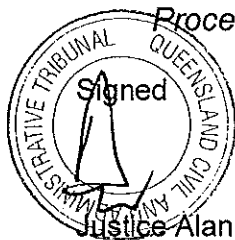


DECISION

Case number: OCR205-12
Applicant: Legal Services Commissioner
Respondent: Mr John William Lee
Before: Justice Alan Wilson, President
Assisted by:
Mr Douglas Murphy QC,
Ms Julie Cork
Date: 27 August 2013
Proceeding Type: Tribunal Hearing

IT IS THE DECISION OF THE TRIBUNAL THAT:

1. The Respondent's application for a non-publication order is refused.
2. The Respondent be publicly reprimanded.
3. That the conditions imposed by the Bar Association of Queensland on the Respondent's practising certificate:
 - a. requiring him to provide its Chief Executive a sworn statement that he has lodged each Business Activity Statement after it is due;
 - b. authorising his accountants to report to the Chief Executive any concerns they have about his ability to comply with his tax obligations; and
 - c. requiring him to report to it any incident of non-compliance and the steps he has taken to rectify any breach,continue for a further three years from the date of this order.
4. The Respondent is ordered to pay a pecuniary penalty of \$5,000, within 90 days of the date of this order.
5. The Respondent is ordered to pay the Applicant's costs of and incidental to the disciplinary proceedings as agreed or, failing agreement, as assessed according to the Supreme Court scale of costs under the *Uniform Civil Procedure Rules 1999*.



Justice Alan Wilson
President
Queensland Civil and Administrative Tribunal

QCAT

Queensland Civil and Administrative Tribunal

CITATION: *Legal Services Commissioner v Lee* [2013]
QCAT

PARTIES: Legal Services Commissioner
(Applicant)
v
John William Lee
(Respondent)

APPLICATION NUMBER: OCR205-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers; the Panel met to consider the
matter on 6 August 2013

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**

Assisted by:

Mr Douglas Murphy QC
Practitioner Panel Member
and
Ms Julie Cork
Lay Panel Member

DELIVERED ON: 27 August 2013

DELIVERED AT: Brisbane

ORDERS MADE:

1. The Respondent's application for a non-publication order is refused.
2. The Respondent be publicly reprimanded.
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 - b. authorising his accountants to report to the Chief Executive any concerns they have about his ability to comply with his tax obligations; and

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CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – UNSATISFACTORY PROFESSIONAL CONDUCT OR PROFESSIONAL MISCONDUCT – where the Respondent was convicted for failing to lodge income tax returns and Business Activity Statements between 1991 and 2009 – where the Respondent failed to give notice of his conviction to the Bar Association of Queensland – where s 420 of the *Legal Profession Act 2007* (Qld) provides that a conviction of a tax offence is capable of constituting unsatisfactory professional conduct or professional misconduct – where the parties disagree about the proper characterisation of the Respondent's conduct – whether the Respondent's conduct amounts to unsatisfactory professional conduct or professional misconduct – whether a pecuniary penalty is appropriate in the circumstances

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PUBLICATION OF INFORMATION – where Respondent has applied for a non-publication order – where Applicant opposes application – where s 656D of the *Legal Profession Act 2007* (Qld) provides that the Tribunal may make an order prohibiting the publication of information stated in the order that relates to the discipline application, the hearing or an order of the Tribunal – where the public interest ordinarily requires the publication of any disciplinary

orders and findings by the Tribunal – whether a non-publication order is appropriate in the circumstances

Legal Profession Act 2004 (Qld), s 63(1), s 480
Legal Profession Act 2007 (Qld), s 418, s 419, s 420, s 472(1), s 472(2), s 473, s 656D
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 7(2), s 66

Kennedy v Council of the Incorporated Law Institute of NSW (1939) 13 ALJR 563, cited
Legal Services Commissioner v Bradshaw [2009] LPT 21, distinguished
Legal Services Commissioner v Cain [2009] LPT 19, distinguished
Legal Services Commissioner v Donnelly [2010] QCAT 569, distinguished
Legal Services Commissioner v Hewlett [2008] LPT 3, followed
Legal Services Commissioner v Laurie [2011] QCAT 335, distinguished
Legal Services Commissioner v Sing (No 2) [2007] LPT 5, followed
New South Wales Bar Association v Somosi (2001) 48 ATR 562, cited
Re Hodgekiss [1962] SR (NSW) 340, cited

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*.

