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Supreme Court of New South Wales

Brinsmead v Commissioner Tweed Shire Council Public Inquiry [2007] NSWSC 246 (22 March 2007)

Last Updated: 22 March 2007

NEW SOUTH WALES SUPREME COURT

CITATION: Brinsmead v Commissioner Tweed Shire Council Public Inquiry [2007] NSWSC 246

JURISDICTION:

FILE NUMBER(S): 2006/30041

HEARING DATE(S): 7 February 2007

JUDGMENT DATE: 22 March 2007

PARTIES:

Paul  Brinsmead

Commissioner Tweed Shire  Council Public Inquiry

Minister for Local Government

JUDGMENT OF: Price J

LOWER COURT JURISDICTION:

LOWER COURT FILE NUMBER(S):

LOWER COURT JUDICIAL OFFICER:

COUNSEL:

S Gageler SC; R Bellamy - plaintiff

N Perram SC; A Kuklik - first and second defendant

SOLICITORS:

Robinson Legal - plaintiff

Crown Solicitor's Office - first and second defendant

CATCHWORDS:

Administrative law - declaratory relief - power of Commissioner of Inquiry to make findings of criminal or professional misconduct - procedural fairness - findings made and recommendation made in excess of power - declarations of denial of procedural fairness and nullity.

LEGISLATION CITED:

Local Courts Act 1982 s 27A, s 27B

Local Government Act 1993 s 7, s 12A, s 12A(2) s 21, s 22, s 740, s 740(2), s 740(4),

Royal Commissions Act 1923 s 12A, s 13 Div 1 Pt 2, s 13 Div 2 Pt 2, s 14B, s 19, s 20, s 21, s 22

Independent Commission Against Corruption Act 1988 s 14(1), s 14(2), s 74(5)

Interpretation Act 1987 s 33

CASES CITED:

Ainsworth v Criminal Justice Commission [1992] HCA 10; (1992) 175 CLR 564

Application by the Anti-Corruption Commission; Parker v Anti Corruption Commission (Supreme Court of Western Australia 27 August 1998 unreported

Annetts v McCann [1990] HCA 57; (1990) 170 CLR 596

Balog v ICAC [1990] HCA 28; (1990) 169 CLR 625

Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman (1995) 63 FCR 163

Greiner v Independent Commission of Corruption (1992) 28 NSWLR 125

Mahon v Air New Zealand Ltd [1984] AC 808

Penrith Rugby League Club Ltd v Brown [2004] NSWSC 932; (2004) 63 NSWLR 13

Ross v Costigan (No 2) [1982] FCA 73; (1982) 64 FLR 55

DECISION:

1. Declare that the findings, determinations, comments and recommendation made by the first defendant in the report furnished by him to the second defendant and entitled "Tweed Shire Council Public Inquiry Second Report" which are adverse to the plaintiff were made without procedural fairness. 2. Declare that on the true construction of s 740 of the Local Government Act 1993 the first defendant, in the course of making a report pursuant to that section is not and was not entitled to make any finding or determination that the plaintiff had engaged in criminal or professional misconduct. 3. Declare that the findings, determinations and recommendation made by the first defendant in the report furnished by him to the second defendant entitled "Tweed Shire Council Public Inquiry Second Report" as specified in the schedule annexed to this Judgment were without or in excess of jurisdiction, and are a nullity. 4. Order that the first defendant and second defendant pay the plaintiff's costs.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

Price J

March 2007

2006/30041 Paul Brinsmead v Commissioner, Tweed Shire Council Public Inquiry & Anor

JUDGMENT

1 HIS HONOUR: The first issue raised in this case is whether the power of the Commissioner, Tweed Shire Council Public Inquiry (the first defendant) extends to making findings that the plaintiff had engaged in criminal or professional misconduct.

2 The Minister for Local Government (the second defendant) in November 2004 convened a Public Inquiry into Tweed Shire Council pursuant to s 740 of the *Local Government Act* 1993 (the LG Act). The Commissioner in the course of conducting the Inquiry requested the plaintiff attend to give evidence which he did on 23 February 2005. The plaintiff is a solicitor who at the time of his attendance before the Inquiry was a partner in a firm of solicitors on the Gold Coast in Queensland.

