

**Council of the Law Society of New South Wales v Thornton - [2019] NSWCATOD
155**

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Council of the Law Society of New South Wales v Thornton [2019] NSWCATOD 155

Hearing dates: On the papers

Date of orders: 09 October 2019

Decision date: 09 October 2019

Jurisdiction: Occupational Division

Before: J S Currie, Senior Member
M Sindler, Senior Member
B Thomson, General Member

Decision: (1) The application for disciplinary findings is dismissed.
(2) The Applicant is to pay the Respondent's costs as agreed or assessed.

Catchwords: LEGAL PRACTITIONERS – disciplinary proceedings against solicitor – no complaint validly made to or by the New South Wales Legal Services Commissioner – no valid delegation of function to initiate proceedings given by Commissioner to Law Society – lack of jurisdiction – proceedings dismissed – costs – “special circumstances” exist – costs order against Law Society

Legislation Cited: [Civil and Administrative Tribunal Act 2013](#) No 2 (NSW)
[Legal Profession Act 2004](#) (NSW)
Legal Profession Uniform Law (NSW)

Cases Cited: Council of the Law Society of New South Wales v DRE [2019] NSWCATOD 147
Council of the Law Society of New South Wales v EBA [20

19] NSWCATOD 145,
Council of the Law Society of New South Wales v Judah [2019] NSWCATOD 135,
Council of the Law Society of NSW v DXW [2019] NSWCATOD 101.

Category: Principal judgment

Parties: Council of the Law Society of New South Wales (Applicant)
Brian David Thornton (Respondent)

Representation: Counsel:
S Foda (Respondent)

Solicitors:
Law Society of New South Wales (Applicant)
Cragg Braye & Thornton (Respondent)

File Number(s): 2019/00119326

Publication restriction: Nil

REASONS FOR DECISION

What is this matter about?

1. The Law Society of NSW (“**the Law Society**” or “**the Applicant**”) purported to commence disciplinary action against Mr Brian David Thornton, Solicitor (“**Mr Thornton**” or “**the Respondent**”), which culminated in the filing in this Tribunal on 16 April 2019 of an application for disciplinary findings and orders (“**the Application**”). The Application contended that Mr Thornton was guilty of professional misconduct on three grounds and sought an order that he be reprimanded, pay a fine, pay the costs of the Law Society as agreed or assessed and any other order which the Tribunal deemed appropriate.
2. In summary, the Law Society’s case was based on allegations that Mr Thornton had:
 1. intermixed trust monies with other monies, in breach of section 260 of the *Legal Profession Act 2004* (NSW) (“**the 2004 Act**”);
 2. misappropriated trust monies; and
 3. caused a deficiency in his trust account.
3. By his Reply, filed on 5 June 2019, Mr Thornton admitted his breach of section 260 and admitted certain of the factual matters on which the Law Society relied. He admitted that he had caused a deficiency in his trust account but denied that he had misappropriated trust monies.

Dismissal

4. As confirmed by this Tribunal's decision in *Council of the Law Society of NSW v DXW* [2019] NSWCATOD 101 ("DXW"), which was followed in *Council of the Law Society of New South Wales v Judah* [2019] NSWCATOD 135 ("Judah") and more recently in *Council of the Law Society of New South Wales v DRE* [2019] NSWCATOD 147 ("DRE") and *Council of the Law Society of New South Wales v EBA* [2019] NSWCATOD 145 ("EBA");
 1. the *Legal Profession Uniform Law* (NSW) ("**Uniform Law**") regulates the manner in which an applicant may commence any disciplinary proceedings of this nature;
 2. the Legal Services Commissioner of New South Wales ("**the Commissioner**") is the designated local regulatory authority for the purposes of Chapter 5 of the Uniform Law;
 3. the Commissioner may delegate any of his or her functions under Chapter 5 to the Law Society;
 4. the Commissioner has done this by an instrument of delegation dated 18 June 2015; however
 5. an essential precondition to the initiation of disciplinary proceedings is the making of a complaint under the Uniform Law.
5. In *DXW* and the subsequent decisions cited above, the Tribunal found that no valid complaint had been made by the Law Society pursuant to its purported delegated powers, no complaint had been made to or by the Legal Services Commissioner and accordingly there was no complaint to found those proceedings. It followed that in those matters, the Tribunal had no jurisdictional power to deal with the disciplinary proceedings and it dismissed them.
6. In the present matter, based on the Tribunal's reasoning in *DXW* and *Judah*, counsel for Mr Thornton has contended that the application should be dismissed for want of jurisdiction. The Law Society has conceded that *DXW* is applicable to this case and accordingly that this Tribunal does not have jurisdiction to hear and determine the present application. On that basis, it concedes that the present application should be dismissed and submits to a dismissal order.
7. The Law Society has also contended that it would be appropriate for us to order that each party pay its own costs. However, counsel for Mr Thornton submits that the Law Society should be ordered to pay his costs.

