LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v Bradshaw* [2009] LPT 21
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **JAMES TODD BRADSHAW** (respondent)
FILE NO:	5723 of 2009
DIVISION:	Legal Practice Tribunal
PROCEEDING:	Discipline Application
DELIVERED ON:	8 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2009
JUDGE:	Fryberg J
PRACTITIONER PANEL MEMBER:	Mr L Bowden
LAY PANEL MEMBER:	Ms K Keating
ORDER:	**Parties to make further submissions on sanction.**
CATCHWORDS:	Profession and trades – Lawyers – Complaints and discipline – Other matters – Failure to lodge tax returns – No tax payable Profession and trades – Lawyers – Complaints and discipline – Professional misconduct – Threatening letters – Attempt to intimidate opposing solicitor by threatened litigation Profession and trades – Lawyers – Complaints and discipline – Generally – Complainant's immunity from action – Claim for compensation Profession and trades – Lawyers – Complaints and discipline – Professional misconduct – Generally – Private criticism of judge – Strong criticism may not amount to scandalous or offensive conduct Profession and trades – Lawyers – Unqualified persons and

disqualified practitioners – Acting for party – "engage in legal practice" – *Legal Profession Act* 2007 (Qld), s 24

Statutes – Acts of Parliament – Interpretation – Particular words and phrases – Specific interpretations – *Legal Profession Act* 2007 (Qld) s 24 – "engage in legal practice"

Legal Profession Act 2007 (Qld), s 24, s 27, s 443, s 452, s 456, s 464, s 465, s 466, s 467, s 487, s 643

COUNSEL: B I McMillan for the applicant
The respondent appeared on his own behalf

SOLICITORS: Legal Services Commission for the applicant
The respondent appeared on his own behalf

LEGAL PRACTICE TRIBUNAL

FRYBERG J

MR L BOWDEN
MS K KEATING

No 5723 of 2009

LEGAL SERVICES COMMISSIONER	Applicant
and	
JAMES TODD BRADSHAW	Respondent

BRISBANE

..DATE 08/09/2009

ORDER

HIS HONOUR: There is before the Tribunal a disciplinary application brought by the Legal Services Commissioner against James Todd Bradshaw, a barrister. The Commissioner seeks unspecified disciplinary orders pursuant to section 456 of the Act. He lays five charges, which it is asserted, constitute unsatisfactory professional conduct and/or professional misconduct.

The first is that Mr Bradshaw failed to lodge tax returns for the years ended 30th of June 1999 through to 30th of June 2005, conduct for which he was convicted of offences against the Taxation Administration Act in April 2008.

The second charge is a charge of engaging in conduct which fell short of the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. That was particularised to relate to a letter dated 19th of July 2008 sent by Mr Bradshaw to Miller Harris, a firm of solicitors in Cairns.

The third charge is engaging in legal practice while prohibited, and it alleges that on or about the 13th of October 2008, Mr Bradshaw engaged in legal practice contrary to section 24 of the Legal Profession Act.

The fourth charge is that on the same date, Mr Bradshaw prepared and sent correspondence which was scandalous,

offensive and/or likely to bring the profession into disrepute. It is admitted that on that date Mr Bradshaw wrote a letter to another barrister, Mr Morzone in Cairns, and it is that letter which is at the heart of the third and the fourth charges.

The final charge is a failure without reasonable excuse to comply with a written notice issued by the Commissioner under section 443(3) of the Legal Profession Act. I think it is fair to say that Mr Bradshaw does not deny that he failed to comply with that notice. He asserts that in the circumstances it was unreasonable for him to have to done so.

I turn then to each of the charges in a little more detail. In May 2008, Mr Bradshaw disclosed to the Bar Association of Queensland that he'd been convicted in the Cairns Magistrates Court on the 4th of April of seven counts of failing to lodge a tax return. The convictions were in respect of the years which I specified earlier.

The material before the Tribunal shows that the Commonwealth Director of Public Prosecutions prosecuted Mr Bradshaw after a considerable period during which he had been given opportunities to lodge the necessary returns. It began in March 2005, when he was issued with lodgement reminder notices for the years 2000 to 2003. A series of subsequent notices were issued by the Tax Department in respect of those years and of other years. Negotiations took place between Mr Bradshaw and the Department. Mr Bradshaw made the point that his accountant had died in 1999 and that was a cause of the

difficulties in respect of that year. For the rest, however, I am satisfied on the evidence that the failure to lodge the returns was quite simply a case of a deliberate omission on the part of Mr Bradshaw.

