PARTIES:	ANDREW GORDON ROGERSON
	v
	THE LAW SOCIETY OF THE NORTHERN TERRITORY
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	APPEAL FROM SUPREME COURT OF THE NORTHERN TERRITORY
FILE NO:	AP24 OF 1991
DELIVERED:	24 FEBRUARY 1993
HEARING DATES:	12 MARCH 1992, 1 & 2 DECEMBER 1992
JUDGMENT OF:	ASCHE CJ, MARTIN & ANGEL JJ

CATCHWORDS:

APPEAL - General principles - leave to appeal - not appeal simpliciter - appeal from an interlocutory order

APPEAL - General principles - leave to appeal - grounds - clearly wrong, or sufficiently doubtful and causing substantial injustice - Supreme Court Act s53 -

Niemann v Electrical Industries [1978] VR 431, applied
Nationwide News v Bradshaw [1985] 41 NTR 1, applied

LEGAL PRACTITIONERS - Misconduct - privilege - powers of Law Society - investigation of complaint - investigating officer - notice to solicitor to produce documents connected with his practice as solicitor - contingency fees - solicitor's claim that documents subject to privilege against self-incrimination - scope of principle - characterisation of proceedings for professional misconduct

LEGAL PRACTITIONERS - Misconduct - Privilege - powers of Law Society - investigation of complaint - investigating officer - notice to solicitor to produce documents connected with his practice as solicitor - contingency fees - solicitor's claim that documents subject to legal professional privilege - whether professional privilege available - legislative intention to abrogate privilege - necessary intendments - Legal Practitioners Act s47A

A Solicitor v The Law Society of NSW (unreported 26/11/88 p7), approved
Parry-Jones v Law Society [1969] 1 Ch 1, applied
Baker v Campbell (1983) 153 CLR 52, followed

REPRESENTATION:

Counsel:

Appellant:	F. Gaffy QC & Mr J. McCormack
Respondent:	G. Hiley QC, Mr T. Coulehan and Mr N. Henwood

Solicitors:

Appellant:	Loftus & Cameron Waters James McCormack (30/11/92)
Respondent:	Cridlands

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 24 of 1991

On Appeal from Supreme Court
No. 420 of 1991

BETWEEN:

ANDREW GORDON ROGERSON

Appellant

AND:

THE LAW SOCIETY OF THE
NORTHERN TERRITORY

Respondent

CORAM: Asche CJ, Martin & Angel JJ

REASONS FOR JUDGMENT
(Delivered 24 February 1993)

ASCHE CJ: This is in form an appeal from a decision of Kearney J wherein he refused certain injunctive orders sought by the appellant by Originating Motion filed 18 November 1991. The orders sought were:

1. That the defendant its servants or agents be restrained from having unrestricted access to the files of the clients of Lofra Pty Ltd.

2. Alternatively to 1 that the defendant by itself, its servants and agents be restrained from access to any such files until it defines which files it wishes to

examine and Lofra Pty Ltd has the opportunity in relation thereto to raise any professional privilege before any examination takes place.

3. That the defendant be restrained from exercising against Lofra Pty Ltd and its professional employees its power under s27(1)(g) of the Legal Practitioners Act by virtue of maintenance on any part of the right to silence (sic).

4. Such further or other orders as this Honourable Court deems fit.

The plaintiff at the time was a legal practitioner and a director of Lofra Pty Ltd which carries on the practice of a legal practitioner under the Legal Practitioners (Incorporation) Act and trades under the name of "Loftus & Cameron Barristers & Solicitors".

The Law Society of the Northern Territory had, pursuant to s47A of the Legal Practitioners Act, delegated to Mr Barbaro a legal practitioner, a power to investigate the professional conduct of the plaintiff. That delegation included a power to

(a) inspect books, accounts, documents or writings in the custody or control of (the plaintiff) or of a person employed by (him) ... and

(b) make notes or copies of, or take extracts from such books, accounts, documents or writings relating to the legal practice of (the plaintiff).

