QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Jensen* [2018] QCAT 264
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **CRAIG GRAHAM SELWYN JENSEN** (respondent)
APPLICATION NO/S:	OCR069-14
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	13 August 2018
HEARING DATE:	13 August 2018
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Mr Scott Anderson Ms Patrice McKay
ORDERS:	**The respondent shall pay the applicant's costs to be assessed on the standard basis on the Supreme Court Scale under the *Uniform Civil Procedure Rules* in the manner that the costs would be assessed in the Supreme Court of Queensland.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – where costs reserved – where respondent appealed to Court of Appeal – where Court of Appeal allowed the appeal – where Court of Appeal made no determination as to costs – whether exceptional circumstances exist to depart from the prima facie position under s 462 *Legal Profession Act* 2007. *Legal Profession Act* 2007, s 462 *Legal Services Commissioner v Scott* [2009] LPT 007

APPEARANCES &
REPRESENTATION:

Applicant:	M Nicholson of counsel, instructed by Legal Services Commissioner
Respondent:	M Cooper Solicitor, appearing pro bono of Michael Cooper Lawyer

REASONS FOR DECISION

[1] Today's hearing represents what should be the denouement of long-running litigation in this tribunal between the applicant, the Legal Services Commissioner ('**LSC**'), and the respondent, who is a legal practitioner.

[2] Ultimately, today's hearing is concerned only with whether an order for costs should be made under section 462 of the *Legal Profession Act* 2007 ("the Act"), and, if so, the nature and form of that costs order.

[3] It is sufficient, for present purposes, to give only a very brief history of the matter. In 2014, the applicant commenced disciplinary proceedings against the respondent in the tribunal, preferring four charges against the respondent. Those charges came on for hearing in the tribunal in August of 2015. Ultimately, on 22 May 2017, the decision of the tribunal was published, by which, amongst other things, the tribunal made findings that the respondent had engaged in professional misconduct, and unsatisfactory professional conduct, and imposed a sanction purporting to order that the respondent's name be removed from the Roll of Solicitors. Importantly, order 3 of the tribunal's decision delivered on that day effectively reserved the question of costs by providing:

> Unless either party requests an oral hearing by 9 June 2017, the issue of costs will be decided on the papers after 9 June 2017.

[4] The questions of costs, so reserved by the tribunal, was never determined.

[5] The respondent instituted an appeal, which is the subject of the judgment of the Court of Appeal in *Jensen v Legal Services Commissioner*.[1] His appeal was allowed, and when one reads the judgment of Atkinson J (with whom Soffronoff P and Gotterson JA agreed) it is clear enough that the approach of the Court of Appeal was to reconsider the impugned conduct and come to an assessment of the characterisation of the conduct of the respondent which was, in several respects, quite different from the characterisation which was found in the decision of this tribunal.

[6] That characterisation is summarised at [170] and [171] of Atkinson J's judgment, where she held that, on charges 1 and 2, she found the respondent guilty of unprofessional conduct; on charge 3, guilty of professional conduct; and, on charge 4, guilty of unprofessional conduct and of professional misconduct, which justified a finding that he was not a fit and proper person to engage in legal practice. Her Honour

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1 [2017] QCA 189.

noted that those findings were different from those made by QCAT, and meant that the appeal should be allowed and replaced with those findings.

[7] Again, it is sufficient to note that the characterisation of the conduct, as found by the Court of Appeal, was, by and large, less serious than that which had been found in this tribunal. In particular, on charges 1 and 2, the tribunal had made findings of professional misconduct, whereas, as I have just noted, in the Court of Appeal that was, effectively, downgraded to one of unsatisfactory professional conduct (noting that Atkinson J used the term "unprofessional conduct", which I construe was equivalent to the technical term "unsatisfactory professional conduct").