Mr Bradshaw has given evidence that in the relevant years he did not earn any assessable income and I infer that with a somewhat insouciant and perhaps arrogant attitude, he simply decided that he did not need to bother with futile paperwork. Despite the promptings, which were considerable and repeated by the Tax Office, he did not rectify the situation and the end result was a prosecution. Mr Bradshaw was fined an amount of $5,000 in respect of all of the charges.

Conduct like that brings the legal profession into disrepute. It also demonstrates that the practitioner involved has a lack of respect for duties imposed on citizens under the law. It is conduct, which in respect of the period after 2004, was made statutorily capable of constituting misconduct but which I have no doubt in the years prior to that year was in the sense in which misconduct has been defined at common law equally amounted at least to unprofessional conduct.

The characterisation depends a little on the level of seriousness with which one regards the offending. Mr Bradshaw's conduct displayed a somewhat arrogant willingness to disregard the rules. However it must be said, that there was, in fact, no tax payable in respect of any of the years, and indeed in one year Mr Bradshaw actually received a tax refund.

It is therefore a situation to be distinguished from other cases in more recent times where there has been a failure to lodge returns by lawyers intent upon concealing substantial income. That, however, goes only to whether or not the conduct amounts to unprofessional conduct rather than to professional misconduct.

In the submissions on behalf of the Commissioner, it is asserted that on each of the five charges the relevant conduct amounts to professional misconduct or unsatisfactory professional conduct; that is in the written submissions (there is an exception being made to that in oral submissions in respect of one charge). It seems to me that the conduct of Mr Bradshaw, in respect of the tax returns and the fact that he allowed the matter to proceed to the stage of a conviction, does constitute unprofessional conduct.

Mr Bradshaw submitted that a different conclusion should be reached because he has already been punished for his conduct in not submitting tax returns. It is, however, well established that proceedings in this Tribunal are designed to protect the public, not to punish wrong-doers and that no principle of double jeopardy arises. Mr Bradshaw further submitted that it was a wrongful exercise of discretion to prosecute him, but in my judgment, it does not fall to this Tribunal to make an assessment of the exercise by the Commissioner of any discretion which he might have. In any event, I would not think that anything has been shown which would suggest a wrongful exercise of a discretion. I am

satisfied, therefore, that the first charge is proved.

The second charge is asserted to be falling short of the standard competence and diligence expected of a reasonably competent member of the Australian legal profession, that is a reasonably competent Australian legal practitioner. That charge is based on a letter sent by Mr Bradshaw to the solicitors acting for the defendant in litigation between his wife, for whom he was acting, and a company called Jilt Pty Limited. Those solicitors were Messrs Miller Harris.

Mr Bradshaw wrote a letter, the first three paragraphs of which related to an alleged conflict of interest arising from the involvement of an employee of the solicitors, a Mr Michael Laycock. Mr Laycock, it was asserted, was the plaintiff's nephew and had acted for her in relation to other matters. Mr Bradshaw concluded those three paragraphs, asserting that the solicitors were ethically obliged to withdraw from acting for the defendant.

The next two paragraphs, which is the subject of the complaint, were as follows:

> "Further I advise that as a result of the Commissioner's decision which you, in Williams' claim for compensation, clearly assisted and no doubt advised his ill-advised complaint that I am holding you liable for abuse of process with Williams. I intend to issue proceedings in the Supreme Court nominating a jury and obviously Irene's matter should be joined in this process. Of course, she also has a substantial action in abuse of process having regard to the ramifications of the decision.
>
> However in a gesture of goodwill and to maintain the working relationship between us I am prepared to settle my claim in the sum of $385,000.00 and I make this offer on a without prejudice basis. If you do not accept within 28 days I will institute proceedings in the Supreme Court and nominate a jury and you will be a party

> to that litigation. The major component of both Irene and my claims will now concentrate on exemplary damages where the history to date is that Irene has sold her shop at fire sale prices and when seeking redress that you and the defendant, Williams, have used the state resources in the police to have her charged with stealing to promote your defence and that failing you then sought to have me removed from assisting Irene who was declared by Justice White, with the acquiescence of the tribunal members and the prosecutor, McMillan, to be "a vulnerable person."

