

SUPREME COURT OF QUEENSLAND

CITATION: *Legal Services Commissioner v Cain* [2009] LPT 19

PARTIES: **LEGAL SERVICES COMMISSIONER
(applicant)**

AND

**PATRICK BRENDAN CAIN
(respondent)**

FILE NO/S: 980/09

DIVISION: Legal Practice Tribunal

PROCEEDING: Discipline Action

DELIVERED ON: 6 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 5 June; 29 July 2009

JUDGE: Atkinson J

PRACTITIONER
PANEL MEMBER: Mr K Horsely

LAY PANEL
MEMBER: Dr S Dann

ORDER: **Upon the respondent's undertaking, given to the Tribunal in the following terms:
"The respondent undertakes to execute a mortgage over his property at 3 Yurol Forest Drive, Pomona in favour of the Australian Taxation Office as security for his indebtedness to the Australian Taxation and to execute such mortgage within 30 days";**

It is ordered:

- 1. The respondent is publicly reprimanded.**
- 2. The respondent is prohibited from engaging in legal practice as a principal for a period of three years.**
- 3. The respondent is ordered to accept mentoring from Mr Bernard Bradley or other senior solicitor nominated by the Manager, Professional Standards of the**

Queensland Law Society and to confer regularly with that mentor in relation to his legal practice for a period of 12 months.

4. The respondent is to obtain a report from the nominated mentor in relation to the respondent's legal practice and provide it to the Legal Services Commissioner at the conclusion of 12 months.
5. The respondent is to complete a treatment plan as recommended by Cecilia Ann Bendall or another appropriately qualified psychologist, and at the conclusion of that treatment plan is to obtain a report from that psychologist as to the respondent's progress and provide it to the Legal Services Commission.
6. The respondent is to pay the Commissioner's costs of the application fixed in the amount of \$3,000 within six months.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – GENERALLY – where respondent failed to lodge five income taxation returns and one GST return between 1 July 1997 and 11 April 2006 – where respondent convicted of six taxation offences – where applicant charged respondent with failure to lodge returns and failure to comply with notice – where respondent admitted charges – where respondent agreed it amounted to professional misconduct – whether respondent was fit to practice

Income Taxation Assessment Act 1936 (Cth), s 162

Legal Profession Act 2007 (Qld), ss 418, 419, 420, 435(1)(c), 443(3), 452

Taxation Administration Act 1953 (Cth), s 8C(1)(A)

Davison v Council of the New South Wales Bar Association [2007] NSWCA 227, distinguished

Legal Services Commissioner v Browne [2004] NSWADT 63, cited

Legal Services Commissioner v Hewlett [2008] LPT 3, distinguished

Legal Services Commissioner v Madden [2008] QCA 301, cited

Legal Services Commissioner v Richardson [2009] LTP 17, cited

New South Wales Bar Association v Cummins (2001) 52 NSWLR 279, distinguished

New South Wales Bar Association v Somosi [2001] NSW CA 285, distinguished

New South Wales Bar Association v Young [2003] NSW CA 228, distinguished

QLS v Carberry [2000] QCA 450, cited

COUNSEL: B McMillan for the applicant
Rennick P for the respondent

SOLICITORS: Legal Services Commission for the applicant

- [1] The Commissioner filed a discipline application against the respondent, Patrick Brendan Cain, pursuant to s 452 of the *Legal Profession Act 2007* (“the 2007 Act”) on 30 January 2009 as a result of an investigation undertaken by him pursuant to s 435(1)(c) of the 2007 Act.
- [2] The practitioner has admitted the charges which the Commissioner alleged constitute professional misconduct. Those charges are:

Charge 1 – Failure to lodge returns

1. Between 1 July 1997 and 11 April 2006, the respondent engaged in conduct for which he was convicted on 15 May 2007 of six taxation offences, namely he failed to lodge five income taxation returns and one GST return as required.

Particulars

- 1.1 At all material times the respondent was an Australian legal practitioner.
- 1.2 Between 1 July 1997 and 11 April 2006 the respondent failed to furnish personal income tax returns as required for the financial years ended 30 June 1998, 30 June 1999, 30 June 2000, 30 June 2001 and 30 June 2005.
- 1.3 On 15 May 2007 the respondent pleaded guilty to, and was convicted of, five offences under s 8C(1)(A) of the *Taxation Administration Act 1953* (Cth), namely failing to furnish income taxation returns for the financial years ended 30 June 1998, 30 June 1999, 30 June 2000, 30 June 2001 and 30 June 2005 to the Taxation Commissioner when and as required by s 162 of the *Income Taxation Assessment Act 1936* (Cth).
- 1.4 On or about 1 October 2005 the respondent failed to furnish a GST return as required for the period 1 July 2005 to 30 September 2005.