Conclusion as to dismissal

8. We are satisfied on the basis of the parties' written submissions and the concession made by the Law Society as noted above that the proceedings should be dismissed for want of jurisdiction, on the authority of *DXW* and the other cases cited at [4] .

The real issue: costs

9. It follows that the only issue for our determination is whether the Law Society should pay Mr Thornton's costs, or alternatively, whether each party should be left to pay his or its own costs.

Determination on the papers

10. On 7 August 2019 her Honour Judge Cole, with the consent of the parties, ordered that Mr Thornton's applications with respect to the dismissal of the proceedings and the issue of costs were to be decided by the Tribunal on the papers.
11. In making our determination we considered the Law Society's application, the Reply and written submissions by each of the parties.

Consideration

The statutory framework

12. As a preliminary matter, it is undisputed and seems to be beyond doubt that the costs provisions in each of Clause 23(3) of Schedule 5 to the *Civil and Administrative Tribunal Act 2013* No 2 (NSW) ("the NCAT Act") and s 303(3) of the Uniform Law are inapplicable here. Each of those provisions allows for an order for payment of the costs of a respondent to proceedings of this nature, but only in circumstances where there is a finding that the lawyer did not engage in (or in the words of s 303(3), "is not guilty of") unsatisfactory professional conduct or professional misconduct. Of course, no such finding has been made by us.
13. Section 60 of the *NCAT Act* begins with a statement of what may be regarded as the usual or default position that in Tribunal proceedings each party is to pay its own costs. However, subsection (2) allows the Tribunal to award costs only if it is satisfied that there are special circumstances warranting such an order. Subsection (3) permits the Tribunal to have regard to particular considerations in finding that "special circumstances" exist.
14. However, the making of a costs order is not predicated upon the existence of one or more of the particular special circumstances described in subsection (3), but rather merely upon the existence of what the Tribunal finds to be special circumstances. It follows that there is an overriding discretion in the Tribunal as to whether or not to award costs under s 60(2) . That is clear from the facilitative but not mandatory wording of subsections (2) and (3).

15. (For convenience of reference the text of section 60 is set out in the Appendix to these Reasons.)

DXW, Judah and recent similar cases should be followed

16. The Law Society's application in this case originated in the same way and was subject to the same defects of process described at [4] above as in *DXW, Judah* and the other cases cited above.
17. In *Judah*, the Tribunal concluded, at [15], that the circumstances of the case constituted special circumstances in that they were out of the ordinary. The Tribunal found that those special circumstances warranted an award of costs because the respondent in that case had been put to expense by reason of the bringing of the application. The Tribunal found that special circumstances existed because the proceedings had no tenable basis in law on account of the procedural defects which rendered them a nullity and as a consequence, the Tribunal had no jurisdiction.
18. Similar findings were made in the other cases cited at [4] above.
19. There is nothing before us or which has been put to us which distinguishes the facts in *Judah* or the other cases cited at [4] sufficiently to persuade us to reach a different conclusion.
20. We find accordingly.

Orders

21. We therefore order as follows:

1. The application for disciplinary findings is dismissed.
2. The Applicant is to pay the Respondent's costs as agreed or assessed.

Appendix

Civil and Administrative Tribunal Act 2013 No 2 (NSW); section 60

60 Costs

- (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
- (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:

- (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
- (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
- (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
- (d) the nature and complexity of the proceedings,
- (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
- (f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),
- (g) any other matter that the Tribunal considers relevant.

(4) If costs are to be awarded by the Tribunal, the Tribunal may:

- (a) determine by whom and to what extent costs are to be paid, and
- (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) or on any other basis.

(5) In this section:

costs includes:

- (a) the costs of, or incidental to, proceedings in the Tribunal, and
- (b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

Decision last updated: 09 October 2019