

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

No 25361 of 1987

CORAM: LEE J

MONDAY 11 APRIL 1988

BROWN v WILLIAMS AND ORS

JUDGMENT

HIS HONOUR: The plaintiff in this matter seeks to discontinue the proceedings. The sixth defendant (the Department of Health), the other defendants having put in submitted appearances, has no objection to the proceedings being discontinued provided his costs are paid.

The summons was issued in this matter on 29 September 1987. A few days before, on 25 September 1987, the Investigating Committee established under the Medical Practitioner's Act, 1983, had given a decision on a complaint brought to it and the significant part of that decision is as follows:

"Now the matter cannot be said to be other than serious indeed very properly in a particular respect , it was accepted by Dr Brown to be a serious matter. So that bearing in mind the individual findings of the particulars contained in the complaint itself and bearing in mind the committee's view of the serious nature of the offence, the only proper course is for its reference to the Disciplinary Tribunal and that will be the order."

The Medical Practitioners (Amendment) Act 1987 amended the earlier Act and in particular the Investigating Committee and the Disciplinary Tribunal established under those acts were abolished. New procedures to deal with complaints were laid down involving a Medical Board, a Medical Tribunal and Standards Committees. The Savings and Transitional provisions, par 9 (3) provides:

"Any uncompleted inquiry that is being conducted by a Disciplinary Tribunal immediately before the commencement of schedule 2 (11) -

(a) shall be terminated on and from that commencement.

(b) shall be deemed to have been referred to the Tribunal under s 31 of the Principal Act, as amended by this Act:

and

(c) shall be dealt with by way of rehearing."

The 1987 Act commenced on 1 October 1987.

The evidence is that the Disciplinary Tribunal had not, up to the 1st October 1987, been constituted under s 28 (2A) for the purpose of the reference from the Investigating Committee. I the decision of the Investigating Committee made on 25 September 1987, involving as it did an immediate reference of the matter then before the Committee to the Disciplinary Tribunal is within the expression "uncompleted inquiry" in sch 4 par 9 (3) then the amending Act operates to put that inquiry before the Medical Tribunal under the amending Act. If, however, that is not the position then the amending Act is wholly silent as to what happens to the reference from the Investigating Committee. There is simply no provision indicating what should happen in regard to that and of course the Disciplinary Tribunal was abolished on 1 October 1987. It seems to me that that unfortunate state of affairs has been brought about and that there is a hiatus in the provisions in the schedule in regard to that and that nothing can be done about it. The proceedings in this court have remained on foot on the assumption of both counsel that they would produce a fruitful result, so far as the orders sought were concerned. However, on 8 April the Department of Health wrote to the solicitors for the plaintiff informing them, correctly in my

view, that the only way the complaints made against Dr Brown could be brought to the Medical Tribunal would be by way of lodging a fresh complaint, and that in the circumstances the Department took the view that the appropriate course was to refer the matter to the Professional Standards Committee established under the amending Act of 1987.

The plaintiff now seeks, as I say, to discontinue but on terms that it not be required to pay the costs of the defendant. Ms Bylhouwer in her very able analysis of the provisions of the Act - and Mr Donovan's submissions have been most helpful also - has put forward the proposition that it was for the Department of Health to advise the plaintiff that the proceedings were to be referred to a Standards Committee and that had that been done at a much earlier date the costs in this matter would have been significantly less and that it is no real fault on the part of the plaintiff that the matter has gone as far as it has. On the other hand, Mr Donovan submits that the defendant's position is no more than that of a defendant who has been brought into this court, correctly at the time the summons was issued but who now finds that by reason of the amending Act of 1987 and the abolition of the Disciplinary Tribunal he can gain nothing by a victory in the case: The findings of the Investigating Committee which are under challenge by the plaintiff in these proceedings do not avail the defendant any because of the hiatus to which I have earlier referred.

Looking at the matter quite objectively it is obvious that both parties only very recently realised the significance of the amending Act and that there was a hiatus, and that these proceedings cannot avail Dr Brown in any way, nor can they in any real sense

avail the defendant, even if the Court rejected the plaintiff's challenges to the finding of the Investigating Committee. The ordinary rule is that where a person brings a defendant to a court and cannot proceed for whatever reason, the defendant is not the party to suffer. It seems to me that, giving full weight to all the submissions that have been made so ably by Ms Bylhouwer, the defendant has done nothing which in any way could be said to have resulted in costs being run up. It, like the plaintiff, only ascertained the real effect of the amending Act only a few days ago. I am required to observe the ordinary principles that have been applied over a long period of time in regard to the matter of costs in the case of proceedings which are discontinued and in this particular matter I cannot see that there has been any fault on the part of the defendant in any way at all or that there has been any step that it ought to have taken earlier which was not taken. It simply is a case in which the amending Act has come into force whilst proceedings are pending, and both parties regrettably, but in real respects understandably, have not appreciated the full significance of Sch 4 par 9 (3) of that Act and have gone ahead and briefed counsel and prepared for a contest in Court. In my view, the plaintiff must pay the defendant's costs in the way that I am about to indicate.

The order that I will make is that the plaintiff is granted leave to discontinue. I think that I am entitled, in view of the very unsatisfactory state of affairs brought about by the legislation, to take into account that both the plaintiff and the defendant have been, in a sense, misled into allowing the proceedings to remain on foot as long as they did and, in the circumstances, it seems to me appropriate, as a matter of

fairness, to order that the plaintiff pay the defendant's costs which shall include not a full brief fee for counsel but a half brief fee. The orders may be entered and exhibits may be returned.