- 1.5 On 15 May 2007 the respondent pleaded guilty to, and was convicted of, one offence under s 8C(1)(A) of the *Taxation Administration Act 1953* (Cth), namely failing to furnish a GST return for the period 1 July 2005 to 30 September 2005 to the Taxation Commissioner when and as required by Division 31 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Charge 2 – Failure to comply with s 443(3) Notice

2. The respondent, without reasonable excuse, failed to comply with a written notice issued by the Legal Services Commissioner pursuant to section 443(3) of the *Legal Profession Act 2007* (“the Act”)

Particulars

- 2.1 By letter dated 12 December 2007 the Commissioner advised the respondent that he had commenced an investigation in relation to conduct for which the respondent was convicted on 15 May 2007 of six taxation offences. The Commissioner requested the respondent’s explanation of his conduct by 14 January 2008.
- 2.2 The respondent did not respond to the Commissioner’s letter of 12 December 2007 within the time specified.
- 2.3 By letter dated 7 February 2008 the Commissioner required the respondent pursuant to s 443(1)(a)(i) of the Act to provide his explanation by 22 February 2008.
- 2.4 A written explanation was not provided by the respondent within the time specified.
- 2.5 By letter dated 25 February 2008 the Commissioner gave the respondent written notice pursuant to s 443(3) of the Act that he may be dealt with for professional misconduct if his failure to provide the explanation as required continued for a further 14 days, namely beyond 10 March 2008.
- 2.6 The respondent failed, within the 14 days period specified in the Notice, to comply with the requirement to give to the Commissioner the requested explanation and failed to provide the Commissioner with a reasonable excuse for not complying with the requirement within that period.

Findings

- [3] Mr Cain was born in 1956 and was admitted to practise as a solicitor of the Supreme Court of Queensland by mutual recognition on 9 January 1998 having previously been admitted as a solicitor of the Supreme Court of Victoria in 1992.
- [4] With the exception of a period between 11 March and 12 October 2002 Mr Cain has been employed as a consultant or an employed solicitor at various law practices in Queensland since his admission to practice in Queensland.
- [5] This matter came to the attention of the Queensland Law Society (“the Society”) when Mr Cain informed the Society, as he was obliged to do, on 26 May 2007 followed by his filling of a notice of a show cause event on 8 October 2007.

Charge 1

- [6] There is no doubt that a failure to lodge income tax returns and pay tax liability is misconduct capable of constituting unsatisfactory professional conduct or professional misconduct: see s 420(c)(ii) of the 2007 Act.
- [7] The conduct which falls within the meaning of unsatisfactory professional conduct is set out in s 418 of the 2007 Act which provides:

“418 Meaning of unsatisfactory professional conduct

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.”

- [8] The meaning of professional misconduct is set out in s 419 of the 2007 Act which provides:

“419 Meaning of professional misconduct

- (1) *Professional misconduct* includes –

- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

- (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the

practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.”

- [9] As he admitted, Mr Cain’s failure to furnish income tax returns on five occasions and his failure to furnish a GST return together constitute professional misconduct. This is so because of the combined application of s 420(c)(ii) and s 419(1)(a) of the 2007 Act. Each failure constituted unsatisfactory professional conduct and because it was repeated on so many occasions was a consistent failure to reach or keep a reasonable standard of competence and diligence so that it constituted professional misconduct.
- [10] As the Chief Justice held in *Legal Services Commissioner v Hewlett* [2008] LPT 3 at [24]:
- “One of the substantial obligations of a legal practitioner is to uphold the law, and to ensure the due application of the law in furthering his or her clients’ affairs. The practitioner’s capacity and commitment in those regards will be thrown into question where the practitioner is himself or herself guilty of a substantial contravention of the law, knowingly and deliberately, and for his or her own financial advancement.”
- [11] The reason why such behaviour is regard so seriously when it involves convictions for tax offences is that it shows a disregard for not only legal but also civic obligations. As Spigelman CJ said of a barrister who was removed from the roll in New South Wales in *New South Wales Bar Association v Somosi* [2001] NSWCA 285 at [68]:
- “He took advantage of the full range of public services made available by taxation, not least the provision of the court system in which he earned his income. He left the burden of all of this to his fellow citizens. Furthermore, for a period of almost two decades he engaged in what I described in *Cummins* as the hypocrisy of putting himself in a position, as a legal practitioner, in which he advocated that other people should perform their legal obligations, while systematically failing to perform his own.”

