee
Mr John Joseph Devlin
(Respondents)

APPLICATION NUMBER: OCR327-12 & OCR329-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice DG Thomas, President**
Assisted by:
Ms Megan Mahon, Legal panel member
Dr Margaret Steinberg, Lay panel member

DELIVERED ON: 2 June 2017

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. There be no order as to costs made against Angela Laylee.**
- 2. The Legal Services Commissioner must pay John Joseph Devlin's costs to be assessed on the standard basis on the Supreme Court Scale under the *Uniform Civil Procedure Rules 1999 (Qld)* in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – GENERALLY – where the charges brought by the Commissioner against the respondents were dismissed – where the respondents were found not to have engaged in unsatisfactory professional conduct or professional misconduct – where the respondents submit that the

Commissioner should pay the costs of the proceedings – where the Commissioner may be ordered to pay costs where special circumstances exist pursuant to section 462(4) of the *Legal Profession Act 2007* (Qld) – whether special circumstances exist and warrant such an order

Legal Profession Act 2007 (Qld) ss 418, 419, 462(4)

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Legal Services Commissioner v Atkins [2009] LPT 10

Legal Services Commissioner v Baker [2005] LPT 002

Legal Services Commissioner v Bone [2013] QCAT 550

Legal Services Commissioner v Hansen (No 2) [2008] LPT 10

Legal Services Commissioner v McClelland [2006] LPT 13

Legal Services Commissioner v Sing (No 2) [2007] LPT 005

New South Wales Bar Association v Tedeschi (No 3) [2003] NSWADT 174

REPRESENTATIVES (if any):

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

REASONS FOR DECISION

- [1] Charges, which were brought against the respondents, were dismissed.
- [2] The applicant and the respondents have made submissions regarding costs.
- [3] The applicant submits that there should be no order as to costs.¹ The respondents seek an order that the Commissioner pay their costs, awarded on an indemnity basis.²

¹ Submissions on behalf of the applicant in relation to costs filed 17 August 2016, paragraph 17.

² Submissions on behalf of the respondents in relation to costs filed 15 September 2016, paragraphs 3 & 34.

The submissions

- [4] Section 462(4) *Legal Profession Act 2007* (Qld) ('LPA') provides that the Tribunal may make an order requiring the Commissioner to pay costs. It may do this only if it is satisfied that:
- a) the Australian Legal Practitioner has not engaged in prescribed conduct; and
 - b) special circumstances warrant the making of the order.
- [5] The parties agree that, ordinarily, the Commissioner will not be ordered to pay costs only because the charges he pursues are unsuccessful.³
- [6] The respondents refer to the following special circumstances:
- a) neither charge had any substantial prospect of success, and that ought reasonably to have been known by the Commissioner long before the hearing;
 - b) in May 2012, the respondents offered an appropriate resolution to "make good" Ms Laylee's mistake, which would have avoided any conceivable adverse consequences for the complainant and should have been (but was not) accepted;
 - c) the Commissioner's dogged prosecution of the respondents for what only could ever sensibly have been seen – at worst – as honest and minor mistakes, errors of judgment or oversights, was directly contrary to its own published guidelines and could never have been properly considered to be in the public interest. Failure to follow guidelines in prosecuting minor isolated errors which could otherwise be appropriately addressed, particularly when an acceptable offer has been made and rejected are, it is submitted by the respondents, capable of constituting special circumstances at least in combination with other facts such as poor prospects;⁴ and
 - d) the unjustifiable delay in the Commissioner bringing to trial matters about which a complaint was made in June 2011, so that the respondents had the charges unnecessarily hanging over their heads for years.⁵ The respondents submit that although delay alone may not usually comprise a sufficiently special circumstance for section 462(4) LPA, it is capable of forming part of a combination of such circumstances together with matters such as poor prospects.⁶
- [7] The respondents refer to correspondence in which issues were fully ventilated, and in which the respondents' solicitors set out conclusions similar to those that were reached by the Tribunal. In these communications, the respondents submit the position was clearly put that it would not be in the public interest for disciplinary action to be instituted in

³ Submissions on behalf of the respondents in relation to costs filed 15 September 2016, paragraph 4.

⁴ Ibid, paragraph 7.

⁵ Ibid, paragraph 3.

⁶ Ibid, paragraph 6.

the circumstances that have been the subject of these disciplinary proceedings, including in respect of an isolated act of negligence.⁷

[8] The Commissioner submits essentially that no special circumstances exist so that no order should be made under section 462(4) LPA.