3 At the conclusion of the Inquiry the Commissioner published two reports. In the Tweed Shire Council Public Inquiry Second Report issued in August 2005 (the Second Report) findings and recommendations adverse to the plaintiff were made as a result of which the plaintiff seeks declaratory relief.

4 In the plaintiff's summons amended at hearing the following relief is sought:

"1. A declaration that the findings, determinations, comments and recommendations made by the first defendant in the report furnished by him to the second defendant and entitled "Tweed Shire Council Public Enquiry Second Report" which are adverse to the plaintiff were made without according the plaintiff due procedural fairness.

2. A declaration that on the true construction of s 740 of the *Local Government Act* 1993 (NSW) the first defendant, in the course of making a report pursuant to that section is not and was not entitled to make any finding or express a conclusion or opinion that the plaintiff had engaged in criminal or professional misconduct.

3. A declaration that the findings, determinations, comments and recommendations made by the first defendant in the report furnished by him to the second defendant and entitled "Tweed Shire Council Public Enquiry Second Report" which are adverse to the plaintiff were made without or in excess of jurisdiction, and are a nullity."

5 It is not in dispute that the findings by the Commissioner in the Second Report were made in circumstances that the plaintiff was denied procedural fairness. The Minister (the second defendant) has accepted this to be so and has been willing to consent to a declaration that the Second Report was delivered in circumstances which denied the plaintiff procedural fairness.

6 The concession arises as the Commissioner failed to give the plaintiff notice that he was considering making findings adverse to his interests. The publication of unfavourable findings in the Commissioner's reports had the capacity to damage the plaintiff's reputation. Procedural fairness required that he be given the opportunity to address the findings proposed and to make submissions as to the findings and recommendations that might be made: see *Mahon v Air New Zealand Ltd* [1984] AC 808, *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596, *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564.

7 The defendants contend, however, that the Commissioner could make findings in the terms of criminal or professional misconduct and did not exceed his jurisdiction.

8 The appointment of the Commissioner by the Minister was founded upon s 740 of the LG Act which is as follows:

"740 Public inquiries

(1) The Governor or the Minister may appoint a person as commissioner, or two or more persons as commissioners, to hold a public inquiry and to report to the Governor or the Minister with respect to:

- (a) any matter relating to the carrying out of the provisions of this Act or any other Act conferring or imposing functions on a council, and
- (b) any act or omission of a member of a council, any employee of a council or any person elected or appointed to any office or position under this or any other Act conferring or imposing functions on a council, being an act or omission relating to the carrying out of the provisions of the Act concerned, or to the office or position held by the member, employee or person under the Act concerned, or to the functions of that office or position.

(2) For the purposes of any inquiry under this section, any person appointed to hold the inquiry has the powers, authorities, protections and immunities conferred on a commissioner, and:

- (a) if the person is the only person appointed to hold the inquiry – on a sole commissioner, or
 - (b) if the person is one of two or more persons appointed to hold the inquiry and has been appointed as chairman of the inquiry – on a chairman of a commission,
- by Division 1 of Part 2 of the *Royal Commissions Act* 1923.

(3) The provisions of sections 27A and 27B of the *Local Courts Act* 1982 apply to any witness or person summoned by or appearing before the person so appointed in the same way as they apply to witnesses and persons in proceedings under that Act.

(4) The provisions of the *Royal Commissions Act* 1923 (section 13 and Division 2 of Part 2 excepted) apply, with any necessary adaptations, to and in respect of any inquiry under this section and to and in respect of any witness or person summoned by or appearing before the person or persons holding the inquiry.

(5) The Minister is to cause the report of the person or persons who have held an inquiry under this section to be laid before both Houses of Parliament. If neither House of Parliament is sitting, section 14B of the *Royal Commissions Act* 1923 applies.

9 The provisions of the *Royal Commissions Act* 1923 (RC Act) which applied to the Tweed Shire Council Public Inquiry by virtue of ss 740(2) and (4) of the LG Act include ss 12A, 21 and 22. Section 12A(2) authorises the Inquiry to communicate any information or furnish any material (including evidence) obtained in the course of the inquiry to a law enforcement agency, if the information or material relates to a breach of law of the State or of the Commonwealth. Section 21 provides for any witness who knowingly gives false testimony touching any matter, material in the inquiry to be guilty of an indictable offence and s 22 provides that any person who procures or attempts or conspires to procure or cause the giving of false testimony before a commission shall be guilty of an indictable offence. The Commissioner was empowered to deal with contempt committed in the face or hearing of the Inquiry in accordance with the provisions of s 27A and s 27B of the *Local Courts Act* 1982.