Comparison with other cases involving tax offences

- [12] In *Legal Services Commissioner v Hewlett* [2008] LPT 3, the practitioner had failed to file a tax return on 11 occasions. He continued to fail to lodge tax returns even when his practice became very successful and generated high income. Rather than paying the tax owing he had declared himself bankrupt. By the time he alerted the Queensland Law Society to the matters the subject of the charge he was indebted to the Australian Tax Office (“ATO”) in the amount of \$914,572.90 for tax, penalties and interest. He had previously been censured for professional default in 1995 and 1997, on the first occasion after a finding by a Federal Court judge that he had acted without instructions; and on the second occasion for failing to comply with provisions of the *Trust Accounts Act* 1973 in respect of audit requirements and

losing records for the trust accounts of two firms. His name was removed from the roll of practitioners.

- [13] In *New South Wales Bar Association v Somosi* [2001] NSWCA 285, the practitioner neither filed a taxation return nor paid income tax for a period of 17 years for the 17 financial years ended 30 June 1978 to 30 June 1994. He was convicted of 17 offences against s 8(C)1(a) of the *Taxation Administration Act* 1953 (Cth) in February 1996 and then in October 2000 he was convicted of an offence against s 264(i)(a) of the *Income Tax Assessment Act*. Even when the ATO sent notices requiring compliance he was dilatory in attending to those requirements which explained his further conviction. Once these matters came to the attention of the disciplinary authorities he continued to be derelict in his filing of an income tax return and had not filed the latest income tax return which was due. At the time of the hearing he had still not paid any of his over due tax. He voluntarily removed his name from the roll of practitioners but unsuccessfully opposed an order that he was guilty of professional misconduct.
- [14] In *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, the Court of Appeal in New South Wales made a formal declaration that the practitioner was not a fit and proper person and that his conduct constituted professional misconduct. That case involved a barrister who failed to lodge a taxation return for 38 years. He consented to an order removing his name from the roll of legal practitioners. This behaviour occurred from 1961 when he was admitted to the Bar. Judgment in the sum of approximately \$1,000,000 was entered against him by the ATO and he thereupon presented his own debtors petition. He had established a trust “to provide a safe harbour for his assets including his family home and chambers against the prospect of being sued.” The Court of Appeal referred to his failure to lodge any taxation returns for the 38 years as an “inexcusable pattern of illegal conduct in complete defiance of his civic responsibilities.”¹ As the court said at 283:
- “[The] agreed facts make it clear that over about four decades of practice as a barrister, Mr Cummins was perfectly capable of conducting his personal and financial affairs – as a practitioner, director, investor, manager – save in one respect. He never performed his duties as a citizen and tax payer.”
- [15] In *New South Wales Bar Association v Young* [2003] NSWCA 228 the legal practitioner did not file any tax returns from 1 July 1980 to 28 November 1996 and from 1 July 1980 to 30 June 2000 he did not pay any income tax at all. This lack of integrity justified the removal of his name from the roll.
- [16] In *Davison v Council of the New South Wales Bar Association* [2007] NSWCA 227 the legal practitioner failed to meet his income tax obligations for 16 years. As well as his failure to meet his taxation obligations in the amount of \$1,324,570.00, Mr Davison had lived an extravagant lifestyle and was not regarded by the Tribunal as a truthful and reliable witness. The Tribunal quite properly took account of that in ordering his removal from the roll.

¹ At 286.

Charge 2

- [17] The second charge deals with a failure to comply with a written notice issued by the Commissioner pursuant to s 443(3) of the 2007 Act. That section sets out the powers reposed in investigators and the obligations of a practitioner being investigated. It provides:

“443 Powers for investigations

- (1) The entity carrying out an investigation as mentioned in section 435 or 436 may, for the investigation –
 - (a) require an Australian legal practitioner who is the subject of the investigation –
 - (i) to give the entity, in writing or personally, within a stated reasonable time a full explanation of the matter being investigated; or
 - (ii) to appear before the entity at a stated reasonable time and place; or
 - (iii) to produce to the entity within a stated reasonable time any document in the practitioner’s custody, possession or control that the practitioner is entitled at law to produce; or
 - (b) engage a person, who the entity considers is qualified because the person has the necessary expertise or experience, to report on the reasonableness of an Australian legal practitioner’s bill of costs.
- (2) Subject to subsection (6), the practitioner must comply with a requirement under subsection (1)(a).
Maximum penalty – 50 penalty units.
- (3) If the practitioner fails to comply with the requirement, the entity may give the practitioner written notice that if the failure continues for a further 14 days after the notice is given, the practitioner may be dealt with for professional misconduct.
- (4) If notice under subsection (3) is given and the failure continues for the 14 day period –
 - (a) the Australian legal practitioner is taken to have committed professional misconduct, unless the practitioner has a reasonable excuse for not complying with the requirement within the period; and
 - (b) the commissioner may apply to the tribunal for an order in relation to the charge that the practitioner has committed professional misconduct as stated in paragraph (a) as if the application were an application in relation to a complaint against the practitioner.
- (5) In a hearing before the tribunal about a charge of professional misconduct, a copy of the notice

mentioned in subsection (3) and any enclosures with the notice are evidence of the matters in the notice and the enclosures.

