QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Legal Services Commissioner v CBD (No 2)* [2011] QCAT 446
PARTIES:	Legal Services Commissioner (Applicant/Appellant) v CBD (Respondent)
APPLICATION NUMBER:	OCR255-10
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	30 August 2011
HEARD AT:	Brisbane
DECISION OF:	**Justice Alan Wilson, President** Assisted by: **Ms Julie Cameron** (Practitioner Panel Member) **Dr Julian Lamont** (Lay Panel Member)
DELIVERED ON:	14 September 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The respondent is ordered to pay the Commissioner's costs fixed in the amount of $1,500 within 30 days.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – where the respondent was convicted of a criminal offence in the District Court at Brisbane on 16 April 2010 – where the applicant contends that the respondent is guilty of professional misconduct and should be removed from the local roll of solicitors – where the Tribunal ordered that the publication of any information containing any details of the offence for which CBD was convicted is prohibited – whether the respondent's actions amount to professional misconduct or unsatisfactory professional conduct –

appropriate penalty

Legal Profession Act 2007, ss 420, 472, sch 2

A Solicitor v Council of the Law Society of NSW (2004) 216 CLR 253, cited
Barristers' Board v Darveniza (2000) 112 A Crim R 439, cited
Ziems v Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279, cited

APPEARANCES and REPRESENTATION:

APPLICANT:	Ms Premika Prasad, Solicitor
RESPONDENT:	James Bell QC instructed by Brian Bartley & Associates

REASONS FOR DECISION

[1] CBD, an Australian lawyer, was convicted of a criminal offence on his own plea of guilty in the District Court at Brisbane on 16 April 2010. The Commissioner contends that he is therefore guilty of professional misconduct under the *Legal Profession Act 2007* (LPA) and that the criminal offence was sufficiently serious that he should be removed from the local roll of solicitors.

[2] The Commissioner's contention is that the nature of the criminal conviction warrants a finding of professional misconduct, and that it was of sufficient seriousness to also warrant a finding that he is not a fit and proper person to engage in legal practice.

Non-Publication Order

[3] Before this hearing CBD applied to QCAT for a non-publication order about the matters which led up to the disciplinary proceedings. After receiving submissions from the parties I ordered, on 22 August 2011, that because of psychiatric evidence to the effect that publication of detailed information about the matters which lie behind the application could have a serious effect upon the respondent's mental health and, indeed, lead to an increased risk of suicide, the Tribunal ought to prohibit the publication, in this disciplinary application proceeding or any report of it, of any information containing any details of the offence for which CBD was convicted in the Brisbane District Court in 2010.

[4] That order applies to these reasons and the order made now.

The Legislation

[5] The LPA sets up two categories of misconduct by lawyers: *unsatisfactory professional conduct* includes conduct 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.

[6] *Professional misconduct* includes, relevantly here, conduct happening otherwise than in connection with the practice of law that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

[7] Under s 420 either category may be found to apply if there is a conviction for a *serious offence* – a term defined in sch 2 of the LPA to include an indictable offence. It has previously been accepted, in Queensland and New South Wales, that criminal conduct with the elements arising here can constitute the more serious finding of professional misconduct.

[8] On any view the offence here was a serious one. The circumstances do not fall within the definition of *unsatisfactory professional conduct* because they did not occur in connection with CBD's practice of the law, and have no apparent connection with his standards of competence and diligence in that respect. His conviction for a serious offence, happening otherwise than in connection with the practice of the law, places the matter more obviously within the definition of *professional misconduct*.

[9] The more pressing issue for the Tribunal, squarely raised in the submissions from the parties, is whether he is not, therefore, a fit and proper person to engage in legal practice.

A Fit and Proper Person

[10] The question whether, and the circumstances in which, a criminal conviction could lead to a finding that a person is not fit and proper to practice as a lawyer has been addressed by both the High Court, and the Queensland Court of Appeal. In the High Court it was said, in 1957, that the question involves looking at every relevant fact and circumstance; and that, while personal misconduct may be a ground for disbarring a lawyer,

> … the whole approach of a court … must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practice than the former.[1]

[11] In that case Kitto J observed that personal misconduct may show a defect of character incompatible with membership of a self-respecting profession, or carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share, with the person convicted, the kind and degree of association which legal practice entails.[2] Taylor J said that the vital question was whether the conduct was of a kind which showed that the person was unfit to continue in practice – and, the

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1 *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 per Fullagar J at 290.