10 The coercive powers of the Commissioner included the power to summon witnesses to give evidence and produce documents and to take evidence on oath or affirmation. Section 19 of the RC Act makes it an offence to fail to attend or produce documents without reasonable excuse and s 20 provides for an offence for refusing to be sworn or to give evidence before the inquiry.

11 In the introduction to the Second Report the Commissioner remarked [at page 7]: that “the Inquiry has been conducted within the confines of the terms of reference announced by the Minister”. The Terms of Reference were as follows:

“ To inquire, report and provide recommendations to the Minister for Local Government on the efficiency and effectiveness of the governance of Tweed Shire Council.

The Inquiry will have particular regard to:

1. Whether the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of all ratepayers and residents, in an environment free from conflicts of interest.

2. The appropriateness of the procedures and processes adopted by Council in relation to its environmental planning responsibilities, including the processing of applications for development, particularly those of a

significant nature.

3. The appropriateness of the relationship between elected representatives and proponents of development in the council area.

4. Whether the elected representatives are in a position to adequately direct and control the affairs of council in accordance with the Local Government Act 1993, so that council may fulfil the Charter, provisions and intent of the Local Government Act 1993 and otherwise fulfil its statutory functions.

5. Any other matter that warrants mention, particularly where it may impact on the effective administration of the area and/or the working relationships between the council, councillors and its administration.

The Commissioner may make other recommendations as he sees fit, including whether all civic offices in relation to the Council should be declared vacant."

12 In the course of conducting the Inquiry, the Commissioner considered the relationship between the "Tweed Directions" councillors, Tweed Directions and property developers in the Tweed area. He examined the development of the Tweed Directions election fund and the organisation of a team to contest the 2004 shire elections. It was for this purpose the plaintiff was called before the Inquiry. The Commissioner found that the plaintiff was "the prime mover of Tweed Directions". (Second Report at p 881).

13 Reference had been made in the First Report to an attempt by those associated with the Tweed Directions campaign to cover up its activities which theme the Commissioner continued in chapter 5.6 entitled "Misleading the Inquiry" in the Second Report. The Commissioner concluded (at p 848) "this was a concerted campaign" manifested (inter alia) in "failing to provide full, frank and complete answers when giving evidence to the Inquiry". The plaintiff was one of those witnesses whose evidence was considered to be affected.

14 Further references were made to the plaintiff the most notable being:

(i) "He simply set about an attempt to mislead the Inquiry by offering a series of lies" (at p 881).

(ii) "It is clear that Mr [S], Mr [B], Mr P Brinsmead, Mr [M], Mr [P], Mr [W], Mr [A], Mr [W.A] and Mr [R] gave their evidence believing that the inquiry had no evidence that would contradict their evidence. It provided comfort and the base for a litany of lies, oversights, misinformation and deception.

There is no doubt that their evidence was founded on this misbelief. Similarly it was founded on an

ordained commonality in their responses.

While the inquiry has no direct evidence that provides proof of the source, the totality of the evidence and the demeanour of most of the witnesses leads to a sustainable view that the responses were ordained and fashioned by Mr Brinsmead and/or Mr [S].

As has just been acknowledged, the inquiry maintains this view. It does not have the requisite proof that would underlie proceedings for subornation. Hence the matter must be left in the air.

The evidence is however clear the Mr Brinsmead lied to the Inquiry when giving evidence under oath. This was not limited to one occasion. Mr Brinsmead took the opportunity, when thinking that no contrary evidence would come to light to provide a string of lies.

His evidence was calculated to deceive the Inquiry, both regarding his role as well as the role of others.” (at p 885).

(iii) “Mr Brinsmead is a solicitor admitted by the Supreme Courts of Queensland and New South Wales to practice law in each state. Solicitors occupy a particular role that draws upon an expectation that they be honest and have integrity. Mr Brinsmead’s evidence supports a view that he lacks these attributes. Rather he has demonstrated that he is opportunistic and deceitful.”
(at p 886).

(iv) “This statement does not directly equate to the position of Mr Brinsmead, who, himself set about and provided false testimony.”
(at p 894).