Although the delegation was couched in wide terms it was soon made clear that Mr Barbaro was interested in the family law files of the plaintiff. That was because the Law Society had cause to suspect that the plaintiff had made a costs agreement with at least one client in a family law matter which involved the charging of a contingency fee. In fact the plaintiff had admitted as much in a letter to the Law Society dated 3 July 1991. In that letter he had stated his ignorance of the prohibition against contingency fees; stated he was "shocked" at the comments made by Barblett DCJ of the Family Court in the course of the case involving his client (a Mrs Holmes); and said that he had drawn up the agreement "without any sense of wrongdoing".

He further stated that "Once my attention was drawn to that situation I immediately expunged the percentage clause from all costs agreements and propose to maintain that situation for the future".

Faced with admissions such as these the Law Society was under a plain duty to investigate the situation, and would have failed in its duty if it had not.

When Mr Barbaro approached the plaintiff and showed him the delegation from the Law Society the plaintiff immediately and not unreasonably took the point that the firm had a vast number of files relating to family law matters and it would be a giant and expensive task to produce them all. Mr Barbaro agreed to leave and to return a few days later.

The learned trial judge then sets out what next took place and makes some pertinent comments:

> "On Thursday 14 November Mr Barbaro returned and the plaintiff 'allowed Mr Barbaro to commence his investigation' (para 7). I observe that it was not competent for the plaintiff to 'allow' Mr Barbaro 'to commence his investigation'; his authority to do so stemmed from the Act. This is one indication of several in the plaintiff's affidavit and annexures which indicate a misapprehension on his part of what is required of him when a statutory investigation under the Legal Practitioners Act is being carried out. Later that morning, after receiving legal advice, the plaintiff requested 'Mr Barbaro to desist on the grounds of the files being covered by legal professional priviledge (sic)'. Apparently Mr Barbaro did desist.".

On 15 November the appellant wrote to the Law Society pointing out that Mr Barbaro's authority was unlimited in scope and requesting that it identify forthwith any client's files that it may wish to inspect. He stated:

> "I am mindful of the provisions of s47B of the Act (i.e. the Legal Practitioners Act) and I believe that my refusal to permit an unlimited inspection which refusal I conveyed to Mr Barbaro on the 14th instant and on the grounds of priviledge (sic) constitutes a reasonable excuse within the terms of that section."

Likewise on the same day Mr Barbaro particularised what he sought by requiring all documents in relation to the case of Mrs Holmes and all documents in relation to any clients who "have signed or have been requested to sign at any time any document relating to costs in family law matters" and which documents contained provisions in which a percentage was to be added to the basic fee.

The appellant replied verbally that Mr Barbaro could examine such files after the appellant had first perused them. Mr Barbaro rejected this offer and indicated his intention to continue his investigations at the appellant's office on 18 November.

Those were the circumstances in which the appellant sought injunctive relief on 18 November.

His Honour refused that relief and gave short reasons indicating that he would give more detailed reasons later; which he did on 25 November 1991.

His Honour on 18 November said that "speaking generally I should say that I do not consider that the privileges known as "legal professional privilege" and the "privilege against self-incrimination" apply in relation to a solicitor who is the subject of a Law Society investigation under the Act".

In his expanded reasons of 25 November 1991 his Honour referred in detail to the circumstances in which the orders were sought.

He was, in my respectful view, properly censorious of the appellant's stated lack of knowledge of the prohibition against contingency fees. He considered that Mr Barbaro's letter of 15 November had narrowed down very considerably the matters on which he wished to focus. He stated his view that Mr Barbaro had gone as far as was practicable in meeting the appellant's request to identify the files he wished to inspect. He said:

> "Mr Barbaro's letter of 15 November, <u>for the purposes of the present application for interlocutory relief</u> concretizes the scope of his investigation, and it is in the light of what is sought in that letter that the plaintiff's present application must be considered. I approach the application against that background. Should the scope of the investigation be later changed, other considerations may arise and different conclusions may be reached; for the present purposes I am concerned only with the investigation into the matters particularized by Mr Barbaro on 15 November."

I have emphasised the words "for the purposes of the present application for interlocutory relief" because there is an issue before this Court as to whether the application before his Honour was for interlocutory or final relief.

