SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Hewlett* [2008] LPT 3
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **ANDREW OLIVER HEWLETT** (respondent)
FILE NO/S:	BS1341/07
DELIVERED ON:	2 April 2008
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2008
TRIBUNAL MEMBER:	de Jersey CJ
PANEL MEMBERS	Mr P Mullins Professor M Steinberg AM
ORDER:	**1. That the name of the respondent be removed from the Roll; and** **2. That the respondent pay the applicant's costs of and incidental to the application, in an amount to be assessed if not agreed**
CATCHWORDS:	PROFESSION AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – STATUTORY PROCEEDGINS – QUEENSLAND – where respondent failed to lodge personal income tax returns for the financial years 1991-2001 with substantial debt accruing over the last 5 of these years – where respondent knew he was abrogating his civic responsibility – where respondent eventually disclosed his default to ATO and QLS and sought to negotiate a compromise – the respondent concedes that his default amounts to professional misconduct – whether the respondent currently unfit to practice *Legal Profession Act 2004* (Qld), s 63(1)(b) *New South Wales Bar Association v Young* [2003] NSWCA 228 *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 *New South Wales Bar Association v Somosi* (2001) 48 ATR 562 *New South Wales Bar Association v Stevens* [2003] NSWCA

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

COUNSEL: V Trafford-Walker for the applicant

P Davis SC for the respondent

SOLICITORS: Legal Services Commission for the applicant

Brian Bartley and Associates for the respondent

[1] **de Jersey CJ:** The respondent is a 60 year old solicitor, admitted to practice in Queensland in March 1982. He presently practises as a consultant for Hewlett Walker Lawyers. He was declared bankrupt in May 2006, on his own petition, and remains undischarged.

[2] The respondent is charged with professional misconduct, in that "between 1 July 1991 and 28 March 2003 the respondent, in breach of and in deliberate disregard of his legal and civic obligations, failed to lodge any personal income tax returns for the financial years 1991 to 2001".

[3] In March 2003, the respondent voluntarily disclosed to the Australian Tax Office ("ATO") that he had not lodged personal income tax returns for the financial years 1991 to 2001, and then lodged the requisite returns. The ATO has calculated his liability over the presently relevant period as follows:

Financial Year	**Tax Payable**
1991	Nil
1992	Nil
1993	Nil
1994	$1,512.00
1995	$2,022.00
1996	$1,053.00
1997	$58,013.00
1998	$87,575.00
1999	$44,840.00
2000	$77,878.00
2001	$190,858.00
Total tax payable	**$463,769.00**
+ Total penalties & interest	**$157,644.00**
Total due	**$621,413.00**

[4] It is accepted that at all material times the respondent knew that he was required to lodge personal tax returns, and that there was no lawful or reasonable excuse for his failures.

[5] The respondent alerted the Queensland Law Society to the matters the subject of the charge, by filing on 30 May 2006 "a notice by practitioner of a 'show cause' event", under s 63(1)(b) of the *Legal Profession Act 2004*. At that stage he was indebted to the ATO in the amount of $914,572.90 for tax, penalties and interest. In September 2006, the Secretary of the Society referred the matter to the Legal Services Commission.

[6] The respondent has previously been censured for professional default. On 4 October 1995 the Professional Standards Committee administered a censure under Rule 82(4) of the Society's Rules. That followed from a judgment of Justice Drummond, in which His Honour found the respondent had acted without instructions. Then on 9 September 1997 the Professional Standards Committee again censured the respondent 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.

[7] Many of the circumstances giving rise to the instant defaults may be taken from these passages included in the respondent's statement filed with the notice of "show cause" event:

> "In April 1991 I separated from my wife after a marriage lasting 15 years…The separation and subsequent dissolution of the marriage was an extremely traumatic experience for me…The marriage break up also had a negative effect on my financial affairs as I was effectively supporting two households…
>
> From April 1991 onwards, my mental health deteriorated and I began drinking very heavily. My commitment to work and my working capabilities fell to very low levels. In June 1993 my employment with Cleary and Hoare was terminated and I could not obtain any alternative employment…I had no alternative other than to recommence practice on my own account as a sole practitioner, which I did on and from 1 July 1993…
>
> My practice for the next three years generated only small profits…
>
> On 22 December 1995 I married my current wife, and during 1996 I rehabilitated myself with the help of my wife. From about mid-1996 my practice started to expand and became successful and I began to make profits…