(v) “5.6 Misleading the Inquiry

Many of the witnesses who were associated with the Tweed Directions campaign gave evidence was false (sic), understated their true involvement as well as the involvement of others.

There was a concerted campaign mounted by those associated with Tweed Directions to deny evidence to the Inquiry. Evidence suggests but does not confirm that this emanated fro (sic) Mr [S] and/or Mr Brinsmead. This campaign sought to suborn the Inquiry and its processes.

When giving his evidence Mr Brinsmead deliberately gave a significantly untruthful account in an attempt to mislead the Inquiry. This approach was premised upon the belief that he and others associated with Tweed Directions had effectively suborned the evidence that the Inquiry could obtain. In those circumstances he (sic) that his false evidence was unlikely to be discovered and worth the risk.

Mr Brinsmead, being a solicitor and having wider responsibilities in that role has breached those responsibilities.” (at p 945 see also p 976 where these remarks are repeated).

15 It is evident the Commissioner found that the plaintiff lied under oath and had conspired with others to give false evidence to the Inquiry. He further found that the plaintiff lacked the attributes to be a solicitor and had breached his professional responsibilities.

16 The Commissioner recommended that the transcript of the plaintiff's evidence together with the material provided by Baudino and Associates in response to the summons issued by the Inquiry be referred to the Attorney General for consideration on whether proceedings should be commenced against him for giving false testimony and to the Chief Justice of the Supreme Court of New South Wales, the Legal Services Commission and Law Societies of New South Wales and Queensland for consideration on whether the plaintiff is a fit and proper person to be admitted as a solicitor, or has breached "any Act, rule or standard pertaining to the conduct of a solicitor". (Recommendation 20 at p976).

17 The Commissioner's determination that the plaintiff gave false evidence and conspired with others to do so amounts, the plaintiff contends, to findings that criminal offences contrary to ss21 and 22 of the RC Act had been committed by him. The plaintiff contends the Commissioner was not entitled to express conclusions about criminal liability and argues there is no basis to distinguish the powers of the Commissioner in this case from those held by the ICAC considered by the High Court in *Balog v ICAC* [1990] HCA 28; (1990) 169 CLR 625. An analogy is drawn to the provisions of s 12A of the RC Act and s 14(2) of the *Independent Commission Against Corruption Act* 1988 (the ICAC Act) which was then under consideration by the High Court in *Balog*. The principle, the plaintiff argues, which is derived from *Balog* is that the statutory power to inquire and report is not in the absence of clear words to be read as extending the power to make a finding of criminal guilt or other improper conduct.

18 The defendants contend that there is no analogy between the legislation considered in *Balog* and s 740 of the LG Act and there is nothing which lends significant support to the argument that s 740 should be read as prohibiting a Commission of Inquiry from making findings of criminal or professional misconduct. The only practical legal limitations, the defendants submit, were the very broad limitations imposed by s 740 itself. The Court was referred to the following passage in 'Royal Commissions and Permanent Commissions of Inquiry' by Donaghue [at 7.41]:

"Royal Commissions probably are not constrained by the *Balog* principles. The Royal Commissions Act does not impose any obligation to assemble admissible evidence, nor does it provide any guidance in relation to the matters to be contained in reports. There is therefore no statutory text upon which the interpretative principles [set out above] can operate."

19 A more restrictive approach, it is apposite to note, is taken to the functions of Royal Commissions in "Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures" by Hall [at 12.55]:

"It is not the function of a commission of inquiry both to investigate criminal conduct and determine guilt. The primary task of a Royal Commission in its investigation and report have been described in the following terms:

Even if the terms of reference of a Royal Commission take it into a field where its area of inquiry will include the possible commission of criminal offences, it may not necessarily be the task of the Royal

Commission to focus priority upon the securing of criminal prosecutions or convictions. Most certainly it is not the function of a Royal Commission to pronounce upon criminal guilt. This is squarely a matter for the criminal courts.....” (Gary W Croke QC, “Reputation: Does it Matter and can Administrative Law Protect it?”)

20 The decision in *Balog* was based essentially upon s 74(5) of the ICAC Act which enabled the ICAC to include in a report findings as to whether there was sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence. The provision did not specify that findings of corruption might be made. The High Court found that if the legislature had intended, by allowing or requiring the Commission to report, to confer upon it a power to express a finding concerning the criminal liability of a specified person, then it would have been unnecessary to include sub-section (5) of s 74. The inclusion of sub-section (5) impliedly limited the powers of the ICAC to report.