Mr McCormack who appeared before his Honour and now appears before us for the appellant (and who on the previous

appearance before us was led by Mr Gaffy QC) submits that when his Honour used the term "interlocutory relief" he was in error and had forgotten that, in the proceedings before him, he had accepted that they were more than that. Mr McCormack refers us to the following passage in the transcript at p56:-

> HIS HONOUR: All right thank you. Just wondering about this, it certainly seems a most comprehensive argument, if I might say so, Mr McCormack. I had understood the application on Monday to be an application for interim relief, but are you now really moving on your motion of Monday and seeking the release (sic) set out in the motion?
>
> MR McCORMACK: I think that ---
>
> HIS HONOUR: In other words a fully argued application?
>
> MR McCORMACK: Yes, that is the effect of what I'm doing, your Honour.
>
> HIS HONOUR: That's intended and that's the way you understand it Mr Hiley? This is no longer an application for interim relief, but indeed the substance of the action?
>
> MR McCORMACK: It is in the nature of the contentions that I believe I must submit to your Honour, one where for whatever relief the same argument must be advanced. All the cases must be put to your Honour.
>
> HIS HONOUR: It's a question of the degree with which I have to go into it, though. Thank you Mr McCormack.

It is to be noted that Mr Hiley made no response at this point.

Mr Hiley however points to a later dialogue occurring at p182 of the transcript.

MR HILEY: I wonder just before my learned friend proceeds ---

HIS HONOUR: Yes, Mr Hiley.

MR HILEY: --- in this matter that we've been discussing in the break, these submissions, I think, seem to be going towards some sort of application for interlocutory relief. If that's so, we would like to have some notice of precisely what order it is my learned friend seeks, because it's very difficult for us to tell.

HIS HONOUR: Yes. Well let me deal with that immediately.

MR HILEY: And therefore to follow the argument.

HIS HONOUR: Yes, the order being sought is - at the moment, the orders being sought are orders by way of interlocutory relief along the lines of part 2 of the originating motion filed on 18 November, nothing more and nothing less. I don't know that what Mr McCormack's about to say has any bearing upon any other aspect, but we'll find out.

MR McCORMACK: It's certainly not in the nature of an interlocutory application, Your Honour. It is simply to get some information to court as to the background of what this - and I must say that when I do address Your Honour on champerty, I am doing it on the basis that the Law Society hasn't indicated to us what the reason is for its desire to look into all of my client's family law files. We can only deduce that the purpose of its investigation is to seek agreements that might be said to be champertous.

HIS HONOUR: I'm not trying to stop you, Mr McCormack, but I have a little difficulty in seeing this is really relevant to the relief which you

seek. However, if you wish to deal with it, please do so.

MR McCORMACK: It probably isn't strictly relevant other than to say that there are rules in relation to champerty and this propositions that I would say are the fact that a solicitor may have a percentage profit sharing arrangement with a client, of itself, does not constitute professional misconduct."..

The order as taken out by the appellant's own solicitors and authenticated on 10 December 1991 seems self-explanatory. Paragraph 2 of the Order reads:

2. The interlocutory relief asked in Part 2 of the Originating Motion be refused.

It seems to me that this court cannot go beyond the terms of the order. The passage referred to by Mr Hiley indicates that whatever view his Honour had earlier formed he was later quite firm that the application was by way of interlocutory relief "nothing more and nothing less". Other than reiterating at that stage that the application was "certainly not in the nature of an interlocutory application", Mr McCormack does not seem to have pressed the point further.

In such circumstances the matter is really an application for leave to appeal rather than an appeal simpliciter, and therefore the order appealed from must be seen to be clearly wrong or at least attended with sufficient doubt as to whether it is right or wrong and some substantial injustice must be shown as a consequence of the order. See

s53 Supreme Court Act : *Niemann v Electrical Industries* [1978] VR 431 : *Nationwide News v Bradshaw* (1986) 41 NTR 1.

The complaint of the appellant before this court was really that his Honour, in his expanded reasons, did not address what the appellant maintains was the real issue before him namely "whether legal professional privilege could be raised by a solicitor to protect the interests of clients where the Law Society directed an investigation of the solicitor's affairs which was unlimited as to time or ambit". (I am quoting from the appellant's outline of submissions.)