> I neglected my responsibilities to provide for payment of my taxation liabilities as I was concentrating on paying my other creditors…
>
> During the period 1994 to 2003 it appeared I had 'dropped off' the ATO system as I did not once ever receive a notice or correspondence from ATO in regard to the effect that I had not filed any income tax returns during that period. This is not offered as an excuse for my actions. However, in the absence of pressure from the ATO I fell into the temptation of ignoring my taxation obligations while attending to other financial issues.
>
> During the period 1997 to 2000 I became extremely concerned as to the consequences I would suffer through my non-compliance with the taxation legislation. This state of mind only worsened my position as time passed as this led me to continue to non-comply. It was this fear, not a desire to evade my responsibilities, that led to and, perpetuated, my non-compliance during those years.
>
> Finally, in late 2002 I resolved to confront my problems and I engaged…accountants to act on my behalf to prepare all of my outstanding returns for the period 1 July 1991 to 30 June 2002 for lodgement with ATO…In March 2003 I voluntarily disclosed to ATO my non-compliance…and effected lodgement of the outstanding returns."

[8] From October 2003, the respondent negotiated with the ATO in an effort to compromise the outstanding liability.

[9] On 23 October 2003, the respondent put a proposal involving the payment of $380,000 in the "short term", with a further estimated $135,000 to follow in the longer term, contemplating an overall three year payment period. The amount of that offer fell $59,000 short of the total primary tax then owing. The ATO rejected the offer, in light of the respondent's poor "compliance history", the length of the payment period, and because the proposal did not involve full payment, but rather a compromise of the liability.

[10] The respondent continued to negotiate with the ATO, and by letter of 18 October 2005, offered to pay $470,000. That was rejected on 1 March 2006, with the ATO pointing out that the debt including associated penalties and interest then exceeded $900,000.

[11] An application, based on hardship, that he be relieved from liability for the balance of the debt, in the event the amount offered were accepted, had been rejected in May 2004, the ATO then saying to the respondent:

> "You have the capacity to pay the liability over a reasonable period of time without involving serious hardship".

The amount then due was almost $750,000. The claim based on hardship was again rejected in the letter of 1 March 2006, the ATO saying:

> "The Commissioner requires full payment of your outstanding taxation liabilities".

The applicant instituted proceedings in the Administrative Appeals Tribunal, but apparently did not pursue them.

[12] The respondent says:

> "Accordingly it became clear to me that the ATO was not going to change their attitude in favour of a compromise and that as I could not improve my offer, bankruptcy was therefore inevitable. I was concerned to present my own petition as soon as all other avenues were exhausted as I considered this to be the most responsible course."

He presented that petition on 29 May 2006, and it was accepted by the Official Receiver in Bankruptcy.

[13] In seeking an order that the name of the respondent be struck from the roll, the applicant contends that "the failure to declare income appropriately over an extensive period of time is a fundamental breach of one's civic duties and displays a disregard for societal obligations and responsibilities which is particularly concerning in a member of the legal profession". The applicant refers to some comparatively recent discussion of this issue in New South Wales: *New South Wales Bar Association v Young* [2003] NSWCA 228, *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, *New South Wales Bar Association v Somosi* (2001) 48 ATR 562, *New South Wales Bar Association v Stevens* [2003] NSWCA 261 and *Davison v Council of the New South Wales Bar Association* [2007] NSWCA 227.

[14] As to the gravity of the respondent's default, Mr Davis SC, for the respondent, in his outline of argument, took issue with this passage in the applicant's written submissions:

> "The repetitive failure by the respondent to lodge income tax returns resulted in the concealment of income earned by him for a period of 12 years. The respondent availed himself of societal privileges provided by the government without contributing to the public coffers for that entire period. This deliberate flouting of his civic duty exhibited a distinct and continued disregard for community obligations, duties and responsibilities."

[15] Mr Davis pointed out that the return for the year 2002, lodged in March 2003, was within time, leaving 11 instances of default not 12. (That led to amendment of the discipline application.) In respect of those 11 years, no tax was payable for the years 1991, 1992 and 1993, because – as we were informed – assessable income less allowable deductions produced a taxable income below the "threshold". In the following three years, a total of only $4,587 tax was payable. Hence counsel's contention that of the 11 instances of default, "(there were) only five where a failure to lodge returns led to a postponement of the liability to significant amounts of income tax".

[16] Mr Davis used that as a basis for distinguishing the respondent's situation from that of the New South Wales practitioners discussed in the cases upon which the applicant relied.

[17] He also submitted that the applicant's approach failed to accord appropriate significance to the respondent's "difficult personal and financial circumstances"; the fact that his failure initially to lodge the returns related to a period when he was not earning income sufficient to generate a taxation liability; that as he recovered financially, he accepted that he needed to rectify his relationship with the ATO; and that in 2002 he took the initiative of engaging an accountant and the following year lodged all returns and made full disclosure to the ATO.

