

SETTLED BY HIS HONOUR JUSTICE BLUE ON 22 JULY 2015

NO.501/2011

TUESDAY, 21 JULY 2015 AT 5.38 P.M.

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA

V

KAZIMIR KOWALSKI

1 HIS HONOUR: Mr Kowalski has applied for permission under s.39 of the *Supreme Court Act* to institute proceedings, namely, an appeal to the Legal Practitioners Disciplinary Tribunal under s.77K of the *Legal Practitioners Act* against a decision of the Legal Profession Conduct Commissioner on 10 July 2015.

2 Mr Kowalski made a complaint or a series of complaints against Mr Bourne under Division 2, Subdivision 1 of Part 6 of the Act. That provides that a person can make a complaint against a legal practitioner of unsatisfactory professional conduct or professional misconduct, and one species of unsatisfactory professional conduct, for example, is charging of excessive legal costs in connection with the practice of law. The Division distinguishes between complaints of overcharging as such and other complaints of unsatisfactory professional conduct or of professional misconduct.

3 Section 77B(2) provides that the Commissioner must investigate the conduct of a practitioner if a complaint has been received in relation to that practitioner's conduct, subject only to s 77C. In turn s 77C empowers the Commissioner to close a complaint without further consideration of its merits on seven different grounds. Ground (a) is that the complaint is vexatious, misconceived, frivolous or lacking in substance, and ground (c) is the subject matter of the complaint has been or is already being investigated, whether by the Commissioner or another authority.

4 In addition, in relating specifically to overcharging, s 77N(1) provides that the Commissioner must investigate a complaint of overcharging unless the complaint is received more than two years after the final bill to which the complaint relates was delivered to the client or the complaint is resolved before the Commissioner commences an investigation. That subsection is subject to s 77C. It is also subject to sub-ss (2) and (3).

5 Mr Kowalski's complaint encompassed both overcharging and other professional misconduct or unsatisfactory professional conduct aside from overcharging, so it was governed by both 77B and 77N, but both are subject to 77C.

6 The Commissioner by his delegate, Mr Trim QC, decided on 10 July 2015 that he would close the complaint under 77C. He treated there as having been eight separate complaints and relied on para. (a) or para. (c) for various different complaints, different ones of those eight complaints.

7 Mr Kowalski seeks to appeal against that decision under s 77K, which provides that an appeal to the Tribunal against a determination of a Commissioner under s 77J(1)(a) may be instituted by the complainant. That is subject to sub-s (3), which requires it to be instituted within one month.

8 That appeal to the Tribunal is limited to a determination of the Commissioner under 77J(1)(a) relevantly here, because Mr Bourne is a current practitioner, not a former practitioner. 77J(1)(a) empowers the Commissioner, if after conducting an investigation, the Commissioner is satisfied that there is evidence of unsatisfactory professional conduct and that the conduct in question can be adequately dealt with under this sub-section, the Commissioner may then determine not to lay a charge before the Tribunal and instead exercise any one or more of seven different powers.

9 However, the Commissioner has not acted under s 77J; the Commissioner has not in fact conducted an investigation into Mr Bourne's conduct. Indeed, the heart and soul of Mr Kowalski's complaint is that he has not conducted that investigation. Instead, he has closed the file under s 77C without conducting the investigation. It follows that there is no power to appeal against the Commissioner's determination to the Tribunal and the Tribunal would have no jurisdiction to hear Mr Kowalski's substantive complaint.

10 If there is any vehicle that Mr Kowalski can use to challenge the decision, it would have to be judicial review proceedings in this Court against the determination of a Commissioner under s 77C. If Mr Kowalski sought permission to bring judicial review proceedings, he might face the difficulty that s 77C(3) provides that the Commissioner is not required to give a complainant an opportunity to be heard before determining whether or not to close a complaint under this section, although it might be said in a substantive sense that Mr Trim did give Mr Kowalski an opportunity to be heard by the process of back and forth communications between Mr Trim on the one hand and Mr Bourne or Mr Kowalski on the other.

11 At all events, at this stage, Mr Kowalski is not seeking permission to bring judicial review proceedings in this Court. He is seeking to appeal to the Tribunal.

12 Mr Kowalski has provided me with a copy of a presentation that the Commissioner gave on 26 June 2014 about the new Act and his powers, where the Commissioner laid out an overview of the new provisions, particularly as they address overcharging, broadly in accordance with what I have addressed in my ex tempore remarks as to, in particular, s 77N.

13 In that paper, the Commissioner says that if a complaint of overcharge is made outside the two years, then it is not mandatory for him to investigate, but he is not precluded from investigating. In this case, as I said, one of Mr Kowalski's complaints is overcharging, and it would not be mandatory for the Commissioner to investigate, but he would have a discretion to do so. That would be a relevant factor in considering whether judicial review is available, but in respect of his other complaints that are not overcharging, they would not be governed by s 77N; they would be governed by s 77B.

14 There are also complex transitional provisions in the amending Act that introduced the provisions relating to the Commissioner. Schedule 2 of that amending Act, para.13, provides that: 'If a complaint received by the Board in relation to the conduct of a legal practitioner has not been resolved before the relevant day, the Commissioner will on and from that day assume the conduct of the complaint as if it had been received by the Commissioner.' And then it provides specifically for overcharging complaints, sub-s. (3): 'An investigation commenced by the Board into (b) a complaint of overcharging is, if the investigation has not been completed before the relevant day, to be continued by the Commissioner as if the investigation had been commenced under s 77B.'

15 Mr Kowalski tells me that he wrote to the Commissioner about a week ago pointing out the transitional provisions and contending that he had originally made a complaint in or before 1995, which the Board or perhaps even the Law Society's Complaints Committee, being the predecessor of the Board, had investigated but determined in 1995 to take no further action. But then in 1996, the Board effectively and in substance Mr Kowalski contends decided to reopen that investigation and then in July 1996 determined that there had been overcharging in its opinion, and that \$4000 approximately should be refunded and in January 1997 determined that it wouldn't in fact take any further action and wouldn't pursue the overcharging matter.

16 The Board I think at the time described that as an own motion investigation, initiated in 1996 but Mr Kowalski's contention is that it followed his complaint and the Board's initial response to it, he then wrote to the Lay Observer and as a result of that led to the Board reopening the matter. So he contends that, as a matter of substance, it was still investigating his original complaint even though it chose to reopen it, prompted - well perhaps arguably of its own motion but prompted - by his complaint to the Lay Observer.

17 So I understand that contention as to why he says that because he was never told of the January 1997 resolution of the Board, or indeed the July 1996 resolution, that complaint was never resolved because the complainant was required to be informed of the final resolution of his or her complaint. Hence he says it is picked up under the transitional provisions. But this point has received no reply from Mr May. I think it is likely Mr May will delegate that responsibility for replying to another person, perhaps Mr Trim. But at all events,

Mr Kowalski at this point has received no reply from anyone on behalf of the Commissioner.

18 Again, if he does receive a reply that it will not be investigated, it might be that he could bring judicial review proceedings in respect of that before this Court, but again my view is he could not appeal to the Tribunal in relation to such a decision.

19 So for those reasons, I decline to grant permission under s.39 to Mr Kowalski to appeal to the Tribunal. It will be a matter for him whether he wishes to consider applying for permission to bring judicial review proceedings either in respect of Mr Trim's 10 July 2015 decision or in respect of any future decision the Commissioner or his delegate might make in response to his letter of approximately one week ago.

JUDGMENT COMPLETED 5.51 P.M.