His Honour in his expanded reasons noted that Mr Barbaro had already resiled from that position, and I have already set out the relevant passage in his Honour's judgement. Later his Honour said this:

> "Mr Barbaro clearly required access only to the files etc primarily for the purpose of ascertaining the content of the costs agreement. The plaintiff was apparently concerned about the substantive content of the files. It was clearly a case for simple procedural arrangements to be devised, "lubricated by a little elementary good sense and courtesy", as Lord Widgery CJ put it in *R v Peterborough Justices; ex parte Hicks* [1977] 1 WLR 1371 at 1376.

His Honour examined the cost agreement made with Mrs Holmes and came to the conclusion (which I think is inescapable) that its provisions involved a contingency fee in the prohibited sense i.e. that it proposed to charge a percentage of any amount received by the client. He described

it as champerty and "wholly improper unethical and tortious". He also observed that most of the itemized amounts listed under the "Scale of Costs" in the agreement appeared to exceed the costs for those items allowable in the Family Court, and that the agreement did not put Mrs Holmes on notice that the costs to be charged exceeded the scale costs, or properly put her on notice that she might be able to instruct a solicitor who would act for her for lower charges. He noted the appellant's statement that he had, after discussion with counsel, decided to abandon proceedings to recover costs from Mrs Holmes; but pointed out that the appellant had no right in any event to recover costs under a transaction which his Honour characterised as void. He noted that, during the hearing before him the appellant had written to Mr Barbaro stating that, since Mrs Holmes "would seem to waive her privilege", Mr Barbaro was "welcome" to inspect that file held by the appellant. That letter (21 November) also contained the statement that

> "It is my belief that there are no files held by Loftus & Cameron containing any costs agreement including the percentage clause set out in paragraph (b) of your letter".

His Honour commented that this statement seemed at odds with the earlier statement made by the appellant that,

> "Once my attention was drawn to that situation (i.e. the prohibition against contingency fees) I immediately expunged the percentage clause from all costs agreements ...".

His Honour said:

> "It is obvious that the question of professional misconduct can only be considered after the Society is satisfied as to the full extent and circumstances of any champertous fee arrangements."

His Honour then examined the privilege against self-incrimination, which he rightly described as "a fundamental principle of law". After referring to *Hammond v The Commonwealth of Australia* (1982) 152 CLR 188 and *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281 his Honour came to this conclusion:

> "It is clear from the authorities that the privilege against self-incrimination is inherently capable of applying in non-judicial proceedings such as the Law Society investigation presently under way. Whether it is available in that investigation depends on the proper construction of the relevant provisions of the Legal Practitioners Act. There are no words in the Act which expressly exclude the privilege. The question then is whether it is clearly implicit in the Act that the Legislative Assembly intended to exclude the privilege.
>
> I incline to the view that it did not. The purpose of Part VI of the Act is the discipline of the legal profession. What is in issue in an investigation under Part VI is the professional conduct of a practitioner. The Society has ample power under s47(3) to carry out any such investigation, without intruding upon the privilege as far as it concerns the solicitor under investigation. Under s47B it may lawfully require a practitioner to produce all his files. If the practitioner refuses to do so on the basis that he has a 'reasonable excuse' for refusing, based on his privilege against self-incrimination, the public interest would usually appear to require the immediate suspension from practice of that practitioner under one or other of the powers in s27(1) of the Act, and a full and immediate investigation by the Society of the files of the practice, completely independently of the

practitioner.

> But it is not necessary to reach a concluded view on the question whether the Act excludes the privilege against self-incrimination. As noted earlier, no question of an offence under the criminal law arises in relation to the subject matter of the present investigation; champerty is not an offence in the Territory. As is made clear in *Pyneboard* (supra) the privilege against self-incrimination applies to the answering of questions and the provision of information which might tend to expose the party to the imposition of a civil penalty, as well as to those which might tend to expose him to conviction for a crime. But the scope of the privilege does not extend beyond civil penalties and crimes. No question of a civil penalty is in issue here; any proceedings by the Law Society for professional misconduct are not properly so characterised.
>
> Accordingly, I reject Mr McCormack's submissions insofar as they rely on the privilege against self-incrimination.".

Paragraph 10 of the Notice of Appeal seems to be the only basis upon which his Honour's ruling on this issue (i.e. the privilege against self-incrimination) could be attacked. That states: "In general the learned Trial Judge misdirected himself as to the issues properly to be determined by him upon the appellant's application".