[9] The Commissioner submits that, in recognition of the public interest, which motivates the Commissioner in approaching the Tribunal, ordinarily, notwithstanding the success of a respondent, the Commissioner will not be ordered to pay costs.⁸

[10] As to each of the bases upon which the respondents assert that special circumstances arise, the Commissioner submits:

- a) **Neither charge had any substantial prospects of success, and that ought reasonably to have been known by the Commissioner long before the hearing.** The findings of the Tribunal demonstrate that there was a triable issue. The conduct engaged in by the respondents was capable of scrutiny by a Tribunal, and a hearing was required to determine whether the application met the threshold of the *Briginshaw* test.⁹ When considering the test formulated by Byrne J in *Legal Services Commissioner v Atkins*,¹⁰ the present circumstances do not amount to “special circumstances”. There was a triable issue and the mere fact that the application failed cannot establish special circumstances. It was for the Tribunal to determine whether or not the conduct amounted to unsatisfactory professional conduct. Oral evidence was heard and the Tribunal made comments in relation to the credibility of witnesses.¹¹
- b) **In May 2012, the respondents offered an appropriate resolution to make good Ms Laylee’s mistake, which should have avoided any conceivable adverse consequence for the complainant and should have been (but were not) accepted.** The offer involved an assessment of costs or alternatively repayment of a sum of money.¹² The Commissioner notes that the respondents seek costs on a standard basis, up to 3 June 2012, and on an indemnity basis thereafter – this being due to the offer. The Commissioner submits it was a matter for the claimant (not the Commissioner) as to whether the offer was accepted or rejected.¹³ The Commissioner further submits that the focus of a disciplinary proceeding is not to seek a settlement but to seek discipline of a legal practitioner and protection of the public. It is submitted that it is no part of a discipline system for

⁷ Ibid, paragraphs 9 – 19.

⁸ Submissions in reply on behalf the applicant in relation to costs filed 5 October 2016, paragraph 8.

⁹ Ibid, paragraph 12.

¹⁰ [2009] LPT 10.

¹¹ Submissions in reply on behalf the applicant in relation to costs filed 5 October 2016, paragraph 17.

¹² Ibid, paragraph 19.

¹³ Ibid, paragraph 20.

offers of compensation to avoid disciplinary action. In any event, on the authorities, an order on an indemnity basis is not justified.¹⁴

- c) **The Commissioner’s dogged prosecution – was directly contrary to its own published guidelines and could never have properly considered to be in the public interest.** The Commissioner submits that the proceedings against the respondents was an appropriate prosecution action and consistent with the Commissioner guidelines.¹⁵
- d) **The unjustifiable delay in the Commissioner bringing to trial matters about which the complaint was made in June 2011... “unnecessarily hanging over their heads for years.”** The Commissioner filed affidavits of Martin Francis Kelly (sworn 5 October 2016) and Premika Prasad (sworn 17 October 2016). The Commissioner submits that the delay was substantially caused by the respondents.¹⁶ The Commissioner submits that there was no evidence on the basis of which a finding could be made that there was an unacceptable or unjustifiable delay on the part of the Commissioner.¹⁷

Discussion

[11] Section 462(4) LPA provides:

- (4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that—
 - (a) the Australian legal practitioner or law practice employee has not engaged in prescribed conduct; and
 - (b) the body considers that special circumstances warrant the making of the order.

[12] The major divergence between the parties is what constitutes “special circumstances” and so whether special circumstances have occurred in this case.

[13] As is well settled, and as the parties agree, section 462(4) LPA assumes that, generally, the Commissioner will not be ordered to pay costs just because a discipline application fails or that a particular factual allegation is not sustained.

[14] It is logical that lack of success with respect to disputed allegations or charges will not, usually, constitute special circumstances. Otherwise, the position would be no different from other cases where costs follow the event. That is not what is intended by the LPA.

¹⁴ Ibid, paragraphs 23 – 26.

¹⁵ Ibid, paragraph 28.

¹⁶ Submissions in reply on behalf the applicant in relation to costs filed 5 October 2016, paragraph 35.

¹⁷ Ibid, paragraph 36.

[15] The general rule is that a practitioner found not guilty is not entitled to costs.¹⁸

[16] This approach recognises the public interest that motivates the Commissioner in approaching the Tribunal.¹⁹

[17] The public interest is found in the purposes of the disciplinary regime, which include providing for the discipline of the legal profession and promoting and enforcing professional standards, competence and honesty of the legal profession so as to ensure that the public is protected.

[18] As Moynihan SJA observed in *Legal Services Commissioner v Baker*:²⁰

“The predominate consideration in dealing with the consequences of such findings (of professional misconduct and unprofessional conduct) is the public interest in having legal practitioners be aware of their obligations to clients.”