REASONS FOR DECISION

- [1] Mr Lee has been in practice as a Queensland barrister for 30 years. He is 63.
- [2] He failed to lodge income tax returns for the financial years ending in 1991, 1992 and 1993. In 1995 he was convicted in the Magistrates Court (on his own guilty plea) of three offences, and fined \$1,300.
- [3] He again failed to lodge tax returns for the years ending 1995 and 1996, and in 1997 he was, again, convicted of two offences, and fined \$2,500.
- [4] He again failed to lodge a tax return for the financial year ending in 2004 and, in 2006, was convicted on his own guilty plea, and fined \$900.

- [5] In 2009 he was again convicted, on his own plea, of six offences involving a failure to lodge Business Activity Statements and convicted and fined \$6,000.
- [6] Those various convictions comprise the first, second, third and fifth of the charges brought against him by the Commissioner in this disciplinary proceeding.
- [7] The fourth concerns his third conviction in 2006, and his failure under the *Legal Profession Act 2004* (Qld) ('LPA 2004') to give notice of that conviction to the Bar Association within seven days after it occurred and, indeed, before the time of his actual notice which was 14 April 2010.
- [8] That failure was discovered after his conviction in 2009, when he gave notice of that event to the Association under the *Legal Profession Act 2007* (Qld) ('LPA 2007'). The Association imposed conditions upon his practising certificate requiring him to show full and continuing compliance with his tax obligations, and that he undertake a program of practice management. He has satisfied those conditions.
- [9] The obligation resting upon lawyers to meet public and civic obligations, including obligations in their tax affairs, has been stated in clear, strong terms by the Chief Justices of New South Wales, and Queensland.
- [10] Spigelman CJ referred to the hypocrisy of lawyers putting themselves in a position, as legal practitioners, in which they advocated that other people should perform their legal obligations while systematically failing to perform their own.¹
- [11] In *Legal Services Commissioner v Hewlett*² de Jersey AC CJ said that:
- 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.³
- [12] As the Chief Justice also observed in *Hewlett*: 'the occurrence of this sort of default reflects poorly on the legal profession broadly'⁴.
- [13] The Commissioner, and Mr Lee and his legal representative agreed that the Tribunal might deal with this matter without an oral hearing and, to that end, they prepared and filed a Statement of Agreed Facts and exchanged and filed written submissions.

¹ *New South Wales Bar Association v Somosi* (2001) 48 ATR 562.

² [2008] LPT 3 ('*Hewlett*').

³ *Ibid* [24].

⁴ *Ibid* [21].

- [14] Mr Lee has filed four submissions.⁵ He has not replied to each charge in detail but referred to a number of events in recent years which, he says, have contributed to his '*... lapse in compliance with [his] obligations*'.⁶ They include the effects of the global financial crisis, personal business problems, personal health problems and the death of his mother, proceedings brought against him by his bank, his involvement with a number of public and charitable activities, and bad service provided by his former accountant over a period of 35 years. In his last submission he attaches a letter from his new accountant mentioning some errors or oversights by the former accountant, including a failure to lodge tax returns for Mr Lee's self-managed superannuation fund.
- [15] Mr Lee's various submissions provide, however, no satisfactory or exculpatory explanation as to why he has on a number of occasions commencing in 1991 failed to meet universal obligations to lodge essential tax documents.
- [16] In his submissions he describes the most recent failure with BAS returns as '*... my inadequate response to the aggregation of circumstances impacting upon me, being the very serious impact of the GFC, exacerbated by the effects of the matters I have referred to here*'.⁷ Of his accountant at the time he says:
- To some extent, my response was a consequence of the nature and extent of advice and assistance I was receiving from my then accountant, Jim.
- ...
- Whilst I do not seek to burden him with the responsibility of complying with the lodgement regime (which responsibility must ultimately be a personal one falling upon me) I consider that the level of advice and support I was receiving from him must be a factor relevant to explaining how I fell foul of the rule.⁸
- [17] It is nowhere suggested, however, that Mr Lee's accountant bore primary responsibility for preparing and lodging his BAS statements. Indeed, it appears from statutory declarations he made and delivered to the Bar Association that the responsibility fell, not upon his accountant, but upon his bookkeeper.
- [18] At the highest, then, Mr Lee's submissions may be taken as evidence that at around the time he failed to lodge BAS statements in 2007 and 2008 he was suffering quite serious personal, health, and financial problems. Nothing in his submissions explains, however, why he failed to lodge tax returns in the years 1991, 1992, 1993, 1995, 1996, and 2004 – until, of course, compelled to do so after being convicted of offences in relation to those defaults.