In fact little if anything was made of his Honour's ruling on the question of the privilege against self-incrimination and consequently I do not regard paragraph 10 as pertinent to that subject. If it were necessary I would refuse leave on this ground.

As I have mentioned the real basis of attack was that his Honour did not properly examine the question of legal professional privilege. That is the gravamen of all the other

Grounds 2-9. (There is no Ground 1).

His Honour set out the question in this way:

> "Mr McCormack submitted that the interlocutory relief sought should be granted because the plaintiff, as a solicitor, was prevented from disclosing to the Society's investigator, confidential communications passing between himself and his clients. This prohibition on the plaintiff is an aspect of the privilege of his client known as legal professional privilege. To fall within its scope the communications must be made either to enable the client to obtain legal advice or the solicitor to give it; or made with reference to litigation actually taking place or reasonably contemplated."

His Honour referred to *Grant v Downs* (1976) 135 CLR 674. He concluded:

> "I do not consider that the particular costs agreements the subject of Mr Barbaro's investigation fall within the protection of the privilege; in no meaningful way are they part of any actual or anticipated litigation. They cannot be said to be of a confidential nature. They do not fall within the rationale for the privilege, as expressed in *Grant v Downs*".

His Honour then examined whether the provisions of the Legal Practitioners Act abrogated the privilege insofar as it applied to investigations being carried out by the Law Society under Part VI of the Act. He considered the case of *Parry-Jones v Law Society* [1969] 1 Ch 1 as a case directly in point. In that case the Court of Appeal held that s29 of the Solicitors Act 1957 which enabled the council of the Law Society to "take such action as may be necessary" empowered it to make rules whereby it could inspect a solicitor's books and

supporting documents in order to see that rules were complied with even if that meant disclosing the clients' affairs. The contractual duty of confidence was overridden by the duty to obey the general law.

The relevant sections of the NT Legal Practitioners Act are:

> "S47(1)(a) The Law Society may receive, consider and investigate a complaint regarding the professional conduct of a legal practitioner.
>
> S47(3) Without limiting the generality of the powers of the Law Society under subsection (1) it may, for the purpose of an investigation under s46B, at any time during ordinary business hours -
>
> (a) inspect books, accounts, documents or writings in the custody or control of the legal practitioner or of the person employed by the legal practitioner; and
>
> (b) make such notes or copies of, or take extracts from, such books, accounts, documents or writings.
>
> S46(B) states
>
> <u>Investigations</u>
>
> The Law Society -
>
> (a) may of its own motion;
>
> (b) shall upon receipt of a complaint under section 46; and
>
> (c) shall at the direction of the Attorney-General under s46A, investigate the professional conduct of a legal practitioner."

S47 provides for confidentiality in an investigator in the course of his duties.

I agree with his Honour that the provisions of the Act override the privilege. I agree also with the remarks of Smart J in *A Solicitor v The Law Society of New South Wales* (unreported 26/11/87 at p7). His Honour was there examining s82A of the NSW Legal Practitioners Act which gave the Council of the Law Society power to appoint a solicitor or an accountant or an officer or employee of the Society to investigate "any accounts, transactions and affairs of a solicitor" and furnish a confidential report to the council. Smart J said:

> "S82A reveals a legislative scheme whereby the Council of the Law Society, for strictly limited purposes, may appoint an investigator, from a limited class of people, with wide powers to investigate including requiring the production of documents and the giving of information but with stringent requirements to preserve confidentiality. There is no sufficient reason to read down the wide words of s82A(1) and (5). In at least some cases an investigator would have to see privileged material to reach a conclusion. Some of this material may be highly confidential. It may record the facts as told to the solicitor in the seeking of advice, it may deal with very private personal matters or business matters of great sensitivity. The revelation of this material to an investigator may distress a client who may positively forbid its disclosure. Although as a matter of practice an investigator may not persist in such circumstances he probably has the power to do so. Questions of lawful justification or excuse under s82A(6) may then arise for decision.
>
> The powers which the Council exercises are not punitive powers, although they may have a punitive effect. The Council is acting to protect the public interest by ensuring due investigation. Its role is not limited to a particular matter or client, although in a given case it may concentrate on one matter or the affairs of one client. Ultimately, it is concerned with the broad issues of fitness to practice and protection of the community."