[19] Moynihan SJA observed that one of the public interests is to set standards and deter practitioners from departing from those standards.

[20] In furthering the public interest, it is well accepted that disciplinary proceedings against the legal practitioner are primarily directed towards the protection of the public and not punishment of the practitioner.

[21] From the structure of section 462 LPA, it seems clear that the object of the costs provisions is to ensure that the Commissioner can bring disciplinary proceedings in the public interest, without facing the risk of exposure to costs except in special circumstances. That includes bringing proceedings where the Commissioner is in some doubt about a matter and so seeks determination from the Tribunal.

[22] In the context of the public interest, the Tribunal agrees with the observations by White J in *Legal Services Commissioner v Hansen (No 2)*, when her Honour said:²¹

“it is not inappropriate for the Legal Services Commissioner to seek the ruling of the Tribunal so as to further the public interest considerations. As has been said, the mere fact that a discipline application fails, or a particularly factual allegation is not sustained, does not of itself establish “special circumstances”.

[23] If a charge has no substantial prospect of success, and that ought reasonably to have been appreciated by the Commissioner, the necessary “special circumstances” are more likely to arise.

¹⁸ *Legal Services Commissioner v Atkins* [2009] LPT 10 at [80] & [81]; *Legal Services Commissioner v Sing (No 2)* [2007] LPT 005.

¹⁹ *Legal Services Commissioner v Sing (No 2)* [2007] LPT 005.

²⁰ [2005] LPT 002 at page 2.

²¹ [2008] LPT 10 at [20].

[24] White J²² referred to the New South Wales case of *New South Wales Bar Association v Tedeschi (No 3)*²³ when referring to special circumstances. For special circumstances to arise, the Tribunal in *Tedeschi* made the following observations:

- a) There must be something which distinguishes the case from other cases where a legal practitioner has been found not guilty.
- b) There must be something that sets the case apart from the usual or ordinary case where a practitioner has been found not guilty.
- c) The distinguishing feature does not have to be exceptional.
- d) The distinguishing circumstances must be of such significance, and thus special, that the Tribunal considers that they warrant an order being made for payment.
- e) It is not necessary that each circumstance be special if a combination of circumstances amounts to special circumstances.

[25] In *Legal Services Commissioner v Sing (No 2)*²⁴ de Jersey CJ, as he then was, observed that “special circumstances” means just that. They must be special.

[26] The Tribunal agrees with the observations made in *Tedeschi* and also in *Sing*.

[27] Delay may constitute special circumstances, but generally delay on its own will not.²⁵ Delay in conjunction with other circumstances may be relevant, particularly as it is not necessary that each circumstance be special but a combination of circumstances may amount to special circumstances. The absence of a demonstrated connection between delay and additional trouble or expense of defending the application led to the observation by Byrne SJA²⁶ that delay does not afford an adequate foundation for conclusion that there are “special circumstances”.

[28] A significant issue between the parties is whether the charges had no substantial prospects of success in circumstances where this ought reasonably to have been appreciated by the Commissioner.

[29] The Commissioner puts the position on the basis that there was a “triable issue” in circumstances where the conduct engaged in by the respondents was capable of scrutiny by the Tribunal, with a hearing being required to

²² *Legal Services Commissioner v Hansen (No 2)* [2008] LPT 10 at [7].

²³ [2003] NSWADT 174.

²⁴ [2007] LPT 005.

²⁵ *Legal Services Commissioner v Hansen (No 2)* [2008] LPT 10 at [15] & [16].

²⁶ *Legal Services Commissioner v Atkins* [2009] LPT 10 at [76]-[79].

determine whether the application met the threshold of the *Briginshaw* test.²⁷

- [30] Because the charges were different for each respondent, it is necessary to consider the position of each respondent individually.

Charges against Ms Laylee

- [31] The Commissioner submits that where the conduct related to an isolated occasion, it was for the Tribunal to determine whether or not the conduct amounted to unsatisfactory professional conduct.²⁸

- [32] The respondents referred to numerous communications between the parties where the respondents actively made submissions to the effect that there was insufficient basis to justify proceedings against Ms Laylee in which, as the respondents put it, the correct analysis was clarified and emphasised on a number of occasions without any impact upon the Commissioner's approach.²⁹

- [33] It was submitted that the counter position, which to a substantial extent was consistent with the ultimate findings of the Tribunal, was put clearly to the Commissioner but it seems did not impact upon the Commissioner's approach. The submission was therefore that the charges had no substantial prospect of success and this ought reasonably to have been appreciated by the Commissioner, particularly in circumstances where the warnings were provided.

