

CITATION: *Legal Services Commissioner v Donnelly*
[2010] QCAT 569

PARTIES: Legal Services Commissioner
(Applicant)
v
Edwin Mark Donnelly
(Respondent)

APPLICATION NUMBER: OCR094-10

MATTER TYPE: Disciplinary proceedings under the *Legal Profession Act 2007*

HEARING DATE: 10 September 2010

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Assisted by:
Mr L Bowden (Practitioner Panel Member)
Dr J Lamont (Lay Panel Member)

DELIVERED ON: **15 November 2010**

DELIVERED AT: Brisbane

ORDERS MADE: **1. The respondent is publicly reprimanded;**
2. That the respondent pay the
Commissioner's costs fixed in the sum of
\$2,500.00

CATCHWORDS : PROFESSIONS AND TRADES – LAWYERS
– COMPLAINTS AND DISCIPLINE –
DISCIPLINARY PROCEEDINGS –
STATUTORY OBLIGATIONS – PENALTY –
where the respondent failed to lodge Business
Activity Statements between March 2003 and
April 2005 – where respondent convicted of
tax offences – where respondent did not give
notice of 'show cause event' – where
respondent unaware of obligation to give
notice but disclosed conviction when seeking
renewal of practicing certificate – whether
conduct constituted unsatisfactory
professional conduct or professional
misconduct – whether the respondent should
be publicly reprimanded – whether fine should
be imposed

Legal Profession Act 2004, s 63
Legal Profession Act 2007, ss 68, 418, 419,
 420, 443, 452, 456

Legal Services Commissioner v Cain [2009]
 LPT 19, cited
Legal Services Commissioner v Hewlett
 [2008] LPT 3, cited
Legal Services Commissioner v Madden
 [2008] QCA 301
Legal Services Commissioner v Petschler
 [2009] LPT 024, cited
New South Wales Bar Association v Hart
 [2006] NSWADT 97, distinguished
New South Wales Bar Association v Somosi
 [2001] NSWCA 285, cited

APPEARANCES and REPRESENTATION (if any):

APPLICANT : Mr B I McMillan of Counsel instructed by the
 Legal Services Commission
RESPONDENT: Mr A J Kimmins of Counsel instructed by
 Heinz Lawyers

REASONS FOR DECISION

- [1] Mr Donnelly is a well known Barrister in North Queensland. In April 2008 the annual renewal of his practicing certificate was refused because he had been convicted of taxation offences in August 2006, and because he had failed to give prompt notice of that event to his professional association.
- [2] The proceedings which bring him before this Tribunal were commenced by the Legal Services Commissioner in April 2010¹, and involve two charges.
- [3] Charge one is that between 1 March 2003 and 30 April 2005 Mr Donnelly engaged in conduct constituting ten (10) taxation offences – namely, ten counts of failing to lodge Business Activity Statements (BAS) or quarterly returns as and when required between March 2003 and April 2005. On 26 August 2006 Mr Donnelly pleaded guilty in the Magistrates Court at Townsville. He was convicted and fined \$15,000.00, and ordered to pay \$65.40 costs of court.
- [4] The second charge is that, in breach of his obligations as an Australian legal practitioner, he failed to comply with a relevant law in that he did not give his professional association notice of a ‘show cause event’ as required by s 63 of the *Legal Profession Act 2004*. That legislation, now replaced by the *Legal Profession Act 2007*, s 68, required that a lawyer who is convicted of a tax offence will give notice of that occurrence to the lawyer’s professional association (the ‘regulatory authority’) within seven days after the date of the event; and within twenty-eight days, give a written statement explaining why

¹ They are proceedings under s 452 of the *Legal Profession Act 2007*, although one charge involves the preceding statutory regime under the *Legal Profession Act 2004*

the lawyer nevertheless continues to be a fit and proper person to hold a practicing certificate. Mr Donnelly did not do either of those things.

