

IN THE LEGAL PRACTITIONERS  
DISCIPLINARY TRIBUNAL

ACTION NOS. 2 of 2015

IN THE MATTER OF:

BRIAN McFARLANE

and

LEGAL PROFESSION CONDUCT  
COMMISSIONER

DECISION OF THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

THE ISSUE

1. The preliminary issue that has to be determined by this Tribunal is whether it has jurisdiction to entertain the "Appeal" filed with this Tribunal on 11 March 2015 (the **Appeal**) by the Complainant, Mr McFarlane (the **jurisdictional issue**).

BACKGROUND

2. The background which gives rise to the jurisdictional issue is set out in the determination of the Legal Profession Conduct Commissioner (the **Commissioner**) dated 15 January 2015 (the **determination**).<sup>1</sup>
3. The determination from which the Appeal is lodged relates to a complaint made by the Complainant to the Commissioner about the conduct of a legal practitioner, Mr Michael

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<sup>1</sup> See the book supplementing the Commissioner's submissions filed on 27 April 2015.

Manetta of Counsel (the **Practitioner**). Contrary to the suggestion in the Appeal that another legal practitioner, a Mr Mark Esau (**other practitioner**) was also the subject of the determination of the Commissioner, the Commissioner has not received any complaint nor made any determination about the conduct of the other practitioner in the determination.

4. The Legal Practitioners Conduct Board (the **Conduct Board**), the Commissioner's predecessor, had however previously dismissed a complaint made by the Complainant on 29 November 2013 about the conduct of both the Practitioner and the other practitioner.
5. The complaint to the Board related to the conduct of the Practitioner and the other practitioner regarding their representation of an opposing party in contested proceedings in the District Court of South Australia regarding a property sale/purchase transaction. More specifically, the complaint related to the Practitioner's conduct including statements made by him in the course of the court proceedings as counsel, during a trial in June 2010, one of the allegations being that the Practitioner misled the court and was in contempt of court.
6. The Complainant who was the plaintiff in the said proceedings, claimed that the Practitioner misled the court by stating to the court that the conveyancer's file had been "discovered", when this file had not in fact been discovered and the Practitioner was aware that the file had been produced to the court pursuant to a subpoena that had been issued by the Complainant. The Complainant alleged that the Practitioner was aware of the subpoena and the contents of the conveyancer's file but had chosen to withhold the undisclosed material and only to present the documents to the court during his cross-examination of the Complainant. The Complainant claimed that the Practitioner misled the Court by saying that the conveyancer's file had been "discovered", when in the Complainant's view it had not been - it had been produced pursuant to a subpoena. The Complainant appears to have also complained about the use by Mr Manetta of the word "producing" when he put documents from the subpoenaed file to the Complainant in cross examination.
7. The Conduct Board investigated the complaint and on 25 June 2014 found that there was no unprofessional or unsatisfactory conduct on the part of the Practitioner within the meaning of the *Legal Practitioner's Act 1981* (the **Act**).

8. The Complainant then complained to the Commissioner seeking that he further investigate the original complaint he made to the Conduct Board.
9. The Commissioner was empowered to consider the issues raised by the complaint under the Act as amended by the *Legal Practitioners (Miscellaneous) Amendment Act* 2013. He concluded that the circumstances of the complaint were such that it should be closed without further consideration of its merits under:
  - (i) s 77C(1)(c) of the Act, on the ground that the subject matter of the complaint had already been investigated by the Conduct Board, and;
  - (ii) s 77C(1)(g) of the Act, on the ground that it was otherwise in the public interest to close the complaint.
10. Section 77C(1)(c) empowers the Commissioner at any stage after receipt of a complaint, to close the complaint without further consideration of its merits on the ground that the subject matter of the complaint has been, or is already being investigated by the Commissioner or another authority. Section 77(C)(1)(g) empowers the Commissioner at any stage after the receipt of a complaint to close the complaint without further consideration of its merits in the event he is satisfied that it is otherwise in the public interest to close the complaint.
11. The Commissioner stated that the complaint before him did not raise
  - "any new concerns in relation to the Practitioner which he has not already [been] raised in his previous complaint. The Complainant has not provided any fresh or probative evidence such as to warrant a further investigation of his Complaint about the Practitioner ... The subject matter of the Complaint has previously been investigated by the Board. I have not identified any error in relation to the earlier investigation or decision making process".<sup>2</sup>
12. The Commissioner in my view correctly observed that simply because a complainant may disagree with a previous decision of the Conduct Board, or with the manner in which the Board's investigation was conducted, does not without more constitute a ground for the Commissioner to reinvestigate a previous complaint<sup>3</sup> dealt with by the Conduct Board.