[8] In any event, the decision of the Court of Appeal was, overall, to diminish the severity of the characterisation of the conduct which had been the basis of the charges brought against the respondent by the LSC. The consequence of the Court of Appeal's reassessment of the characterisation of the conduct also led the court to reassess the appropriate sanction to be imposed. Whereas the tribunal had purported to direct that the respondent's name be removed from the Roll of Solicitors (remembering that, in truth, the statutory role of the tribunal is to make a recommendation with respect to removal of the name) the Court of Appeal imposed a sanction which comprised a "public sanction", an order for the respondent to be suspended from practice for some nine months, and an order for the respondent to be counselled. I note in passing that the Court of Appeal judgment does not in any way deal, or even refer to, the costs of the appeal, let alone the costs of the proceeding before the tribunal.

[9] An application for special leave to appeal to the High Court against that judgment of the Court of Appeal was subsequently refused in early 2018.

[10] So, finally, the matter has found its way back to this tribunal, for disposition of the question of costs which, as I have already noted, was effectively reserved as long ago as 22 May 2017.

[11] The respondent, in written submissions, sought to raise what was described as a preliminary jurisdictional point contending, in effect, that because the Court of Appeal had made final orders, then the matter of costs was no longer a live consideration before this tribunal. It was submitted that, by the terms of the Court of Appeal judgment, the Court of Appeal had set aside the tribunal's decision and substituted its own and had not remitted anything for further decision by the tribunal. It was also submitted, as I have observed, that the Court of Appeal did not expressly make an order as to costs. From that, it was argued that this tribunal now lacks jurisdiction to make any further order with respect to costs.

[12] I do not accept that supposed jurisdictional point. It is clear from the Court of Appeal judgment that their Honours simply did not deal at all with the question of costs, either before the Court of Appeal or the costs before this tribunal. It would have been difficult, of course, for them to have dealt with the costs before the tribunal, because there had never been a costs order in relation to the proceedings before this tribunal.

[13] I do not know why the parties did not agitate the question of recovery of costs in the Court of Appeal. It is not as if the parties were not represented before the Court of Appeal, and clearly it is not the function of this tribunal to make any costs order in relation to the costs of and incidental to the appeal.

[14] It is equally clear that the question of costs of the proceeding before this tribunal was reserved, and remained reserved, and remains reserved, and nothing done or said by the Court of Appeal in any way disturbs that reservation of the need to determine the question of costs.

[15] Moving then to the substantive argument today. The starting point is section 462(1), of the Act, which provides:

> A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.

[16] It is clear enough that the onus rests on the respondent to satisfy the tribunal that exceptional circumstances exist such as to warrant the departure from a prima facie position, which is made clear under section 462, namely, that it is mandatory for the tribunal to make a costs order, in the absence of the demonstration of exceptional circumstances.

[17] It is unnecessary to traverse the authorities which interpret the phrase 'exceptional circumstances'. It is sufficient to refer to *Legal Services Commissioner v Scott*,[2] in which it was said to the effect that, in order to be "exceptional circumstances", the circumstances have to be unusual, special or uncommon. They do not need to be unique, unprecedented or very rare. But, on the other hand, they cannot be regular, routine or circumstances which are normally encountered.

[18] It has been said on numerous occasions that the words 'exceptional circumstance' are plain words easily understood, and that is the approach that should properly be taken in construing and applying that phrase in the present case.

[19] Ultimately, the submission advanced on behalf of the respondent was that there were two sets of circumstances to take into account as exceptional circumstances. One was the successful appeal, and the second one was what was described as an unannounced change in the applicant's policy as regards the quantum of costs.

[20] A third matter of supposed exceptional circumstance that was originally advertised in the respondent's submissions concerning certain allegations that had mistakenly been made by the LSC against the respondent was expressly abandoned in the course of argument today.

[21] As to the first matter relied on as founding exceptional circumstances, the matter referred to in the respondent's submissions was described as a "successful appeal of the tribunal's decision". That description is accurate so far as it goes, but is apt to disguise the true nature of the proceeding and the real effect of the outcome of the appeal before the Court of Appeal. True it is that the respondent was successful in the appeal, and true it is that the respondent succeeded in obtaining orders from the Court of Appeal that were of much less serious effect than the orders that had originally been imposed by the tribunal. But when one steps back, one understands that the nature of the proceedings are, of course, disciplinary proceedings against a legal practitioner, and that the findings by the tribunal were findings of professional misconduct of such

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2 [2009] LPT 007.

seriousness as to warrant the making or recommendation of an order that the practitioner's name be removed from the roll.