21 Although ‘*Balog*’ was determined upon specific provisions of the ICAC Act the High Court’s reasoning has been considered to have general application: see for example *Penrith Rugby League Club Ltd v Brown* [2004] NSWSC 932; (2004) 63 NSWLR 13, In the matter of an Application by the Anti-Corruption Commission; *Parker v Anti-Corruption Commission* (Supreme Court of Western Australia, Parker J, 27 August 1998, unreported), *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163.

22 The High Court stated in *Balog* [at 632]:

“.....Since the broad function of the Commission under s 13(1)(c) is to communicate the results of its investigations concerning corrupt conduct to appropriate authorities, it is apparent that its primary role is not that of expressing, at all events in any formal way, any conclusions which it might reach concerning criminal liability.”

23 And further observed [at 635 – 636]:

“.....Were the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be as risk of damage to that person’s reputation and of prejudice in any criminal proceedings which might follow. If the legislation admits of a wider interpretation than that which we have given to it (and we do not think that it does), then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.....”

24 The present question is to be resolved on the statutory construction of the LG Act and the RC Act. There is no specification in s 740 of the LG Act of the findings that may be made. Whilst the maxim that the express mention of something excludes that which is not mentioned – *expressum facit cessare tacitum* – assisted the High Court in *Balog* it is not present here. The absence of that element is however not determinative of the question. As the High Court remarked in *Balog* [at 632]:

“However, that maxim, whilst a valuable servant, is apt to be a dangerous master and it is necessary to

seek confirmation in the broader context of the whole Act.”

25 Section 740 of the LG Act provides for the Governor or Minister to appoint a person as Commissioner to hold “a public inquiry and to report”. Subsection 5 of s 740 requires the Minister to cause the report of the inquiry to be laid before both Houses of Parliament. The breadth of the power under the section is indubitably broad as it permits the holding of a public inquiry:

‘.....with respect to.....

(a) any matter relating to the carrying out of the provisions of this Act or any other Act conferring or imposing functions on a council’ (emphasis added).

26 Whilst the ambit of the section is wide, the guiding principle in the interpretation of s 740 is that the provision is to be interpreted with regard to the purpose or object underlying the Act: s 33 of the *Interpretation Act* 1987.

27 The purposes of the LG Act are founded in s 7 of the LG Act which is as follows:

“(a) to provide the legal framework for an effective, efficient environmentally responsible and open system of local government in New South Wales,

(b) to regulate the relationships between the people and bodies comprising the system of local government in New South Wales,

(c) to encourage and assist the effective participation of local communities in the affairs of local government,

(d) to give councils:

- the ability to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and of the wider public
- the responsibility for administering some regulatory systems under this Act
- a role in the management, improvement and development of the resources of their areas,

(e) to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities.”

28 Section 12A of the RC Act authorises a commission to communicate any information or furnish any material (including evidence) that it obtains in the course of its inquiry to the appropriate law enforcement agency, if the information or material relates to a breach of a law of the State or Commonwealth. This section is in similar terms to s 14(2) of the ICAC Act which enabled the ICAC to report, with appropriate recommendations, to the Minister responsible for any public authority. Absent from the RC Act is a provision comparable to s 14(1) of the ICAC Act which related to criminal proceedings and required the commission to assemble admissible evidence and to pass it on either to the Director of

Public Prosecutions or the Attorney General.

29 Although s 12A of the RC Act speaks of 'evidence' (as distinct from 'admissible evidence') it is significant that one function given to the first defendant was to communicate any information including evidence of a breach of a law to a law enforcement agency. Section 14B of the RC Act enables the release of a commission's report when Parliament is not sitting.

30 These legislative provisions suggest that the functions of the first defendant were confined to inquiring, reporting, recommending and in cases of breach of law communicating with the appropriate authority. Confirmation, in my view, that it was not intended that the first defendant have the power to make findings of criminal or professional misconduct is found in the terms of reference [supra] which provide for the Commissioner "to inquire, report and provide recommendations to the Minister". The defendants point to the width of the terms of reference and make specific mention of clause 5 which provides for any line of inquiry which "warrants mention". The Commissioner's powers were limited, to my mind, by the governing words of inquire, report and provide recommendations. Absent from the terms is a specific authority to express a finding of criminal liability or professional misconduct. The Commissioner was obliged to exercise all his powers in good faith and be guided by the terms of reference: *Ross v Costigan* (No 2) [1982] FCA 73; (1982) 64 FLR 55.