⁵ 29 January, 26 February, 18 July, and 1 August 2013.

⁶ John Lee, 'Further submissions by Respondent' Submission in OCR205-12, 26 February 2013, [6].

⁷ Ibid [3].

⁸ Ibid [4].

- [19] Mr Lee seeks an order that the outcome of the proceedings not be published. He has already, he says, paid substantial fines as a consequence of his convictions; has also suffered personal health and financial problems; has cooperated with the Commissioner throughout these proceedings; and, has given long and significant community service.
- [20] The Tribunal does have power to prohibit the publication of information relating to a discipline application.⁹ QCAT also has power under its own Act to make non-publication orders.¹⁰ Other provisions of the LPA 2007 can be said, however, to militate against such an order. Under s 472(1) the Commissioner has a mandatory obligation to keep a discipline register of disciplinary applications taken against an Australian legal practitioner. Section 472(2) provides that the discipline register must include the full name of the person against whom disciplinary action is taken.
- [21] Arguably, s 472(2) prevails over s 66 of the QCAT Act because of the operation of s 7(2) of that Act.¹¹ Under s 472 of the LPA 2007 the discipline register must be available for public inspection on the internet site of the Commissioner, and information recorded in the register may be given to members of the public. The Commissioner also has power to 'publicise' disciplinary action in any other way he considers appropriate.¹² These sections make it clear that Parliament intended that, ordinarily, full identifying particulars of a respondent and of any disciplinary proceedings taken against him or her would be publicised, and available for public inspection.
- [22] As the present Chief Justice remarked in *Legal Services Commissioner v Sing (No 2)*¹³ a similar provision¹⁴ in the earlier version of this legislation allowing the Tribunal to prohibit the publication of the name of the respondent practitioner had to be applied in the context that the 'legislative motivation' of that Act was to secure a level of '... transparency, accountability and independence in the disciplinary process not previously thought to have been present'.
- [23] As the Chief Justice went on to say:
- The Tribunal must be very careful not to thwart the achievement of that objective in any way. It would do so here if, by a non-publication or suppression order, it were seen to elevate the practitioner's private interest over the public interest which should rightly predominate.
- [24] The public interest will ordinarily require the publication of any disciplinary orders and findings by the Tribunal. The facts and circumstances surrounding Mr Lee's previous convictions, his personal history and circumstances, and his cooperation in these proceedings are not so

⁹ LPA 2007 s 656D.

¹⁰ QCAT Act s 66.

¹¹ The LPA 2007 is an 'enabling Act' for the purposes of the QCAT Act and its provisions prevail in the event of any inconsistency between the former, and the latter.

¹² LPA 2007 s 473.

¹³ [2007] LPT 5.

¹⁴ LPA 2004 s 480.

unique, unusual or compelling as to take the case outside this norm, or warrant overriding the plain statutory imperative.