A number of cases were cited to us to establish the historical foundations of the privilege and the importance of it. I am sure no-one on this Court challenges the importance of and necessity for the rule as a general principle. But the point is that there are certain fundamental rules of public policy embodied in the Legal Practitioners Act which make it plain that this very important, indeed vital, privilege cannot be used to prevent those charged with ensuring that practitioners behave properly from carrying out investigations to that end for the protection both of the profession and the public. Otherwise the exercise of the privilege itself may bring into disrepute the very ends for which it was designed.

Appellant's counsel relied on the authority of *Baker v Campbell* (1983) 153 CLR 52. In that case the High Court held that the doctrine of legal professional privilege is not confined to judicial and quasi-judicial proceedings; and to that extent the remarks of Diplock LJ in *Parry-Jones v Law Society* (supra) at 9 cannot apply in Australia. But that does not detract from the thrust of that case, which is that the statutory provisions override the privilege because, as Lord Denning MR puts it at 7:

> "In my opinion the contract between the solicitor and client must be taken to contain this implication: the solicitor must obey the law, and, in particular he must comply with the rules made under the authority of statute for the conduct of the profession. If the rules require him to disclose his client's affairs, then he must do so."

We were urged that on the authority of *Baker v*

Campbell (supra) we could no longer regard *Parry-Jones v Law Society* as good law. I do not see any discrepancy. In *Baker v Campbell* (supra) the High Court were dealing with a section of the Commonwealth Crimes Act which allowed a Justice of the Peace to issue a search warrant if he had reasonable grounds for suspecting the commission of an offence in any house vessel or place. The section was in wide terms and their Honours considered that it evinced no intention to override so fundamental a privilege as legal professional privilege to allow seizure of documents brought into existence for the purpose of obtaining or giving legal advice and held by a firm of solicitors. But their Honours did not suggest that the privilege would survive an enactment plainly abrogating it either expressly or impliedly. Dawson J at 131 said:

> "The legislature may, of course, if it sees fit to do so, cut across the doctrine of legal professional privilege on occasions when it is more important to obtain information than to preserve the privilege and no doubt the inclination to do so will be greater in administrative proceedings where the principle has not been seen to operate as it has in judicial proceedings."

Wilson J said at 96:

> "It is for the legislature, not the courts, to curtail the operation of common law principles designed to serve the public interest."

Deane J said at 116:

> "It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intendments."

Applying the above principles it seems plain that the provisions of the Legal Practitioners Act by necessary intendment plainly abrogate the principle, at least for the examination of agreements as to costs, though they are obviously wider than that. But I take it no further than it is necessary to take it in this case. It is expressly provided that an investigator may "at any time during ordinary business hours" inspect documents "in the custody or control" of a legal practitioner and make notes or copies of such documents. S47(2)(a). In the face of these express provisions it seems difficult to argue that there is not the necessary intendment to abrogate the privilege for the purpose of the investigation by a person who - be it remembered - has an obligation of confidentiality in the course of his duties.

It must be remembered also that in the present case the judge at first instance was not dealing with a situation where an investigation "unlimited in time or ambit", as appellant's counsel puts it, had occurred. Certainly Mr Barbaro originally had a very wide mandate - but that was not what he was seeking at the time the matter came before his Honour. At that time all he was seeking was all books, accounts, documents or writings in relation to Mrs Holmes and all books etc in relation to any clients who had signed or been requested to sign any document relating to costs in Family Law matters which included a contingent fee provision. His Honour was asked to restrain the Law Society from "having

unrestricted access to the files of the clients of Lofra Pty Ltd". That question was not then before him. Mr Barbaro was no longer putting his request in such wide terms. His Honour made this clear:

> "for present purposes I am concerned only with the investigation into the matters particularised by Mr Barbaro."

Alternatively his Honour was asked to restrain the Society from access to "any such files" until it defined which files it wished to examine, and until Lofra had the opportunity to raise any professional privilege before any examination took place.

But the files then required had been particularised as only those containing contingent costs agreements and for the purpose of inspecting those agreements.