31 It is difficult to conclude, without a specific provision, that the legislature intended to confer upon the Commissioner the power to express a finding of criminal liability on evidence, which may be inadmissible in a subsequent criminal prosecution. Although the legislation does not specify the findings that might be made or oblige that admissible evidence be collected, a construction which protects the individual from the risk of damage to reputation or prejudice in criminal proceedings is to be preferred. Such a construction of the relevant legislation would not hinder or prevent the Inquiry from inquiring, reporting and providing recommendations to the Minister on the efficiency and effectiveness of the governance of the Tweed Shire Council.

32 I do not agree with the further submission of the defendants that the *Balog* principle does not extend to findings of professional misconduct. The principles in *Balog* in my view reach findings of misconduct beyond the mandate of a commission. The risk of unfair damage to professional reputation is a significant consideration. Such findings are best left to the appropriate professional bodies. Neither the provisions of s 740 of the LG Act nor the terms of reference empowered the first defendant to make findings that the plaintiff lacked the attributes to be a solicitor and had breached his professional responsibilities. The important objects of the Inquiry were not enhanced by these findings.

33 The first defendant, in my view, did not have the power to make findings that the plaintiff had engaged in criminal or professional misconduct.

34 The defendants contend that the Commissioner has not made a finding of criminal guilt of the kind referred to in *Balog*. *Balog*, it is submitted, was concerned with a pre-emptive attempt to prevent the ICAC making findings that offences had been committed and the High Court was not actually confronted with a finding by the ICAC that any offence had been committed. This contention has little substance. An actual finding of a criminal offence beyond the power of an inquiry enlivens judicial review as does the

potentiality of such a finding.

35 *Balog* and cases such as *Penrith Rugby League Club* (supra) concerned potential adverse findings relating to conduct engaged in by persons outside the course of a commission's inquiry, whereas the present case concerns the Commissioner's assessment of the plaintiff as a witness before the Inquiry.

36 An important object of the Inquiry was to arrive at the truth of matters of fact which might conflict. The Commissioner in conducting the Inquiry was required to assess the honesty and reliability of witnesses appearing before him including the plaintiff. He was entitled to express opinions and make findings which reflected adversely upon the credit of a witness but was not empowered to make findings of criminal misconduct. Whilst I appreciate at times there may be a fine line between such findings, it is a distinction as observed by the High Court in *Balog* [at 635], that should not be difficult to draw.

37 A convenient example is provided by the following passages (at 881 Second Report):

"Mr Brinsmead's assertions that he

- was approached by Tweed Directions
- was to be or fulfilled the role of a "sounding board"
- did not provide legal advice
- had no role in the governance of Tweed Directions
- had only a limited role in Tweed Directions
- had a subservient role
- had a limited role only as a recipient of material from Tweed Directions

are patently incorrect."

38 In assessing the evidence, it was open to the first defendant to find that the plaintiff's assertions were patently incorrect.

39 There next appears the following:

"He simply set about an attempt to mislead the Inquiry by offering a series of lies."

40 The Commissioner plainly made a finding that the plaintiff deliberately lied to the Commission. In doing so, the Commissioner found by implication that the plaintiff had breached s 21 of the RC Act which provides:

"21. Any witness before a commission who knowingly gives false testimony touching any matter, material

in the inquiry being made by the commission, shall be guilty of an indictable offence, and shall be liable to be imprisoned for a period not exceeding five years.”

41 It was beyond the power of the first defendant to make a finding that the plaintiff had told a deliberate falsehood.

42 The remarks made by the Commissioner in the Second Report which I have quoted at paragraph 14 above were not restricted to expressions of opinion or assessments of credibility. They were findings that the plaintiff had deliberately lied to the Inquiry and had conspired to give false evidence.

43 The plaintiff was found by implication to be in breach of ss 21 and 22 of the RC Act.

44 Section 22 of the RC Act is as follows:

“Subornation

22. Any person who procures or causes or attempts or conspires to procure or cause the giving of false testimony before a commission shall be guilty of an indictable offence, and shall be liable to be imprisoned for a period not exceeding five years.”