[22] The true import of the judgment of the Court of Appeal should not be understated. The findings of the Court of Appeal were that, in the circumstances which constituted the impugned conduct, the practitioner engaged in conduct which was variously characterised as being professional misconduct and unsatisfactory professional conduct.

[23] The Court of Appeal, assessing the matter independently, imposed what the Court considered to be an appropriate sanction. True it is that the sanction imposed by the Court of Appeal was less serious than that which had been imposed by the tribunal at first instance, but it was, nevertheless, a serious sanction against the practitioner. It involved a public reprimand and the imposition of a substantial period of suspension from practice. Those are serious sanctions which represent the seriousness of the level of professional misconduct and unsatisfactory professional misconduct which had been found by the Court of Appeal.

[24] In the course of argument, the solicitor who appeared today pro bono for the respondent confirmed that the respondent would have exercised his right to contest the disciplinary proceeding regardless of how much was involved by way of costs. That, of course, is, and always was, the respondent's right, and it is one of the hallmarks of the adversarial system of justice of which we have the benefit. But it would be an error to think that the fact that the respondent was successful in his appeal to the Court of Appeal represented a complete vindication in the context of the disciplinary charges that were brought against him.

[25] On the contrary, the judgment of the Court of Appeal makes clear that he was guilty of conduct which warranted sanction. The difference between the Court of Appeal and this tribunal was, as I have already noted on several occasions, as to the proper characterisation of that conduct and the consequential sanctions to be imposed.

[26] Accordingly, in the circumstances of this case, I do not regard the fact that the respondent pursued with success an appeal against the tribunal's decision, constitutes exceptional circumstances for the purposes of considering whether or not the respondent ought to pay costs in accordance with section 462. On the contrary, as I have already noted, the position advised to this tribunal today was that the respondent would always have exercised his right to contest the disciplinary proceeding which had been brought against him.

[27] The second matter of exceptional circumstance, was what was described as an unannounced change in the LSC's policy as to the quantum of costs. In brief, that can be summarised in this way: it had previously been the 'policy' of the LSC to limit the quantum of costs that he sought to recover in disciplinary proceedings to something in the order of several thousand dollars. During the pendency of this proceeding, that policy changed such that the policy of the LSC was to seek to recover costs effectively calculated on the Supreme Court scale.

[28] Again, that change in policy by the LSC can hardly be pointed to as an exceptional circumstance. As was made clear, and as I have already mentioned on several occasions now, it was always the intention of the respondent to contest the disciplinary charges which had been brought against him. Whatever the LSC's policy may or may

not have been with respect to the quantum of the costs that the LSC might seek to recover could have played no part in the respondent electing, as he was entitled to do, to press for a contested hearing and a determination on the merits by the tribunal.

[29] Accordingly, I am not satisfied that any exceptional circumstances exist in the present case and I am therefore bound by the terms of section 462 to make an order for costs.

[30] Section 462(5), provides that 'an order for costs' may either be for a 'stated amount' or, '...may be for an unstated amount', and in that latter case, it "...must state the basis on which the amount must be decided."

[31] The solicitor appearing for the respondent urged the tribunal to make an order in a stated amount, and also, pursuant to section 462(6), to fix a timeframe as the term within which those costs should be paid.

[32] The applicant was unable to agree to the costs being fixed in a stated amount. It is clear enough, even from a cursory perusal of the file, that this was not a completely straightforward disciplinary proceeding. There was at least one interlocutory joust dealing with an application by the respondent to strike out the proceeding. It is also clear enough that the hearing itself was a strongly contested hearing in which the applicant was represented by Queen's Counsel, and which involved not only extensive oral evidence but the making of extensive submissions by the parties.

[33] I also note that the respondent has not put on any material from which this tribunal could even hazard a good, informed estimate of what the applicant's properly recoverable costs might be likely to be.

[34] In all the circumstances, I am not persuaded that this is an appropriate case for making an order for costs to be in a stated amount. Rather, there will be an order to the effect that the respondent pay the applicant's costs of and incidental to the disciplinary proceeding before this Tribunal, to be assessed as if the matter were a proceeding in the Supreme Court.