[18] This is not a case where, as in the New South Wales cases, the respondent has been "motivated purely by greed". Yet it is the situation, as Mr Davis acknowledged, that the respondent's practice "became quite financially successful from 1997". As counsel records in his written outline:

> "…by that stage, the practitioner had failed to lodge six income tax returns and initially didn't face up to the problem that he had created. The practitioner realized his taxation position had to be regularized but fell to the temptation of allowing the situation to continue."

In fact, from the time when his practice became "financially successful", in 1997, it took the respondent another five years or so to confront the problem and seek to recover his position. He preferred over that period to attend to payment to other creditors.

[19] It is also significant that in his subsequent negotiations with the ATO, the respondent was not proposing to pay all of the outstanding liability, even over a period of years. He was offering a lesser amount. The result of his bankruptcy is to limit forever the amount recoverable by the ATO, with the inevitable result that the respondent's fellow taxpayers will be out of pocket.

[20] While the extent of the respondent's default may be contrasted in various ways with that of the New South Wales practitioners involved in those cases, on any view the failure to lodge returns for 11 consecutive years, even if substantial tax was payable

only in five of them, is a default of substantial proportion. Further, it was deliberate default: the respondent knew of his obligation and chose not to discharge it. As said in *New South Wales Bar Association v Young* (pp 2, 3) by Meagher JA:

> "Deliberately to ignore one's obligations in this matter bespeaks a lack of integrity, particularly if one is not ignorant of the consequence, and a lack of integrity justifies removal of…from the roll…
>
> Non filing of the tax returns is incompatible with that degree of integrity, which the public has the right to expect in a barrister."

Obviously the same applies in the case of a solicitor.

[21] The respondent has conceded that his default amounted to professional misconduct. It plainly did, because of its relationship to the generation of income from his practice as a solicitor. It is also relevant that as a solicitor, the respondent bore responsibility for safeguarding and distributing clients' moneys. Further, the occurrence of this sort of default reflects poorly on the legal profession broadly.

[22] Mr Davis submitted, as is plain, that a finding of professional misconduct does not automatically warrant striking off. That is because it may not necessarily indicate unfitness to practise as at the present time. Mr Davis submitted that the aggregation of these five features warranted the conclusion that the respondent is presently fit for practice notwithstanding his guilt of the professional misconduct: that he has provided an explanation for his failure to lodge the returns; that he voluntarily disclosed the position to the ATO and lodged the returns; that he made "full attempts" to settle the debt; that he has complied with his obligations since; and that he has good references showing him to be a good practitioner. He submitted that by reason of such circumstances, this is not a case where the respondent is to be regarded as abandoning his civic responsibilities.

[23] Mr Davis submitted that the Tribunal, while finding the professional misconduct established, would find the respondent presently fit to practise as a legal practitioner, and fine him, recognizing his personal circumstances. Striking off would deny him his professional livelihood, at a time when he is of mature if not advancing years, and is obliged to support a wife and young child.

[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.

[25] In this case, the respondent knew that he was abrogating his statutory responsibilities, and deliberately did so, preferring to use his available resources to meet debts other than that due to the ATO.

[26] In addition, the respondent's dereliction was protracted, extending over 11 years, with substantial debt consequently accruing over the last five of them

[27] Also significantly, from when the respondent's professional earnings emerged from the financial doldrums, he continued to set his face against his civic responsibility for a substantial period (about five years) before finally facing up to it in 2002.

[28] When the respondent ultimately confronted the problem, he did not approach the ATO on the basis he would seek to discharge the whole of the debt, if over a substantial term of years, but sought a compromise which would see the ATO surrender a substantial part of the amount owing.

[29] Notwithstanding the five features emphasized by Mr Davis, these circumstances betray, and betray currently, a level of character falling short of that which will, so far as may be foreseen, guarantee maintenance of the high standards which must lie at the foundation of legal practice.

[30] Mr Davis referred to the circumstance that on 18 September 2006, aware of the respondent's defaults, the Secretary of the Queensland Law Society exercised his discretion to enable the respondent to retain his "employee level practising certificate", subject to certain undertakings. But as Mr Davis acknowledged, this Tribunal must make its own assessment of the critical issue of fitness for practice. While interesting, that view on the part of the Secretary at that stage of the matter is not, in the Tribunal's assessment at this stage, particularly helpful let alone influential.

[31] The predominant concern for protection of the public warrants an order that the respondent be struck off.

[32] The orders of the Tribunal are as follows:

1. that the name of the respondent be removed from the Roll; and
2. that the respondent pay the applicant's costs of and incidental to the application, in an amount to be assessed if not agreed.