45 The remarks quoted at paragraph 14 above include findings that the plaintiff lacked the attributes to be a solicitor and had breached his professional responsibilities. The plaintiff was found by implication to have engaged in professional misconduct.

46 The first defendant in making these findings overstepped his mandate.

47 The defendants submit that the remarks at page 848 of the Second Report are not findings of criminal misconduct. I have referred to these remarks at paragraph 13 above. The Commissioner after observing that the plaintiff was one of the persons who provided “*This affected material*” went on the say [at p 848]:

“Such was the extent of the campaign that it is difficult to conclude that it was anything but an attempt to suborn the Inquiry.

The Inquiry does not however have sufficient evidence to conclude, beyond doubt, that particular individuals, most likely within the individuals named in this group, were personally responsible for this attempt.

Accordingly, the Inquiry cannot take the appropriate action to prosecute these matters.”

48 The argument is that the Commissioner in determining in the passage quoted above there was insufficient evidence to conclude beyond doubt that any particular individual was responsible for the attempt to suborn the Inquiry was not making a finding of criminal misconduct. The difficulty with the argument is that these passages are not to be read in isolation but in combination with the passages that follow in the Report. A fair-minded reader of the Second Report is left in no doubt that the Commissioner found that the plaintiff had attempted to suborn the Inquiry. A similar observation might be made

concerning the passages which appear at page 885 of the Second Report which I have quoted at para 14 [supra].

49 Comprehension of the Commissioner's findings cannot properly be discerned by the isolation and dissection of particular paragraphs in chapter 5.6.

What orders should be made?

50 The first defendant denied the plaintiff procedural fairness and exceeded his powers. As a result, the defendants' contention that the plaintiff is entitled to no more than a declaration that the Second Report was arrived at in circumstances which denied him procedural fairness is rejected. The plaintiff is entitled to a declaration of invalidity: see *Greiner v Independent Commission of Corruption* (1992) 28 NSWLR 125.

51 Although the first defendant was empowered to provide recommendations to the Minister, it would be a curious result if *Recommendation 20* based on findings beyond power, is not similarly affected. In my opinion, Recommendation 20 is invalid.

52 The defendants criticise the declaration sought in the third prayer of the amended summons as being too wide. With that submission I agree. Not all the findings and comments are beyond power. I consider it appropriate to detail in the schedule annexed to this Judgment the findings and recommendation the subject of the third declaration I now propose to make.

53 The plaintiff is entitled to the following declarations and orders:

1. Declare that the findings, determinations, comments and recommendation made by the first defendant in the report furnished by him to the second defendant and entitled "Tweed Shire Council Public Inquiry Second Report" which are adverse to the plaintiff were made without procedural fairness.
2. Declare that on the true construction of s 740 of the *Local Government Act* 1993 (NSW) (the LG Act) the first defendant, in the course of making a report pursuant to that section is not and was not entitled to make any finding or determination that the plaintiff had engaged in criminal or professional misconduct.
3. Declare that the findings, determinations and recommendation made by the first defendant in the report furnished by him to the second defendant and entitled "Tweed Shire Council Public Inquiry Second Report" as specified in the schedule annexed to this Judgment were without or in excess of jurisdiction, and are a nullity.
4. Order that the first defendant and second defendant pay the plaintiff's costs.

Schedule

Page 847

“The first Report referred to an attempt by those associated with the Tweed Directions campaign to cover up it and their activities. This Report also refers to this aspect.

There is no doubt that this was a concerted campaign. It was manifested in:”

Page 848

- “a failure to provide material in response to summonses issued by the Inquiry,*
- providing incomplete material in response to summonses issued by the Inquiry,*
- providing irrelevant material in response to summonses issued by the Inquiry.*
- failing to provide full, frank and complete answers when giving evidence to the Inquiry,*
- giving false evidence to the Inquiry.*

This affected material provided by or the evidence given by:

[.....]

· Mr P Brinsmead

[.....]

Such was the extent of the campaign that it is difficult to conclude that it was anything but an attempt to suborn the Inquiry.

The Inquiry does not however have sufficient evidence to conclude, beyond doubt, that particular individuals, most likely within the individuals named in this group, were personally responsible for this attempt.

Accordingly, the Inquiry cannot take the appropriate action to prosecute these matters.