- [5] The legislation contains two ‘key concepts’ which address disciplinary proceedings against lawyers: *unsatisfactory professional conduct*, and *professional misconduct*².
- [6] *Unsatisfactory professional conduct* includes conduct occurring in connection with a practice of law that falls short of the standard of competence and diligence that the public is entitled to expect for a competent legal practitioner (s 418).
- [7] *Professional misconduct* includes unsatisfactory professional conduct if it involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence, and which would justify a finding that the practitioner is not a fit and proper person to practice as a lawyer (s 419).
- [8] These definitions are in sufficiently broad terms to leave this tribunal, in some circumstances, with a discretion as to how a lawyer’s misbehaviour should be categorised. Section 420 of the Act acknowledges that discretion by making particular reference to tax offences.
- [9] Mr Donnelly, who was represented by very experienced counsel before this tribunal, accepted that his failure to lodge the BAS statements and his associated convictions did constitute the more serious ground of professional misconduct. The concession is appropriate: as the Chief Justice observed in *Legal Services Commissioner v Hewlett*³, a practitioner’s capacity and commitment to uphold the law and ensure its due application will be thrown into question where the practitioner is personally guilty of a substantial contravention of the law, knowingly and deliberately, and for personal financial advancement⁴.

Unsatisfactory Professional Conduct or Professional Misconduct

- [10] Whether the second charge – failing to give notice of a ‘show cause’ event – is properly categorised as unsatisfactory professional conduct or professional misconduct is, as counsel for both parties agreed, a novel one. In the only reported decision involving similar legislation, *New South Wales Bar Association v Hart*⁵, a barrister had been convicted of six tax offences but had not told his professional association until he applied for annual renewal of his practising certificate. The relevant NSW legislation required him to notify the Bar Council within seven days of being found guilty of a tax offence. The barrister admitted that his failure to do so constituted professional misconduct.
- [11] Mr Donnelly alleges that he was unaware of his obligation his failure to give notice to the regulatory authority of the show cause event within seven days, or provide a written statement within twenty-eight days. Yet when the time

² *Legal Profession Act 2007*, Chapter 4, Part 4.2

³ [2008] LPT 3 at [24]

⁴ See also *New South Wales Bar Association v Somosi* [2001] NSWCA 285 at [68], per Spigelman CJ

⁵ [2006] NSWADT 97

came for him to renew his practising certificate in April of the following year, and he was asked specifically about the events in respect to which he should have given the notice, he properly and frankly notified the regulatory authority.

- [12] *Hart's* case on the other hand, as the report shows, involved circumstances which were considerably worse. Hart failed on two occasions to answer questions in a notice from his Association, or to cooperate and assist the Bar Council and had also been guilty, of course, of a failure to comply with his tax obligations. Importantly, he also had an earlier conviction and therefore was well aware of his obligations to give notice of tax offences. In addition, his ultimate notification was inadequate in important respects.
- [13] It is said, for Mr Donnelly, that his conduct does not amount to a substantial or consistent failure to reach or maintain a reasonable standard of competence within the meaning of s 419(1)(a). Rather, at the worst, it is better described as behaviour falling short from the standard of competence and diligence required under s 418 – with the result that he should be found guilty of unsatisfactory professional conduct, and not professional misconduct.
- [14] Under s 420(1) the offending conduct, if it includes the contravention of a relevant law, can constitute either unsatisfactory professional conduct or professional misconduct. Non compliance with the obligation to give notice of a show cause event is a contravention of a relevant law.
- [15] As counsel for the Commissioner fairly submitted, Mr Donnelly's conduct probably rests on the cusp. A breach of the requirement to give notice of a show cause event might, on the one hand, be described as similar to a failure to comply with a statutory notice issued under s 443 of the Act, which relates to investigations involving practitioners and their strict obligations to comply with requirements for explanations and material. Under s 443(3), a failure to comply with a requirement of that kind may attract a finding of professional misconduct.
- [16] On the other hand where a practitioner has simply failed to respond to a complaint or investigation, that may amount to nothing more than unsatisfactory professional conduct, as in *Legal Services Commissioner v Petschler*⁶ in which, although the practitioner had failed to respond to enquiries or cooperate with an investigation over a lengthy period, conviction on only the lesser count was sought.
- [17] In oral submissions counsel for the Commissioner appropriately, I thought for the purposes of this proceeding, described the distinction as one which focused on the nature of the lawyer's conduct at the time the failure to deliver the notice occurred. The breach is, in a sense, a technical one and there was no actual misconduct at the relevant time of non-disclosure. This circumstance may be distinguished from the kinds of occasions usually arising under s 443 where a demand issues and the practitioner is squarely put on notice that failing a response, a serious adverse finding may result.