The Law Society's wide powers of investigation under the Legal Practitioner's Act must, of course, be exercised bona fide and in a manner such as not to oppress. The investigation of the Law Society via Mr Barbaro, limited as it was to matrimonial files containing champertous costs agreements, was neither mala fide nor oppressive to the appellant. Neither the undoubted clients' privilege in the information sought nor its confidential nature overrode or stood in the way of the Law Society's investigation which was being conducted pursuant to express statutory powers in the Legal Practitioner's Act to do so, and in the public interest

in so far as it related to the appellant's fitness to practise the law by virtue of that Act.

I agree with his Honour's conclusion that:

> "I do not consider the privilege will apply in practice to investigations under the Act directed to the professional conduct of a solicitor vis-a-vis his client, at least as far as investigations of costs agreement are concerned. It cannot be said in such cases that in general the solicitor cannot answer questions without disclosing communications made to him professionally by his client. Further, costs agreements of the type the subject of this investigation are contrary to the public interest and fall outside the scope of the privilege. There is ample evidence in this case to warrant the concern of the Law Society that the solicitor has entered into champertous costs agreements. I consider it would be contrary to the public interest and the administration of justice to allow legal professional privilege to be used to protect costs agreements which on their face are champertous." (Emphasis added).

Thus Grounds 1 and 2 of the application before his Honour and in the circumstances which were before his Honour did not justify the injunctions sought and in my respectful view his Honour was correct to refuse them. The final ground for the injunction was based in effect on the privilege against self-incrimination and I have set out his Honour's reasons for refusing an injunction on this ground.

Even if this were an appeal simpliciter I could not find that his Honour had erred in law or failed to deal with the issues raised. A fortiori on an appeal from an interlocutory order I would not be disposed to give leave to appeal.

Mr McCormack however urges on us that this is a matter of wider import touching directly on the general powers of the Law Society under the Act and that we should grant some form of declaration. No doubt we have the power to do so but for an appeal court to go outside the immediate matters of appeal and indulge in some general declaratory statements seems to me to be fraught with danger and only exercisable in exceptional circumstances which do not seem to me to operate here. See *Ibeneweka v Egbuna* [1964] 1 WLR 219 at 225; *Ainsworth v Criminal Justice Commission* (1992) 66 ALJR 271 at 284 (per Brennan J).

Mr McCormack seeks this relief as a new ground by way of amendment to the Notice of Appeal:

> "The learned trial judge misdirected himself in coming to his decision to refuse to grant the relief sought by the appellant in that he failed to direct his attention to, and decide upon, the real issue raised upon the material before him and argued by the parties in the hearing. His Honour decided the matter upon one minor aspect of the issue only. The real issue between the parties which his Honour did not address was whether the common law principle of legal professional privilege could be successfully raised to a direction to a delegate in the following terms:
>
> (then follows the original delegation to Mr Barbaro).

I think I have said enough to indicate that I would not allow the amendment. It was not what was before his Honour, it is in far wider terms than it was necessary for his Honour to decide and it invites this Court to expand in

broader terms than necessary a doctrine which requires examination only to the extent required for the appeal and not in the void.

There are certain other matters which to my mind make it improper to take the argument further. The appellant is no longer in practice. We are told the business of Lofra is in the hands of a receiver so the appellant has no further control over the documents in his office. Any decisions as to them must be made by the receiver. I think we can safely leave in his hands any proper objections to the investigation and to the form it might take. Events have overtaken the situation which this Court has been asked to rule on.

The Society has possession of the Holmes agreement, and this Court has been told that at least some of the family law files have been handed over for inspection by the Law Society. If others are required no doubt a request will be made but it appears, at least at this stage, no such requests have been made but if they are made there is no reason to believe that the Receiver will not co-operate with due regard to any proper objections.

In such a situation any ruling of this court of the nature sought by the appellant would be a brutum fulmen.

I would refuse the amendment sought and refuse leave to appeal. For completeness, and if it could still be

maintained that this is an appeal simpliciter (a view which I reject), I would dismiss the appeal for the reasons already given.

I would order that the appellant pay the costs of the appeal.

MARTIN J: I agree.

ANGEL J: I agree.