It is clear from evidence that has become available to the Inquiry, that certain witnesses have given false testimony to the Inquiry when appearing at the Public Hearings.

This aspect is important as so co-ordinated were the effort of members of this group that, but for the evidence provided in the Baudino files, many of the falsities would not have been discovered.”

Page 881

“He simply set about an attempt to mislead the Inquiry by offering a series of lies.”

Page 885

“It is clear that Mr [S], Mr [B], Mr P Brinsmead, Mr [M], Mr [P], Mr [W], Mr [A], M [W.A] and Mr [R] gave their evidence believing that the inquiry had no evidence that would contradict their evidence. It provided comfort and the base for a litany of lies, oversights, misinformation and deception.

There is no doubt that their evidence was founded on this misbelief. Similarly it was founded on an ordained commonality in their responses.

While the inquiry has no direct evidence that provides proof of the source, the totality of the evidence and the demeanour of most of the witnesses leads to a sustainable view that the responses were ordained and fashioned by Mr Brinsmead and/or Mr [S].

As has just been acknowledged, the inquiry maintains this view. It does not have the requisite proof that would underlie proceedings for subornation. Hence the matter must be left in the air.

The evidence is however clear the Mr Brinsmead lied to the Inquiry when giving evidence under oath. This was not limited to one occasion. Mr Brinsmead took the opportunity, when thinking that no contrary evidence would come to light to provide a string of lies.

His evidence was calculated to deceive the Inquiry both regarding his role as well as the role of others.”

Page 886

“Mr Brinsmead is a solicitor admitted by the Supreme Courts of Queensland and New South Wales to practice law in each state. Solicitors occupy a particular role that draws upon an expectation that they be honest and have integrity. Mr Brinsmead’s evidence supports a view that he lacks these attributes. Rather he has demonstrated that he is opportunistic and deceitful.”

Page 894

“This statement does not directly equate to the position of Mr Brinsmead, who, himself set about and provided false testimony.”

Page 945

“5.6 Misleading the Inquiry

Many of the witnesses who were associated with the Tweed Directions campaign gave evidence that was false, understating their true involvement as well as the involvement of others.

There was a concerted campaign mounted by those associated with Tweed Directions to deny evidence to the Inquiry. Evidence suggests but does not confirm that this emanated from (sic) Mr [S] and/or Mr Brinsmead. This campaign sought to suborn the Inquiry and its processes."

When giving his evidence Mr Brinsmead deliberately gave a significantly untruthful account in an attempt to mislead the Inquiry. This approach was premised upon the belief that he and others associated with Tweed Directions had effectively suborned the evidence that the Inquiry could obtain. In those circumstances he (sic) that his false evidence was unlikely to be discovered and worth the risk.

Mr Brinsmead, being a solicitor and having wider responsibilities in that role has breached those responsibilities."

Page 976

o *Many of the witnesses who were associated with the Tweed Directions campaign gave evidence that was false, understating their true involvement as well as the involvement of others.*

o *There was a concerted campaign mounted by those associated with Tweed Directions to deny evidence to the Inquiry. Evidence suggests but does not confirm that this emanated from Mr [S] and/or Mr Brinsmead. This campaign sought to suborn the Inquiry and its processes.*

o *When giving his evidence Mr Brinsmead deliberately gave a significantly untruthful account in an attempt to mislead the Inquiry. This approach was premised upon the belief that he and others associated with Tweed Directions had effectively suborned that evidence that the Inquiry could obtain. In those circumstances he considered that his false evidence was unlikely to be discovered and worth the risk.*

o *Mr Brinsmead, being a solicitor and having wider responsibilities in that role has breached those responsibilities.*

o *These matters are so significant that the behaviour of Mr Brinsmead should be drawn to the attention of the Attorney General who is responsible for the administration of justice in "*

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o Mr Brinsmead, being a solicitor and having wider responsibilities in that role has breached those responsibilities.

o These matters are so significant that the behaviour of Mr Brinsmead should be drawn to the attention of the Attorney General who is responsible for the administration of justice in New South Wales”

Page 977

o “It is also appropriate that the behaviour of Mr Brinsmead, as a solicitor admitted to practice in New South Wales and Queensland be examined by those institutions that have the power to admit solicitors to practice or govern the conduct and professional standards to be observed by solicitors.”

LAST UPDATED: 22 March 2007