- [25] The parties also disagree whether Mr Lee's misconduct amounts to *unsatisfactory professional conduct* or the more serious *professional misconduct* under the legislation which prevailed at the time each infraction occurred.
- [26] Charges 1, 2, 3 and 5 involve prosecutions and convictions under the *Taxation Administration Act 1953* (Cth) and charge 4 a failure to comply with notice requirements in s 63(1) of the LPA 2004.
- [27] The misconduct, which occurred over almost two decades, first involved offences referable to the *Queensland Law Society Act 1952* (Qld) (his convictions in 1995, 1997 and 2006)¹⁵ in which the term used was '*unprofessional conduct or practice*' defined relevantly as '*conduct described, under another Act, as unprofessional conduct or practice*'.¹⁶
- [28] The term '*professional misconduct*' was, however, generally known to the common law (in the context of misconduct by professional persons) as conduct which would reasonably be regarded as disgraceful or dishonourable by fellow practitioners of good repute and competency.¹⁷
- [29] For the fourth and fifth charges against Mr Lee the misconduct is to be categorised by reference to definitions in ss 418 and 419 of the LPA 2007. Under s 420 conduct consisting of a conviction for a tax offence is conduct capable of constituting either *unsatisfactory professional conduct* or *professional misconduct*.
- [30] This Tribunal (and before 2009 the Supreme Court) have already considered a number of matters involving legal practitioners and their tax affairs. All involved recurring failures to lodge annual tax returns or associated tax documents.
- [31] In *Hewlett* eleven annual tax returns went unlogged. The practitioner conceded that his default amounted to the more serious level of offending, *professional misconduct*, and the Tribunal accepted that as an appropriate submission because, among other things, the behaviour reflected poorly on the legal profession broadly.¹⁸
- [32] In *Legal Services Commissioner v Cain*¹⁹ tax returns were not lodged for five separate tax years. While the Tribunal accepted that the solicitor had faced serious personal difficulties and his misconduct arose from his being overwhelmed by them, rather than any dishonest motive, he was found to be guilty of *professional misconduct*: each failure, by itself, constituted

¹⁵ Charges 1, 2 and 3 in the discipline proceeding.

¹⁶ *Queensland Law Society Act 1952* (Qld) s 3B.

¹⁷ *Kennedy v Council of the Incorporated Law Institute of NSW* (1939) 13 ALJR 563 per Rich J; *Re Hodgekiss* [1962] SR (NSW) 340 at 351 per Hardie J.

¹⁸ [2008] LPT 3 at [21].

¹⁹ [2009] LPT 19 ('*Cain*').

unsatisfactory professional conduct but the offending was repeated on so many occasions that it amounted to a *consistent failure to keep or reach a reasonable standard of competence and diligence* and, for that reason, constituted the more serious *professional misconduct*.

- [33] In *Legal Services Commissioner v Bradshaw*²⁰ a barrister failed to lodge tax returns for six consecutive years. He had not, in fact, owed any tax and it was that circumstance which led the Tribunal to conclude that the misconduct should be placed in the lesser category. In doing so, however, the Tribunal observed that it:

... brings the legal profession into disrepute. It also demonstrates that the practitioner involved has a lack of respect for the duties imposed on citizens under the law.

- [34] In both *Legal Services Commissioner v Donnelly*²¹ and *Legal Services Commissioner v Laurie*²² the practitioners, both barristers, were charged with one count of having been convicted of a taxation offence. The respondent in *Donnelly* had failed to lodge 10 consecutive BAS statements over a two year period. The Tribunal accepted that his misconduct was the product of personal psychological issues, and not greed, and that his non-compliance resulted from procrastination more than anything else. The practitioner conceded, however, that his failure amounted to *professional misconduct* and the Tribunal accepted that categorisation.
- [35] The respondent in *Laurie* failed to lodge eight income tax returns and 12 BAS statements over a period of eight years; again, he conceded that his behaviour amounted to professional misconduct under the LPA 2004. As in *Cain*, the Tribunal observed that the barrister's prolonged and continuing failure to lodge tax documents met one of the categories of professional misconduct in both the LPA 2004 and LPA 2007 – namely, conduct that involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.
- [36] The Commissioner submits, and the Tribunal accepts, that Mr Lee's offending is at least as serious, and arguably more so, than that addressed in any of these cases. It involved four separate convictions over almost 20 years. The practitioner was, at intervals in that long period, a repeat offender in circumstances where, after his first conviction in 1995, it might reasonably have been expected that he would take necessary steps in his practice management and personal affairs to ensure he had no further problems with income tax.
- [37] Mr Lee's submissions do not address that circumstance, or the failure inherent in it. Rather, his submissions reflect persistent attempts to blame others for what is, ultimately, an important personal and civic obligation for

²⁰ [2009] LPT 21.

²¹ [2010] QCAT 569 (*'Donnelly'*).

²² [2011] QCAT 335 (*'Laurie'*).

which a legal practitioner must assume a high level of personal responsibility.