- (6) An Australian legal practitioner may refuse to give the entity an explanation of a matter being investigated if –
 - (a) the practitioner satisfies the entity that to give the explanation would contravene, or invalidate, a policy for professional indemnity insurance held by the practitioner; or
 - (b) the explanation would tend to incriminate the practitioner.
- (7) A regulation may provide for how part 4.9 applies to an application to the tribunal for an order in relation to a charge that a legal practitioner has committed professional misconduct as stated in subsection (4)(a) and may be dealt with under that part as an application in relation to a complaint against the practitioner.”

[18] It can be seen that the failure to comply with a requirement under s 443(3) of the 2007 Act may have serious consequences for the practitioner.

[19] Mr Cain failed to comply with a notice given under s 443(3) of the 2007 Act. The failure was without reasonable excuse and so, in the Tribunal’s view, *prima facie* constituted professional misconduct.

[20] The Commissioner relied on the following passage from *Legal Services Commissioner v Browne*,² where the Tribunal observed:

“The Tribunal again sends a very clear message to the profession that Practitioners must comply with correspondence sent to them by the Commissioner or the Law Society in a timely fashion. In *Veghelyi - v- Council of the Law Society of New South Wales* 12662 of 1989, unreported, NSW SC6/9/89, Mr Justice Smart stated at page 16:

‘It is important that Solicitors respond promptly to the Society when it asks for a reply in response to complaints that have been made. It will be an unusual and complex case when a delay of more than 14 days is acceptable and often, the replies should be delivered within a shorter period such as 7/10 days. Replies to the Law Society in respect of complaints warrant a high priority.’ ”

[21] As this Tribunal said in *Legal Services Commissioner v Richardson* [2009] LTP 17 at [277] – [279]:

“[277] A member of the public who makes a complaint against a legal practitioner to the practitioner’s professional association or the statutory body set up to investigate complaints is, in the Tribunal’s

² [2004] NSWADT 63 at [13].

view, entitled to expect that a reasonably competent legal practitioner will respond competently and diligently to the investigation of that complaint. The public interest in maintaining confidence in the legal profession demands no less.

...

[279] The public is entitled to expect a legal practitioner, unless he or she finds himself or herself in peril under s 443(6), to be “candid” and “co-operative” to use the words of Pincus JA in *QLS v Carberry*; *A-G v Carberry* [2000] QCA 450 at [7]. This is part of his or her professional duties.”

- [22] No reasonable excuse was offered at the hearing of the discipline application. The failure was a result of the combined effects of procrastination and avoidance. It follows that, as he admitted, the practitioner should also be found guilty of professional misconduct under the second charge.

Orders

- [23] As the Commissioner submitted, when considering the appropriate penalty to be imposed following a finding of professional misconduct, regard is to be had primarily to the need to protect the public. The Court of Appeal held in *QLS v Carberry* [2000] QCA 450 at [38]:

“... the primary role of proceedings such as those before the Tribunal is to protect the public from persons not fit to be held out as officers of the court and as a proper person to be entrusted with the duties and responsibilities of the solicitor: *Harvey v Law Society of New South Wales* (1975) 49 ALJR 362 at 364; *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186; *Adamson v Queensland Law Society Incorporated* [1990] 1 QdR 498. As was pointed out in *Attorney-General v Bax* [1999] 2 QdR 9 at 21 by Pincus JA, there is a subsidiary purpose in the public interest and that is to deter other practitioners who might otherwise engage in professional misconduct.”

- [24] Disciplinary proceedings are protective rather than punitive in nature: *Legal Services Commissioner v Madden* [2008] QCA 301. The question is whether the practitioner is at this time fit to practice.³ The appropriate orders in this case require not only an examination of the seriousness of the practitioner’s conduct but also a consideration of the factors which are in the practitioner’s favour. They tend to show that so long as appropriate conditions for practice are put in place the practitioner is not unfit to practice.
- [25] Mr Cain’s disciplinary charges appear to arise from his being overwhelmed by circumstances rather than because of any dishonesty. Unlike *Hewlett* there were no previous adverse findings against him. His failure to lodge income tax returns did

³ *Legal Services Commissioner v Cousins* [2009] LPT 002 at [4].

not continue for the length of time nor did it involve the amount of money of any of the cases referred to herein; he was not motivated by greed; did not live a lavish lifestyle; and was prepared to repay the moneys owed rather than transfer his assets into another name or declare himself bankrupt.