- [34] There are some similarities with the facts that were considered by the Legal Practice Tribunal in *Legal Services Commissioner v Hansen (No 2)*.³⁰

- [35] In *Hansen*, the Legal Services Commissioner had a report from the Bar Association which recommended that no disciplinary charges be brought against the respondent as a consequence of the original complaint because the evidence did not support such a charge.³¹ Moreover, the Bar Association Report concluded that there seemed to be no public benefit in charging the respondent, whether or not there were reasonable prospects of finding misconduct by the respondent.³²

- [36] As in the current case, submissions were made in *Hansen* as to the Commissioner's prosecution guidelines. These guidelines were to the effect that the Commissioner will not make a discipline application to the disciplinary body unless satisfied that the evidence, after investigation, establishes both that there is a reasonable likelihood of a finding of either

²⁷ Submissions in reply on behalf the applicant in relation to costs filed 5 October 2016, paragraph 12.

²⁸ *Ibid*, paragraph 17.

²⁹ Submissions on behalf of the respondent in relation to costs filed 15 September 2016, paragraphs 12, 14, and 15.

³⁰ [2008] LPT 10.

³¹ *Legal Services Commissioner v Hansen (No 2)* [2008] LPT 10 at [12].

³² *Ibid* at [13].

unsatisfactory professional conduct or professional misconduct and it is in the public interest to make the disciplinary application.³³

[37] In *Hansen's* case, the respondent contended that the evidence available to the Legal Services Commissioner should not have satisfied the reasonable likelihood test.

[38] White J concluded that the question of breach required a number of factors to be weighed and, in the context of the public interest, the tone of observations made in the Bar Association Report alerted the Legal Services Commissioner to wider issues of professional standards. White J noted that disciplinary proceedings against the legal practitioner are directed primarily towards protection of the public and not the punishment of the practitioner. It was further noted that the matter which was the subject of the disciplinary proceedings was an important question, which had not been the subject of any analysis in the jurisdiction. White J concluded it was not inappropriate for the Legal Services Commissioner to seek the ruling of the Tribunal.³⁴

[39] In reference to the Legal Services Commissioner's prosecution guidelines, as outlined by White J, the following comment is made by the Commissioner:

“...a new benchmark to the regulation of the legal profession in Queensland – a legal practitioner's conduct is no longer to be assessed by reference only to the standard ‘members of the profession of good repute and competency’ are entitled to expect of their fellow practitioner but by reference to the standard ‘member of the public’ is entitled to expect.

...The Commission believes it goes beyond unethical or improper conduct to include, depending on the circumstances, the sorts of honest mistakes, errors of judgment and poor standards of client service that give rise to legitimate consumer grievance.”³⁵

[40] The belief of the Commissioner as reflected in those guidelines derives, no doubt, from the definitions of “unsatisfactory provisional conduct” and “professional misconduct”.³⁶

[41] As has been submitted by the respondents, there have been just two decisions that touched upon this issue, namely, *Legal Services Commissioner v McClelland*³⁷ and *Legal Services Commissioner v Bone*.³⁸

³³ Ibid at [19] & [20].

³⁴ *Legal Services Commissioner v Hansen (No 2)* [2008] LPT 10 at [20].

³⁵ Ibid at [19].

³⁶ *Legal Profession Act* 2007 (Qld) ss 418, 419.

³⁷ [2006] LPT 13.

³⁸ [2013] QCAT 550.

- [42] The Tribunal concludes that the law in this area was not sufficiently settled that it could be said that the charges had “no substantial prospect of success and that ought reasonably to have been appreciated by the Commissioner.”
- [43] In the circumstances confronting the Commissioner concerning these proceedings, the issue regarding prospects and the appreciation of the Commissioner as to prospects, was not a special circumstance relevant to section 462(4) LPA.
- [44] Of course, the consideration of whether special circumstances exist happens in the context of the particular factual matrix at the time of the consideration. With the benefit of the primary decision in this case, it may be that, for future similar factual circumstances, a different outcome would follow.
- [45] In relation to the question of delay, there is a factual dispute between the parties. With the submissions in reply (filed on 5 October 2016 and 1 November 2016), the Commissioner filed affidavits of Martin Kelly (sworn 5 October 2016) and Premika Prasad (sworn 17 October 2016) which set out the steps which were taken in the proceedings.
- [46] From the information contained in these affidavits and the submissions in reply, the Tribunal finds that the progress of the proceedings was attributable to both the Commissioner and the respondents.
- [47] In the circumstance, the Tribunal concludes that delay is not a special circumstance in this case.
- [48] As to the Commissioner’s guidelines, the respondents refer to the approach as to prosecution concerning minor isolated issues, particularly when an offer to appropriately address the matters has been made and rejected without justification. The respondents submit that such matters are capable of constituting special circumstances in combination with an issue such as poor prospects.
- [49] The factors concerning the guidelines and the offer to address the matters do not amount to special circumstances especially in view of the conclusion that has been reached by the Tribunal regarding the question of prospects of success.
- [50] The Tribunal makes no order as to costs, in relation to Ms Laylee.