- [38] That theme is reiterated in one of his own submissions in the matter, concerning the most recent charge around his failure to lodge BAS statements, in which he says his former accountant never gave him advice about lodgement procedures and protocols for BAS documents, or that he could be prosecuted for failing to do so. The submission can only be described, in light of Mr Lee's previous problems with tax and well known general or common knowledge in the tax-paying community about BAS statements as, at the highest, disingenuous.
- [39] It can be said in Mr Lee's favour that his conduct in respect of the fifth charge was not deliberate and may have been brought about by unrelated personal circumstances, but that conclusion is not available in respect of the earlier convictions for failing to lodge tax returns.
- [40] In short, convictions on four separate occasions for a total of 12 taxation offences over the course of 19 years can only fairly be described in the terms set out in s 419(1)(a) as *professional misconduct* arising from a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. For these reasons the Tribunal is persuaded that Mr Lee's conduct in respect of charges 1, 2, 3 and 5 should be categorised as professional misconduct.
- [41] The fourth charge, involving a failure to give notice to his professional association of what is called is a '*show cause*' event is also, in the Tribunal's view, properly categorised in that way. Mr Lee did not disclose his 2006 conviction to the Bar Association until some four years after the event. In particular, he did not disclose it when renewing his practising certificates each year in that period, nor at the time of the 2009 conviction.
- [42] The practitioner in *Donnelly* also submitted, like Mr Lee, that he was not aware of that obligation but when he came to renew his practising certificate in the year after his conviction and he was asked specifically about events in respect of which he should give notice, he did so.
- [43] These reporting requirements are important professional obligations and practitioners operate under a compulsion to ensure full and proper compliance with them. Mr Lee failed to meet them for four years. In the circumstances surrounding the fourth charge it should properly be categorised, also, as professional misconduct.
- [44] As to the nature of any sanction to be imposed the Commissioner properly points to Mr Lee's otherwise unblemished record; the fact that he has made full admissions and cooperated in the prosecution of this disciplinary proceeding; and, that his conduct does not involve any aspect of apparent dishonesty and does not, in any instance, appear to have been calculated or deliberate. In light of those mitigating factors the Commissioner argues for no more than a public reprimand; the imposition of conditions upon Mr Lee's practising certificate requiring him to report compliance with his

taxation obligations to the Bar Association, and/or a penalty; and, that he pay the Commissioner's costs.

- [45] In his submissions Mr Lee points to his high level of community involvement and public service, and contends for (as discussed earlier) a non-publication order and that no further penalty, save for the payment of costs fixed at \$2,000, be imposed.
- [46] As these reasons will have already made clear, the Tribunal looks upon the charges against Mr Lee as serious matters for which, at the least, a public reprimand is both warranted, and necessary.
- [47] The Bar Association has previously imposed conditions upon his practising certificate requiring him to provide its Chief Executive with a sworn statement confirming that he has lodged each BAS statement after it is due; authorising his accountants to report to the Chief Executive any concerns they have about his ability to comply with his tax obligations; and requiring him to report any incident of non-compliance and the steps he has taken to rectify any breach. In the Tribunal's view that requirement should, in light of the long history of default in regard to tax obligations, continue for a further three years from the date of this order.
- [48] It is also appropriate to impose a pecuniary penalty. While any sanction in matters of this kind is primarily directed toward the protection of the public there must also be an element of personal deterrence. Mr Lee must appreciate that he ought not to default on his tax obligations again. A penalty in the order of \$5,000, payable within 90 days, is appropriate.
- [49] As to costs the Commissioner seeks an order that they be paid in an amount to be agreed, or assessed. Costs flow almost automatically in matters of this kind, unless there are exceptional circumstances.²³ They may be awarded for a stated amount, or as calculated by a method to be ordered.²⁴ The Commissioner has not said whether he disagrees with Mr Lee's submission that they be fixed at \$2000.
- [50] In the circumstances it is appropriate to order that Mr Lee pay the Commissioner's costs of and incidental to the disciplinary proceeding as agreed or, failing agreement, as assessed according the Supreme Court scale of costs under the *Uniform Civil Procedure Rules* 1999.

²³ LPA 2007 s 462.

²⁴ *Ibid* s 462(5).