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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

HULME J

THURSDAY 18 DECEMBER 2008

30147/08 - RICHARD FRANCIS GORMAN v MEDICAL BOARD OF NEW SOUTH WALES

JUDGMENT

HIS HONOUR: By summons filed on 16 December 2008 Dr Gorman sought orders against the Medical Board of New South Wales:

- “1. A stay of the suspension order instituted under s 66 of the **Medical Practice Act 1992**.
2. Recompense for the wages lost during the period of suspension.
3. Costs.”

The application to this Court followed a decision of the Medical Board made on 5 December 2008 whereby it suspended Dr Gorman from practising medicine effective, from 9am on Friday 5 December for a period of eight weeks under the provisions of s 66(1)(a) of the **Medical Practice Act 1992** as the Board is satisfied that this action is appropriate for the protection of the health or safety of any person or is otherwise in the public interest. Leave to serve short notice of the application was granted and the matter has come back before me today.

Written submissions which were forwarded to my chambers on behalf of the Medical Board indicated that the Board would contend that this Court had no power to grant the relief which Dr Gorman sought.

In consequence, after the parties had indicated the evidentiary material upon which they wished to rely, and which in the case of the Board included a Lever Arch file, nearly full, and which I would estimate to contain somewhere

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between four and five hundred pages, it seemed to me appropriate to invite counsel appearing for the Board to indicate the basis upon which it submitted that this Court had no power to grant Dr Gorman the relief he sought no matter how meritorious his claim might otherwise be.

I was taken to s 66, 66AB, 95 and 95A of the **Medical Practice Act**. It is clear that those sections envisage the suspension of medical practitioners by the Board, that the Board has power to review its decisions, that a person may appeal to the Medical Tribunal against a decision of the Board, and that a person may also appeal, rather than to the Tribunal, to the Chairperson of the Tribunal with respect to a point of law. Section 95A, which so provides, in sub-s (2) provides that an appeal under this section does not operate as a stay on the Board's decision unless the Chairperson or Deputy Chairperson otherwise orders, and by sub-s (4) provides:

"A registered medical practitioner may not make an application to the Supreme Court for judicial review of action taken by the Board under s 66, 66A or 66AB, being an application alleging any error of law, until an appeal under this section in respect of the point of law concerned has been made and disposed of."

Section 98, which was also referred to, provides that:

"An appeal under this Division does not affect any suspension or conditions with respect to which it has been made until the Tribunal makes an order on the appeal."

There is no provision, at least no provision to which I have been taken, in the **Medical Practice Act** which gives this Court a general right of appeal from decisions of the Medical Board. Of course subject to the terms of s 95A(4) it does have power to review actions of the Board under its usual judicial review or prerogative powers, but those powers are limited to errors of law, using that term perhaps somewhat broadly.

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It thus seems on the basis of the matters to which I have referred that this Court has no power to review what was done by the Board unless or until an appeal has been made under s 95A.

Thus, there not having been any such appeal, Dr Gorman cannot succeed here. This Court does not have a general power to review on the merits decisions of all and any inferior tribunals such as the Medical Board.

There is a further difficulty, which may well not be insuperable, but which exists at this stage, and that is that Dr Gorman's principal prayer for relief was for a stay of the suspension order. This Court has no general jurisdiction to grant stays of orders of inferior tribunals except in circumstances where there is some substantive proceedings within the court seeking to challenge or upset the order of the Tribunal below and to which a power to stay is purely ancillary. However, for the reasons that I have indicated the summons must be dismissed.

The Board has asked for costs and Dr Gorman seeks to resist that, but the general rule is that unsuccessful litigants must pay their successful opponent's costs. It is in some respects one of the unfortunate consequences of commencing litigation, though one must recognise also that someone having effectively forced a defendant to come to court and incur legal costs may not legitimately be in an unfaier situation so far as those costs are concerned than the defendant who is forced, not of its own will, to bear them.

I can see nothing in this case which would justify me departing from the general rule that the unsuccessful party must pay the costs. Accordingly, I order Dr Gorman to pay the defendant's costs.

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