The claim against Mr Devlin

- [51] There were two aspects of the claim against Mr Devlin which were dealt with in the primary decision.
- [52] Mr Devlin argued that, as the words of the application stood, knowledge was no element of the charge and, in those circumstances, the charge could not succeed because, without knowledge, the sending of the invoice could never comprise unsatisfactory professional conduct.

- [53] As to the second aspect, Mr Devlin argued that, assuming knowledge was an element of the charge, the factual circumstances did not demonstrate sufficient level of knowledge that the conduct could be regarded as unsatisfactory professional conduct.
- [54] Mr Devlin argues that the Tribunal concluded (at paragraph 108) that knowledge could form no aspect of the charge against Mr Devlin and in those circumstances accepted (at paragraph 114) the submissions for Mr Devlin that the charge could not succeed because, without knowledge, the sending of the invoice could never comprise unsatisfactory professional conduct.³⁹
- [55] Mr Devlin further argued that, based largely upon uncontroversial and mostly documentary evidence, the Tribunal concluded (at paragraph 146) that it was not reasonable to infer that Mr Devlin knew, or should reasonably have suspected, that Ms Laylee had made a mistake which would mean that the work she undertook should not be billed.⁴⁰
- [56] In relation to Mr Delvin, the Commissioner refers to the Tribunal's conclusions outlined in paragraphs 146 & 147 of the reasons and submits that these findings demonstrate there was a triable issue.⁴¹
- [57] The Commissioner submits that there was conduct engaged in by the respondents that was capable of scrutiny by a Tribunal and that the hearing was required to determine whether the application met the threshold of the *Briginshaw* test.
- [58] The paragraphs in the reasons referred to by the Commissioner were those which considered whether, assuming knowledge was an element, it was reasonable to infer that Mr Devlin knew or should reasonably have suspected that Ms Laylee had made a mistake which would mean that the work which she undertook should not be billed.
- [59] The Commissioner did not specifically address the argument by Mr Devlin concerning the scope of the charge and whether knowledge was any element of the charge.
- [60] As to Mr Devlin, the respondent submits it was inevitable that the scope of the charges would be found to make knowledge irrelevant and that in any event on the contemporaneous documents, he could not be inferred to have had the requisite knowledge.⁴²

³⁹ Submissions on behalf of the respondents in relation to costs filed 15 September 2016, paragraph 27.

⁴⁰ Submissions on behalf of the respondents in relation to costs filed 15 September 2016, paragraph 29.

⁴¹ Applicant's reply, submissions on costs filed 5 October 2016, paragraphs 11 & 12.

⁴² Respondent's further submissions dated 11 October 2016.

- [61] In considering whether special circumstances exist, it is necessary to consider whether this was inevitable, and this ought reasonably to have been known by the Commissioner.
- [62] This is against the background of the general rule that the practitioner found not guilty is not entitled to costs.
- [63] The outcome concerning the relevance of knowledge was more obvious than that which concerns the question of requisite knowledge.
- [64] Even as to the question of requisite knowledge, the decision turned on the documents, particularly the email exchanges which took place on 18 March 2010, between Mr Devlin and Ms Misso.
- [65] Whilst the Tribunal found Ms Misso to be an unimpressive witness, that factor was not relevant to those written exchanges.
- [66] The failure of the charge as made did not depend upon the cross-examination at the hearing. The charge had no substantial prospects of success.
- [67] This should have been obvious to the Commissioner.
- [68] In the circumstances, where the charge had no substantial prospects of success and that ought reasonably to have been appreciated by the Commissioner, the Tribunal finds that special circumstances did arise with respect to the claim against Mr Devlin and so orders that the Commissioner pay Mr Devlin's costs.
- [69] The Tribunal orders that:
- a) There will be no order as to costs as to the claim involving Ms Laylee.
 - b) The Legal Services Commissioner pay the costs of Mr Devlin to be assessed on the standard basis on the Supreme Court Scale under the *Uniform Civil Procedure Rules* 1999 (Qld) in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland.