

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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LEGAL PROFESSION CONDUCT COMMISSIONER v O'BRYAN

[2023] SASCF 2

Judgment of The Full Court

(The Honourable President Livesey, the Honourable Justice Bleby and the Honourable Justice S David)

31 August 2023

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - GENERALLY

Application by the Legal Profession Conduct Commissioner for orders that the practitioner's name be struck from the roll of legal practitioners and for the costs of the application.

The practitioner was struck off the Victorian roll of legal practitioners following findings of serious misconduct in connection with charging practices during the course of the practitioner acting as senior counsel in class action proceedings. The details of the misconduct are set out in the reasons of Justice Dixon in *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666.

The Court held (granting the applications):

1. The practitioner's name will be removed from the roll of legal practitioners maintained under the *Legal Practitioners Act 1981* (SA).
2. The practitioner is ordered to pay the Commissioner's costs of and occasioned by the application to be taxed if not agreed.

Legal Practitioners Act 1981 (SA) ss 88A, 89, referred to.
Bolitho v Banksia Securities Ltd (No 18) [2021] VSC 666; *Botsman v Bolitho* (2018) 57 VR 68;
Legal Profession Conduct Commissioner v Kaminski [2021] SASCF 39, considered.

Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER

Respondent: NORMAN JOHN O'BRYAN

Hearing Date/s: On the papers

File No/s: CIV-23-008676

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LEGAL PROFESSION CONDUCT COMMISSIONER v O'BRYAN
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Full Court: Livesey P, Bleby and David JJ

THE COURT:

Introduction

1 The Legal Profession Conduct Commissioner applies for orders that the practitioner's name be struck from the roll of legal practitioners and that the practitioner pay the Commissioner's costs of the application.

2 The Commissioner's application is made pursuant to s 89(6) of the *Legal Practitioners Act 1981 (SA)* (the **Act**) which is in the following terms:

Where the Supreme Court is satisfied, on the application of the Commissioner, the Attorney-General or the Society, that a legal practitioner is disqualified or suspended from practice under the law of any other State (whether or not that State is a participating State), it may, without further inquiry, impose a corresponding disqualification or suspension under the provisions of this section.

3 Pursuant to s 89(2)(d), or under this Court's inherent jurisdiction as recognised by s 88A of the Act, this Court may order that the name of a legal practitioner be struck off the roll of legal practitioners maintained under the Act, or the roll kept in a participating State that corresponds to the roll maintained under the Act.

4 For the reasons that follow, orders should be made in the terms sought by the Commissioner.

The order made in Victoria

5 By letter dated 9 November 2021, the Prothonotary of the Supreme Court of Victoria advised the Registrar of the Supreme Court of South Australia that the practitioner's name had been struck off the Roll of Barristers and Solicitors of the Supreme Court of Victoria pursuant to the judgment of Dixon J made on 11 October 2021.¹

6 For reasons that are not explained on the material made available to this Court, Registry did not provide a copy of the letter to the Commissioner until an email was sent on 9 March 2023.

7 On 20 June 2023, a representative of the Commissioner wrote to the practitioner advising that the Commissioner had decided to institute disciplinary proceedings seeking an order for strike off pursuant to s 89(6) of the Act. The practitioner was invited to indicate whether he would consent to an order, as well

¹ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666 (Dixon J).

as to the application being dealt with without a hearing. Personal service has been proved. The Commissioner has not received a response from the practitioner.

8 At the callover on 25 August 2023, the Commissioner invited this Court to make an order for striking off without further inquiry and to deal with the application without a hearing pursuant to r 261.2 of the *Uniform Civil Rules 2020* (SA).

9 Whilst this Court regards striking off as a matter of public interest, where transparency in the Court's consideration and determination of the matter is important, this is a proper case for the Court to exercise its discretion to proceed on the papers in private.²

10 It is appropriate to proceed in private in this matter for the following reasons. First, this Court is effectively being asked to act on the order made by the Supreme Court of Victoria. Whilst it might be said that the Court retains a discretion in the matter, the exercise of that discretion is in this case straightforward.

11 Secondly, it is not necessary for this Court to examine the personal circumstances of the practitioner or to do other than proceed on the basis of the careful and detailed findings made by Dixon J. Finally, and relatedly, the practitioner has been a party to a lengthy proceeding in Victoria in which the circumstances of his misconduct (addressed later in these reasons) have been outlined in considerable detail. Those proceedings, together with the reasons of Dixon J, were widely publicised at the time.

The Victorian proceedings

12 The practitioner's misconduct came to light in connection with proceedings commenced as a class action by a group of investors against Banksia Securities Ltd, the trustee of a failed investment scheme. The practitioner was retained as senior counsel for Bolitho, one of the investors and lead plaintiff in that class action until 2019.