⁶ [2009] LPT 024

- [18] The central question, according to the tests implicit in ss 418 and 419, is whether the offending conduct involves a *substantial or consistent failure to reach or keep a reasonable standard of competence and diligence* (the words used in s 419). That is the more serious end of the spectrum of offending conduct, to be considered in contrast with the conduct which falls under the lower end, of the kind described in s 418 – ie, 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*.
- [19] Here the offending conduct involves a failure to apprehend a statutory obligation associated with the barrister's practice for his profession. However, he gives a frank and accurate response on the first occasion that he is asked about the matter. Further, the conduct itself is far from being of the worst kind in terms of taxation offences. For these reasons I do not think it can be said that it '*involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence*', and therefore it should properly be categorised as unsatisfactory professional conduct.

Penalty

- [20] Mr Donnelly is 54 and has been practising since he was admitted as a Barrister in 1984. He has never previously been dealt with by a disciplinary body and has an unblemished record. He failed to lodge quarterly returns between March 2003 and April 2005 and, as previously remarked, promptly pleaded guilty and was fined \$15,000.00. His tax liability arising from those statements was assessed at \$53,000.00. At the time of his sentence he had lodged the outstanding BAS statements and reduced his tax liability to some extent. He was made bankrupt on the application of the Deputy Commissioner at Taxation in September 2006.
- [21] He has not engaged in legal practice as a barrister since his application for renewal of his practising certificate was refused in April 2008.
- [22] On the scale of tax offences by barristers (particularly NSW barristers) Mr Donnelly's defaults are very much at the lower end. The NSW cases, many of which are shocking, were discussed by QCAT's predecessor, the Legal Practice Tribunal, in *Legal Services Commissioner v Cain*⁷ and *Hewlett*. In the first, the solicitor had failed to lodge any tax returns over six years, and had an outstanding liability of about \$70,000.00. In the second the lawyer had not lodged a return for eleven years and had a liability of over \$600,000.00.
- [23] Other relevant factors here include the relatively short period of time during which Mr Donnelly failed to comply with his obligations and that, as it is accepted, his conduct was not motivated by greed but, rather, personal psychological issues usefully addressed at some length in the report of Dr Walkley, a psychologist who has examined him. His conclusions, which are not disputed, include findings that the non-compliance resulted from procrastination more than anything else, and that Mr Donnelly is genuinely

⁷ [2009] LPT 19

embarrassed and remorseful. Those conclusions may more readily be accepted because they accord with Mr Donnelly's conduct: he promptly surrendered his practising certificate and has, in effect, submitted himself to a period of self-imposed suspension from practice of almost 3 years.

- [24] As counsel for the Commissioner pointed out, this has the same practical effect as though an order had been made around the time of the original offending which suspended Mr Donnelly's local practising certificate⁸.
- [25] The measure of an appropriate penalty is to be considered in light of the fact that these proceedings are essentially protective⁹. Nothing here suggests, however, that it is necessary to take any further steps to protect the public from Mr Donnelly, or to preserve the integrity of the profession. His penalty should include, therefore, a public reprimand; and, he should be ordered to pay the Commissioner's costs fixed in the sum of \$2,500.00.
- [26] The only remaining question is whether or not a pecuniary penalty of some kind should be ordered. In *Petschler* the practitioner had misapplied small amounts in his trust account but, more importantly, had simply failed to act properly in a client's interest for a period of almost ten years and, when enquiries were made by the Legal Services Commissioner, he failed to properly respond to enquiries. He was found guilty of three counts of unprofessional conduct and two of professional misconduct, and fined \$2,000.00.
- [27] In *Cain* the practitioner, as mentioned earlier, failed to lodge five income tax returns over a number of years, failed to respond to a notice from the Commissioner under s 443(3). He was prohibited from engaging in practice for three years and obliged to undergo treatment from a psychologist and mentoring from senior practitioners when he returned to legal work, but no pecuniary penalty was imposed.
- [28] These decisions indicate that the imposition of a fine, and its amount if imposed, will be considered in light of the particular circumstances surrounding the offending conduct; and, that in the case of tax offences at the lower end of the scale, a fine is not a necessary or inevitable element of the disciplinary process. It is also material, of course, that Mr Donnelly has already been obliged to pay a large fine of \$15,000.00 for the tax offences themselves. In light of these matters, no additional penalty is called for.
- [29] The orders will be:
- (a) The respondent is publicly reprimanded;
 - (b) That the respondent pay the Commissioner's costs fixed in the sum of \$2,500.00.

⁸ Under s 456(2)(b)

⁹ *Legal Services Commissioner v Madden* [2008] QCA 301