- [26] His personal circumstances show that he has suffered and been able to overcome adversity. After recovering from a very serious injury from a motor vehicle accident which occurred not long after he left school, Mr Cain married at a relatively young age and deferred his university studies when his first child was born. He and his wife had three children while he worked fulltime and studied law part-time. When he was in his second last year of study his wife was diagnosed with breast cancer while she was pregnant with the youngest child. She went into remission and he completed his law studies in 1989 but the cancer returned and his wife died in June 1990.
- [27] He was admitted to legal practice in Victoria in 1992. He then took on the burden of sole practice and caring for his three young children. He suffered from depression and was drinking too much. So in 1994, he decided to change career so that he would have more time to look after the children. He completed a diploma of education at Melbourne University in 1994.
- [28] In 1995 he moved to the Sunshine Coast in Queensland to live where his sister and her family were living and able to provide support for him. He lost confidence and worked in a number of unskilled positions until 1997 when he was offered a position at a law firm on the Sunshine Coast. He was admitted to practise as a solicitor of the Supreme Court of Queensland on 9 January 1998. He was unable to keep up fulltime practice but then took on work as a consultant particularly in the area of criminal law and to a lesser extent family law. He continued to suffer from depression. Eight years ago he gave up drinking and five years ago he took on work with Lynch and Associates fulltime.
- [29] He failed however to keep his books in order. In 2001 he employed a bookkeeper to get all his financial records in order and to assist with the filing of tax returns which had not previously been filed. She disappeared and he lost his records. During the years 2002 to 2004 he employed another bookkeeper who applied herself diligently and got his books in order. He lodged his tax returns for the 2002, 2003 and 2004 years on time. He then employed a firm of accountants to do the outstanding returns for the years 1998 to 2001 and 2005 which were the subject of the charges. He has subsequently remarried and has two small children.
- [30] Before he was dealt with on the income tax matters on 15 May 2007 he had attended to the lodgement of his outstanding tax returns and GST returns. Mr Cain was extremely contrite and remorseful for his actions. He intends to pay the outstanding tax of about \$70,000 from the sale of his residential property which is listed for sale. He has undertaken to execute a mortgage over that property in favour of the ATO as security for his indebtedness and this undertaking will be incorporated into the orders.

- [31] He has sought the assistance of a psychologist, Cecilia Bendall, who provided two reports to the court. He is undertaking a programme of treatment to deal with his unresolved grief and to extinguish his maladaptive automatic protective mechanism of avoidance when feeling emotionally overwhelmed. Mr Cain was supported by a reference from his employer, Patrick Lynch, who speaks highly of his conscientiousness, his commitment to often legally aided clients and his readiness to work after hours including weekends. Mr Lynch also speaks of Mr Cain's contribution to the welfare of the community both by after hours pro bono work at the Suncoast Community Legal Service and by the onerous legally aided work he undertakes.
- [32] The parties were able to reach agreement as to the terms of the conditions which should be imposed if the Tribunal accepted, as it has, that he is fit to practice if subject to those conditions.
- [33] The orders will be:

Upon the respondent's undertaking, given to the Tribunal in the following terms:

"The respondent undertakes to execute a mortgage over his property at 3 Yurolo Forest Drive, Pomona in favour of the Australian Taxation Office as security for his indebtedness to the Australian Taxation and to execute such mortgage within 30 days";

It is ordered:

1. The respondent is publicly reprimanded.
 2. The respondent is prohibited from engaging in legal practice as a principal for a period of three years.
 3. The respondent is ordered to accept mentoring from Mr Bernard Bradley or other senior solicitor nominated by the Manager, Professional Standards of the Queensland Law Society and to confer regularly with that mentor in relation to his legal practice for a period of 12 months.
 4. The respondent is to obtain a report from the nominated mentor in relation to the respondent's legal practice and provide it to the Legal Services Commissioner at the conclusion of 12 months.
 5. The respondent is to complete a treatment plan as recommended by Cecilia Ann Bendall or another appropriately qualified psychologist, and at the conclusion of that treatment plan is to obtain a report from that psychologist as to the respondent's progress and provide it to the Legal Services Commission.
- Costs
6. The respondent is to pay the Commissioner's costs of the application fixed in the amount of \$3,000 within six months.