13 Those proceedings were conducted in the Group Proceedings List before the Commercial Court.

14 The solicitor on the record for the plaintiffs was Mr Mark Elliott of Elliott Legal. He had incorporated Australian Funding Partners Pty Ltd (**Australian Funding Partners**) to act as litigation funder for the group of plaintiff investors. Entities controlled by the family of Mr Elliott (AMEO Investments Pty Ltd) and an entity controlled by the family of the practitioner (Noysue Pty Ltd) held substantial shareholdings in Australian Funding Partners. It followed that the practitioner had a financial interest in the proceedings over and above any legal fees recoverable as senior counsel.

² Cf *Legal Profession Conduct Commissioner v Kaminski* [2021] SASCF 39, [8]-[10] (Livesey P, Bleby and David JJ).

15 In November 2017, the Victorian proceedings settled in favour of the
plaintiffs in an amount of \$64 million. Australian Funding Partners sought and
obtained approval for a funding commission of \$12.8 million in addition to legal
costs and disbursements. These were said to amount to \$4.7 million, including
fees payable to the practitioner in the order of \$2.5 million.

16 A plaintiff investor appealed the settlement approval and the claims for
commission and legal costs, contending that they were neither reasonable nor
proportionate. The Court of Appeal subsequently approved the settlement but
remitted the questions of commission and costs to the Supreme Court.³ A
Contradictor was appointed, whereupon the practitioner and his junior, Mr Michael
Symons, returned their briefs.

17 After an extensive investigation, the Contradictor submitted to the Supreme
Court that Australian Funding Partners should not be permitted to recover any
amount for costs. It was submitted that there was discrediting conduct, including
dishonesty and misconduct by the practitioner, junior counsel and the solicitors on
the record for the plaintiffs. The Contradictor submitted that compensation should
be paid to the debenture shareholders together with the costs of the remittals on an
indemnity basis by Australian Funding Partners and, amongst others, the
practitioner.

18 During the trial and the remittals, shortly before giving evidence, the
practitioner announced through his senior counsel that he did not maintain any
defence to the allegations made by the Contradictor, that he consented to the entry
of judgment against him, that he accepted that his name should be removed from
the roll of persons admitted to the legal profession and he abandoned all claims to
unpaid fees.

19 Following this dramatic announcement, Dixon J reserved his decision and on
11 October 2021 delivered very extensive reasons supporting orders that the claim
by Australian Funding Partners for commission and costs be dismissed. His
Honour also ordered that, with others, the practitioner pay compensation in the
sum of \$11.7 million together with the cost of the remittals and the Contradictor
on an indemnity basis. Dixon J ordered that the names of the practitioner and his
junior counsel be removed from the roll pursuant to the court's inherent
jurisdiction.

20 Justice Dixon was satisfied that the conduct of the practitioner contravened
his obligations to act honestly, not to mislead or deceive and to ensure that legal
costs were both reasonable and proportionate. His Honour found that the
practitioner's conduct amounted to a breach of his paramount duty to the court.

21 In particular, Dixon J found that both the practitioner and his junior facilitated
the provision of costs agreements to the Contradictor in a manner that suggested

³ *Botsman v Bolitho* (2018) 57 VR 68.

that they were created before costs were incurred when that was false. They were only created after the event in December 2017. Moreover, Dixon J held that the practitioner and his junior had continued to act after serious allegations had been made against them when they knew those allegations to be true and that they had resisted the Contradictor's efforts to establish when their costs agreements were made. His Honour found that the practitioner attempted to collude with witnesses so as to mislead the court.

22 Justice Dixon observed that the practitioner had not offered any explanation for his conduct and that it was only after the Contradictor's opening submissions had laid bare the true extent of the "appalling conduct" that the practitioner and others "capitulated and purported to express remorse".⁴

23 Justice Dixon found that the practitioner's deception of the court and the debenture holders was undertaken "in the arrogant and defiant (but ultimately erroneous) belief that their conduct would go undetected".⁵

24 Justice Dixon also found that the conduct "left a stain on the integrity of barristers as a profession". His Honour said that "O'Bryan's conduct, in particular, deserved strong condemnation".⁶ After analysing the material in painstaking detail, Dixon J held that the practitioner's claim for fees based on work that he claimed to have carried out was patently false,⁷ and that ultimately there was no proper basis for the claim for fees sought to be recovered.

25 Justice Dixon explained that the "fraudulent scheme relied on projecting an image of counsel studiously analysing shelves of lever arch folders of material constituting the Receivers' Court Book for full days at a time, for months on end, without generating any work product".⁸ Examples were given of dishonest charging by each of the practitioner and his junior.

26 Justice Dixon found that "no clearer case of professional misconduct warranting removal from the Roll can be imagined".⁹

Conclusion

27 Pursuant to s 89(6), the practitioner's name will be removed from the roll of legal practitioners maintained under the *Legal Practitioners Act 1981* (SA).

28 The practitioner is ordered to pay the Commissioner's costs of and occasioned by the application to be taxed if not agreed.

⁴ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666, [98] (Dixon J).

⁵ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666, [99] (Dixon J).

⁶ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666, [99] (Dixon J).

⁷ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666, [483] (Dixon J).

⁸ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666, [487] (Dixon J).

⁹ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666, [1705] (Dixon J).