The Commissioner submits that that letter demonstrates a failure of competence and diligence because, first, Mr Bradshaw should have known that he personally did not have any cause of action against either Mr Williams or Miller Harris for abuse of process, arising out of a complaint to the Legal Services Commission. It is, I think, tolerably clear that the letter does assert that Mr Bradshaw did have a cause of action for abuse of process against both.

The Commissioner has made no attempt to put forward evidence to show the absence, in fact, of any such cause of action. He has relied solely on the letter, and on section 487 of the Legal Profession Act 2007, a section which I've been informed did not have an equivalent in the 2004 Act. That means that unless it can be shown that by virtue of that section it is impossible to argue that the action for abuse of process could not be brought, the onus of proof has not been satisfied and counsel conceded as much. However, counsel strongly urged that section 487 clearly provides that no action could be brought in the circumstances and that the admissions made by Mr Bradshaw, at least in the course of the hearing, show that he was aware of the section at the time.

Section 487 provides:

"(1) This section applies if a person makes a complaint or otherwise gives information to the commissioner, the law society or the bar association about conduct that is-
(a) conduct of an Australian lawyer or a law practice employee; or
(b) a possible contravention of section 24 or 25.

(2) The person is not liable, civilly (including in an action for defamation), criminally or under an administrative process for making the complaint, giving the notice or otherwise giving information to the commissioner, the law society or the bar association relating to the complaint or notice, including, for example, giving further information under section 431.

(3) Also, merely because the person makes the complaint, gives the notice or otherwise gives information as mentioned in subsection (2), the person can not be held to have-
(a) breached any code of professional etiquette or ethics; or
(b) departed from accepted standards of professional conduct."

Most emphasis was placed on subsection (2). In looking at that subsection, it is important to notice precisely what it was that Mr Bradshaw asserted in his letter. He did not claim that it was simply the making of a complaint, which gave rise to his right to bring proceedings for abuse of process. He asserted that there was in that complaint by Mr Williams, a claim for compensation. If a matter is referred to the Tribunal, a complainant may make a request for a compensation order (s643(3)(a)), and the Tribunal has power to order the practitioner to pay compensation: see sections 464 through 467.

It seems probable that an application for an order for such compensation can be made by the Commissioner when he starts proceedings under section 452 because the order which he may seek is empowered by section 456 subsection (4)(b). On the

other hand it is also worthy of note that under section 643 of the Act the complainant is entitled to appear at the hearing on those aspects which relate to a request for a compensation order.

In the present case, the request of the complainant for a compensation order is the gravamen of Mr Bradshaw's assertion of a cause of action for abuse of process. I have no doubt that it is that to which he referred in using the words "Williams' claim for compensation".

So the question comes down to whether or not there is at least an arguable view that section 487 does not preclude a possible action for abuse of process. As I have said, counsel for the Commissioner strongly submitted that it does prevent such proceedings. Subsection (2) refers to liability civilly, including in an action for defamation; criminally; or under an administrative process - and here are the critical words - "for making the complaint, giving the notice or otherwise giving information to the Commissioner, the Law Society or the Bar Association relating to the complaint or notice including, for example, further information under section 431." It does not seem to me that a claim for compensation or, more accurately, a request for a compensation order is adequately described in that section by the words "otherwise giving information relating to the complaint".

There are two reasons for that conclusion. First, the protection which is provided by the section is absolute.

There are no exceptions. Second, there is no inhibition anywhere in the Act on a person falsely or maliciously requesting the payment of compensation. One might have expected that there would be somewhere a provision creating an offence for maliciously or without bona fide intent making a request for compensation, but there is no such provision. That to my mind indicates the need to construe the wide words in subsection (2) as narrowly as possible.

In short, it seems to me that the terms of section 487 do not provide a complete defence to a possible claim for abuse of process. At the very least they are not so obviously adapted to providing such a defence that it could be said that in asserting the existence of a right of action Mr Bradshaw demonstrated a falling short of the standard of competence and diligence to which the public is entitled.

That was not the only basis on which the Commissioner put his claim. He suggested that in the alternative, I suppose, the claims were grossly exaggerated and exceeded any legitimate assertion of legal rights or entitlements on behalf of Mr Bradshaw's wife, Ms Coronis. The evidence before me does not descend into any detail of the rights which Ms Coronis might have had. It is not clear what she could or could not have sued for. Mr Bradshaw made an assertion of a claim for exemplary damages but whether that would be available is impossible to say since the facts of the case have not been put before the Tribunal by the Commissioner.