2 At 298.

fact that the conduct may have amounted to an offence against the law was a matter for consideration but '… *by no means the end of the inquiry*'.[3]

[12] In 2004 the High Court said, in *A Solicitor v Council of the Law Society of NSW*' (2004) 216 CLR 253, that the '… *ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner*'. In that case, a solicitor had been convicted of four counts of aggravated indecent assault upon the children of a woman he subsequently married. The Court held that the circumstances of personal misconduct had no connection with the solicitor's legal practice and, indeed, were so remote from anything to do with that practice that the characterisation of the conduct as *professional misconduct* was mistaken. The Court then set aside a decision of the NSW Court of Appeal to the effect that the solicitor was unfit to practice and, instead, suspended him for five years.

[13] In *Barristers' Board v Darveniza* (2000) 112 A Crim R 439, a barrister had been convicted of two counts of supplying a dangerous drug. Despite that he subsequently obtained a certificate to practice as a barrister in New South Wales but, in doing so, failed to disclose his prior drug convictions. It was also established that an affidavit he had sworn, denying further dealings with the persons involved in the original offences, was untrue.

[14] Thomas JA observed that the legal disciplinary jurisdiction is not one in which punishment is applied to the offending practitioner but, rather, one in which the penalty is primarily intended to protect the public and maintain public confidence in the administration of justice. His Honour referred to *Ziems*' case (the first of the High Court decisions mentioned above, in which the barrister was convicted of manslaughter and sentenced to imprisonment, but the High Court had held that he should not be struck off), and cited a passage from the judgment of Kitto J in which it was pointed out that the offending conduct did not indicate a tendency to vice, or violence, and had neither connection with nor significance for any professional function.

[15] It was submitted, for the Commissioner, that CBD has not shown any apparent insight into the problems found by the psychiatrist who reported upon him to both the District Court, and this Tribunal; but the psychiatrist says that he is not out of touch with reality, and has developed some understanding of the nature of his difficulties.[4] CBD's initial response to advice from the Commissioner in October 2010 that a discipline application had been filed was sensible, and realistic. While he continues to labour under the psychiatric difficulties diagnosed by the psychiatrist, they do not apparently affect his perception of reality. One of his referees says that CBD told him all the details of his offending, and his behaviour on that occasion indicated genuine remorse.

[16] An individual's full understanding of (and insight into) the nature of their misconduct, and expressions of remorse, are things that are readily expressed but not easily examined for truth, or falsity. In the criminal and disciplinary jurisdictions expressions of insight and remorse are often made,

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3 At 303.

4 Report of Dr Gary Larder, 15 April 2010, page 9.

but hard to test. In any event, it cannot be uncreditable to CBD that he has, both in the criminal court and here, addressed the proceedings in a realistic and straightforward and appropriately responsive way, with apparent honesty.

Conclusion

[17] In *Ziems* Kitto J said that drawing the dividing line between conduct which is deserving of disapproval but which does not spell unfitness for legal practice, and personal misconduct that does fall on the wrong side of that line is by no means always an easy task.[5]

[18] Each case must be considered with reference to its particular circumstances. I adopt the following factors, as those which should guide the Tribunal here: the extent and circumstances of the offending in question, its relationship to the offender's professional life, and the behaviour of the offender before, during and after the legal processes which resulted from that offending.

[19] This practitioner has an otherwise unblemished record. His conduct during his criminal proceedings, and, here, has been in no way discreditable. There is no evidence to suggest that the personal failings which lead to his conviction affected or might in the future affect his performance of his work, or those for whom he acts; and, the risk of re-offending is small.

[20] This analysis tells, on balance, against a finding that he is not a fit and proper person to resume practice.

Penalty

[21] He has not been employed or worked as a legal practitioner since June 2010. Prior to that, after being charged in 2008 he did not seek permanent or long term employment but worked intermittently as a locum. It is submitted, for him, that an appropriate penalty would involve no further period of suspension beyond that he has already, in reality, suffered.

[22] The primary purpose of sanction in this jurisdiction is protective. CBD has served his suspended sentence, without default. The weight of evidence here points strongly towards the conclusion that, but for the conviction itself, nothing in his conduct might suggest that the public, including his potential clients could require protection from him. While the nature of his offending is something that engenders concern, the actual circumstances did not give rise to an apprehension that the community needs to be protected from him; nor does any other factor in this case.

[23] If an order prohibiting him from practice is not necessary for any reason to do with the protection of his clients or the public generally, and his offending is not of a kind warranting a finding that he is not a fit and proper person to work as a lawyer, there is no persuasive reason to impose any further period of disqualification or suspension.

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5 *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298.

[24] While his psychiatrist has suggested he would benefit from treatment from a psychiatrist or psychologist, it is not said that treatment of that kind is a necessary prerequisite to his resumption of practice.

[25] This does not mean that he escapes sanction. He must live with the conviction recorded against him; and, despite the non-publication order, his name and details of this disciplinary action will be available to the public through the records the Commissioner must keep under s 472 of the LPA.

[26] The Commissioner also seeks its costs of $1,500, and CBD does not oppose that.