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<sup>2</sup> Commissioner's determination at [12] and [13].

<sup>3</sup> Commissioner's determination at [16].

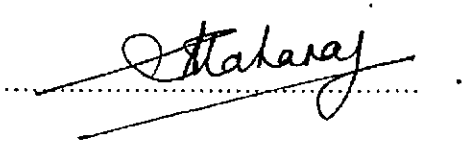
13. I have upon a close consideration of the material before me formed a similar view as the Conduct Board and the Commissioner, that the language used by Mr Manetta in the course of proceedings to the effect that he was "producing" a document to the witness (the Complainant) he was cross-examining, is language commonly deployed by counsel in cross examination when putting a document to a witness that may have been produced to the court pursuant to a subpoena issued by another party. Mr Manetta's statement that he was "producing" the document to the witness in cross-examination in these circumstances does not disclose anything unusual in the context of a cross-examination of a witness and it certainly does not mean that Mr Manetta was stating to the court that he himself was producing the document to the court. It was clear to all concerned that the document had been produced by another entity, Schrieber Pty Ltd, the conveyancing practice, pursuant to a subpoena that had been issued against it by the Complainant. Mr Manetta did not represent Schrieber Pty Ltd, and it appears from the facts noted in the determination, that Mr Manetta had not seen the document in question, or the conveyancer's file prior to its production to the court pursuant to the subpoena. Additionally, I see no cogent basis to go behind the Board's findings as noted in the determination about the use of the word "discovered" by Mr Manetta in the proceedings.
14. Given the circumstances, it is difficult to see how Mr Manetta's said statements to the court could be said to be misleading or contemptuous. However, given my conclusion below, that this Tribunal is without jurisdiction to hear the Appeal, this view is of little moment.

## CONSIDERATION

15. The Complainant represented himself and relied on his written submissions filed with the Tribunal on 22 June 2015 and oral submissions made to the Tribunal. The Commissioner was represented by Mr C McCarthy of counsel and relied on the written submissions filed by the Commissioner and oral submissions made to this Tribunal.
16. The question whether the Tribunal has jurisdiction to entertain the Appeal from the determination of the Commissioner, has to be resolved through a construction of sections s 77K and 77J, the two provisions governing the question of whether a statutory right of appeal exists under the Amending Act in the present circumstances.

17. Section 77K(1) gives a right of appeal against a determination of the Commissioner made under s 77J(1)(a) or s 77J(3)(a)(i). Thus, only a determination made by the Commissioner under these subsections can be appealed by virtue of s 77K(1). Section 77K(2) gives a right of appeal against a determination of the Commissioner made under s 77J(1)(b), s 77J(2), s 77J(3)(a)(ii), or s 77J(3)(b). Thus, only a determination made by the Commissioner under these subsections can be appealed by virtue of s 77K(2). The Commissioner's determination has to be studied to ascertain whether any of these subsections are invoked.
18. One of the conditions that has to be satisfied before any of sub-sections 77J(1)(a), 77J(1)(b), 77J(2), 77J(3)(a)(i), 77J(3)(a)(ii) or 77J(3)(b) can apply to bestow a statutory right of appeal is that the Commissioner has conducted an investigation into the conduct of a legal practitioner or a former legal practitioner under Division 2 Part 6 of the Act.
19. The Commissioner does not appear to have conducted any such investigation. The Commissioner closed the complaint without further investigation under s 77C of the Act.
20. It follows that none of the above provisions that bestow a statutory right of appeal are invoked in the present circumstances. There are other preconditions stipulated in each of these sub-sections which are also not satisfied in the present case but I do not see the need to deal with them given my above firm conclusion.
21. In my view, given the clear terms of the determination no statutory right of appeal is available to the Complainant under s 77K(1) or (2) in respect of the determination of the Commissioner. Given the Australian jurisprudence, that a right of appeal in the circumstances of the present case has to be bestowed by statute, the question of whether the Complainant has right of appeal at common law or in equity, as contended for by the Complainant, does not arise.
22. I am of the view that this Tribunal is without jurisdiction to hear the Appeal as the prerequisites for such a statutory right to exist under s77K are not satisfied.
23. The parties are at liberty to address in writing (submissions not to exceed two pages) within ten business days of the date of these reasons, whether this Tribunal has

jurisdiction to award costs, and if it does, what if any orders ought to be made on the issue of costs.

A handwritten signature in black ink, appearing to read "SJ Maharaj", is written over a horizontal dotted line. A solid horizontal line is drawn below the dotted line, extending across the width of the signature.

Deputy President of the Disciplinary Appeals Tribunal

SJ Maharaj QC

6 August 2015