In the further alternative, the Commission asserts that the claims were intended by Mr Bradshaw to intimidate the solicitors. The word "calculated" is used in the charge but intimidated is what counsel submitted it meant. In response, Mr Bradshaw urged that he was not attempting to intimidate anyone but rather was trying to induce the solicitors to cease acting for Jilt Proprietary Limited in circumstances where they had a conflict of interest. He related the two paragraphs, which I have quoted above, to the three paragraphs which preceded them and submitted that what was written in the paragraphs was no more than attempt to make the solicitors see reason and not continue to act.

Unfortunately for Mr Bradshaw, I think his submission is correct. I say "unfortunately" because it seems to me that the only way in which the two quoted paragraphs could be

regarded as intended to induce the solicitors to cease acting for his wife's opponent is by intimidation. Why else would he threaten personal action against the solicitors? It may be that there were good reasons for why the solicitors should not continue to act. As Mr Bradshaw emphasised a number of times, they did cease to act. They withdrew from the matter and other solicitors took over. But that does not justify the use of threats of personal litigation against a solicitor to try to detach the solicitor from the client. The threat of personal litigation was not made with respect to the solicitor's conduct in acting in a situation of conflict of interest. It was collateral, made in relation to the solicitor's conduct in assisting the client to claim compensation in the course of the client's complaint.

It seems to me that that is not proper conduct for a practitioner. I find that it amounts to professional misconduct.

Finally (on this charge), the Commissioner alleged that the letter was scandalous and likely to bring the profession into disrepute. I see nothing in it which can properly be called scandalous and nothing in the circumstances of its publication which could reasonably be regarded as likely to bring the profession into disrepute. I reject the Commissioner's submissions in that respect but find the second charge proved for the reason which I have just given.

The third charge is engaging in legal practice while

prohibited. On the 13th of October Mr Bradshaw sent a letter to Mr Dean Morzone, a barrister in Cairns. The letter dealt with the proceedings between Ms Coronis and Jilt. It was headed "Re Coronis v Jilt Proprietary Limited". The salutation to Mr Morzone was, "Dear colleague". It was signed by Mr Bradshaw as a "Barrister-At-Law", and it had a poorly disguised attempt at scratching out those words beneath his name at the head of the letter.

I think it is clear that in sending that letter Mr Bradshaw was acting as a lawyer would act on his wife's behalf. However, that is not enough for the Commissioner to prove the third charge. The charge is, as I have said, engaging in legal practice contrary to section 24 of the Act. Section 24 provides:

> "A person must not engage in legal practice unless the person is an Australian legal practitioner."

"Engage in legal practice" is defined to include "practise law".

"An Australian legal practitioner" is defined in section 6 to mean:

> "An Australian lawyer who holds a current local practising certificate or a current interstate practising certificate."

At the material time Mr Bradshaw was an Australian lawyer but he was not the holder of either of those two certificates. He has therefore committed the offence under section 24 if he engaged in legal practice or practised law. A contravention

of section 24 is capable of constituting unsatisfactory professional conduct or professional misconduct (see section 27).

Neither party cited any authority to the Tribunal about the meaning of the expression "engage in legal practice" or, for that matter, "practise law". It seems to me that both of those expressions are the professional equivalent of the expression "carry on business" which is used in relation to activities other than professional activities. In other words, practising law is an activity which has the characteristics of carrying on the business of being a lawyer.

One would look for evidence of continuity, of repeated acts; one would look for evidence of payment for those acts; one would look for evidence of seeking business from members of the public, or at least from other lawyers; one would look for evidence of a business system; one would look for evidence of maintaining books and records consistent with the existence of a practice; one would look for evidence of a multiplicity of clients. None of those things is in evidence before me.

All that appears is that Mr Bradshaw sent a letter on behalf of his wife dealing with legal matters in a way which is consistent with the form of letter and the subject matter which a lawyer would send. That is not enough. The Commissioner has not demonstrated that Mr Bradshaw engaged in legal practice. It is a question of fact. The facts have not been proved.

The same letter founded the fourth charge of sending correspondence which was scandalous, offensive or likely to bring the profession into disrepute. It included the following passages, particularly relied upon for this charge:

> "The matter is still up in the air where my next application for Emerson [sic] to disqualify himself, nobody deserves to be threatened and spoken to the way Irene was and that the judgment is clearly a face saving exercise after a week he realised he had acted unjudicially and it was time to protect his own backside. Nothing more ludicrous than adjourning for a week to see whether you were going to adjourn."
>
> ...
>
> "...knowing Williams and his love of money I could imagine where he will attempt to recoup his losses."
>
> ...
>
> "Clearly Emerson [sic] is just a person not suited to the bench and for us to continue before him is simply self defeating."

In those passages the word "Emerson" is obviously intended as a reference to District Court Judge Everson, a local Judge in Cairns.

It must be said that the criticism of the Judge is robust. However, it is not scandalous or offensive or likely to bring the profession into disrepute to ask a Judge to disqualify himself. That did happen in this case and the Judge did disqualify himself. It is not scandalous or offensive or likely to bring the profession into disrepute to write to a fellow barrister, "Nobody deserves to be threatened." It

implies that the Judge did threaten somebody, presumably Ms Coronis, but the Commissioner has not sought to prove that this did not happen. If it did, then it is perhaps something deserving of censure. Whether it did or not need not and, indeed, cannot be determined. The Commissioner has not shown that there is anything scandalous or offensive or likely to bring the profession into disrepute in the expression in the letter.

To describe a judgment as a face saving exercise is strong criticism but judges may expect strong criticism from time to time. It might be different if the circumstances of publication were different but this is a letter from one barrister to another. I think judges would be regarded as naive if they thought that barristers do not in contacts between each other sometimes express their criticisms of the judges in strong terms. The system is none the worse for that.

Perhaps the strongest criticism is the assertion that the judge is just a person not suited to the bench. I have thought about that and whether it amounts to a scandalous or offensive statement. It is not, I think, something which is scandalous in the sense in which that term has been used in law. It may be something which could be offensive, particularly if it were said to the judge, but it was not said to the judge. It was said to another barrister and there is no evidence to suggest that that barrister found it the slightest bit offensive. It was not said publicly. Mr

Bradshaw asserted that, in fact, it was a view which coincided with and perhaps was more mild than the view of the addressee in relation to the particular judge. There is no evidence of Mr Morzone's view and I need not make any finding in relation to Mr Bradshaw's assertions about that topic.

I can see nothing in that letter which is scandalous, offensive or likely to bring the profession in disrepute having regard not only to the contents but to the circumstances of publication, the addressee and the events which had occurred by way of background at the time. I would dismiss the fourth charge.

The fifth charge is that Mr Bradshaw without reasonable excuse failed to comply with a written notice dated 10th of December 2008 issued by the Commissioner pursuant to section 443(3) of the Legal Profession Act. I see no reason to set out the terms of the various notices which led up to the one in question. The evidence plainly shows that such a notice was given. The evidence equally plainly shows that it was disregarded by Mr Bradshaw. Whether he threw it in the bin, as he first was inclined to say, or whether he kept it and read it and responded in some way to it is beside the point. He plainly did not do what the notice required and what the Act required him to do.

In his responses to the Commissioner, he simply took the attitude that he would not give efficacy to a complaint made by anyone from the firm of Miller Harris by responding to the notice. That was the defence which he put before the Tribunal in his response to the charge. It is not only no defence at all, it demonstrates the contempt which he had for the processes of discipline which the Commissioner undertook. I am satisfied that charge 5 is proven. Mr Bradshaw was guilty of professional misconduct.

By way of tidying up, may I say that I have not overlooked some arguments on the part of the Commissioner. I have taken into account the decision of Justice White in the Tribunal in relation to the issue of incompetence. I have also taken into account, in relation to charge 3, the submission on the part of the Commissioner that it must follow that if Mr Bradshaw was acting on behalf of his wife that he was engaged in legal practice. I simply reject that submission.

I have listened to Mr Bradshaw's somewhat lengthy submissions in which he has criticised the conduct of Miller Harris, criticised the complaint, and criticised the conduct of the Commissioner. I do not find any of those matters to be of relevance.

In summary, I am satisfied that charges 1, 2 and 5 are proved. I find the practitioner not guilty on charges 3 and 4. For the public record, I record that those advising me agree in relation to charges 1 and 5, but would be inclined also to

find the practitioner not guilty on charge 2.

I will hear argument from the parties on sanction.
