SUPREME COURT OF QUEENSLAND

CITATION:	*Re Wendy Anne Wright* [2011] QSC 34
PARTIES:	**WENDY ANNE WRIGHT** (applicant) **v** **LEGAL PRACTITIONERS ADMISSIONS BOARD** (first respondent) and **QUEENSLAND LAW SOCIETY INC. and** **THE LEGAL SERVICES COMMISSION** (second respondent)
FILE NO/S:	B1567/07
DIVISION:	Trial Division
PROCEEDING:	Application for Leave to Proceed
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	7 March 2011
DELIVERED AT:	Brisbane
HEARING DATES:	10 September 2010
JUDGE:	Margaret Wilson J
ORDER:	THE COURT ORDERS THAT:

1. the applicant be given leave to proceed pursuant to rule 389(2) of the Uniform Civil Procedure Rules in respect of her application filed 22 February 2007; and
2. the applicant pay the Queensland Law Society ("the QLS") and Legal Services Commission ("the LSC")'s costs of and incidental to the application filed 14 April 2010, including any reserved costs, to be assessed on the standard basis.

THE COURT DIRECTS BY CONSENT THAT:

1. the solicitors for the QLS and LSC notify the solicitors for the applicant in writing within 21 days whether they intend to file and serve the further draft affidavits referred to in correspondence, and in the event they do so wish, they file and serve further affidavits by 4 pm on 28 March 2011;
2. the applicant file and serve any remaining affidavits by 4 pm on 29 April 2011;

3. the QLS and LSC file and serve affidavits (if any) in response to the applicant's affidavits by 4 pm on 27 May 2011;

4. the parties agree a written statement of issues in dispute by 4 pm on 10 June 2011 and failing agreement each party file and serve a written statement of issues; and

5. the parties have liberty to apply on 3 clear days written notice.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM PROCEDURE RULES – where applicant a former solicitor of the Supreme Court of Queensland – where applicant found guilty of six counts of professional misconduct by the Solicitors Complaints Tribunal – where applicant struck off roll of solicitors in 1999 – where applicant unsuccessfully appealed to Court of Appeal and application for special leave to appeal to the High Court dismissed – where applicant sought readmission as a legal practitioner – where delay of more than two years since step taken in proceeding – application for leave to proceed pursuant to r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether Court should grant leave to proceed

PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – DUTIES TO COURT – misconduct, unfitness and discipline – where applicant remorseful in relation to some but not all counts of professional misconduct – whether applicant's application for readmission has prospects of success

Uniform Civil Procedure Rules 1999 (Qld) rr 5, 389(2)
Legal Profession Act 2004 (Qld) ss 30, 32
Legal Profession Act 2007 (Qld) s 31

Council of the Queensland Law Society v Wright [2001] QCA 58, cited
Dempsey v Dorber [1990] 1 Qd R. 418, 420, cited
Monaveen Pty Ltd v ABB Service Pty Ltd [2007] WASCA 273, cited
Re Alger Hiss (1975) 333 NE 2d 429, 437, cited
Tyler v Custom Credit Corporation Ltd [1990] 1 Qd R 418, cited
Watt v The Law Society of Upper Canada (2005) CarswellOnt 7055; 205 O.A.C. 289; cited
Wentworth v New South Wales Bar Association (1992) 176 CLR 239, 250 - 251, cited
Zaidi v Health Care Complaints Commission [1998] NSWSC

335, cited

COUNSEL: AJ Glynn SC and PW Hackett for the applicant
JC Bell QC and P Mylne for the Legal Practitioners Admission Board
LF Kelly SC and D Pyle for the Queensland Law Society Inc. and the Legal Services Commission

SOLICITORS: ClarkeKann Lawyers for the applicant
Clayton Utz for the Queensland Law Society Inc. and the Legal Services Commission

[1] **MARGARET WILSON J**: By an originating application filed on 22 February 2007 the applicant, Wendy Anne Wright, seeks admission as a legal practitioner. The application came before the Court of Appeal on 19 March 2007 when it was ordered that the proceedings, in so far as they involve factual disputes and the hearing of oral evidence and cross-examination, be referred to the Trial Division for hearing by a single judge. Subsequently directions were given by judges of the Trial Division on 7 June 2007 and 25 July 2007.

[2] The timetable for interlocutory steps was not complied with, and more than two years after receiving affidavits from the Queensland Law Society Inc. ("the QLS") and the Legal Services Commission ("the LSC") the applicant delivered an affidavit in reply. The QLS and the LSC raised r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") which provides:

> "389. (2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the Court, which may be made either with or without notice."

[3] After a considerable exchange of correspondence, on 14 April 2010 the applicant filed this application for leave to proceed. It was ultimately heard on 10 September 2010. It was resisted by the QLS and the LSC and by the Legal Practitioners Admission Board.

History

[4] The applicant was admitted to practise as a solicitor of the Supreme Court of Queensland on 22 September 1986. Her name was struck off the roll of solicitors on 22 December 1999, when the Solicitors Complaints Tribunal found her guilty of six counts of professional misconduct. An appeal against the Tribunal's decision was dismissed with costs,[1] and an application for special leave to appeal to the High Court was dismissed.[2]

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1 *Council of the Queensland Law Society v Wright* [2001] QCA 58.

2 [2002] HCA Trans 341.

[5] Thus her application for admission is in fact an application for readmission. It is expressed to be pursuant to s 32 of the *Legal Profession Act* 2004 (Qld), which was the applicable legislation at the time the application was filed. It has since been repealed and replaced by the *Legal Profession Act* 2007 (Qld).

[6] The two Acts deal with the criteria for admission in similar terms. Of present relevance is the requirement of suitability contained in s 30 of the 2004 legislation and s 31 of the 2007 legislation: a person is suitable for admission only if he or she is "a fit and proper person". Whether someone is a fit and proper person for admission as a legal practitioner is to be determined as at the date of hearing of the substantive application. Needless to say, past misconduct may bear upon current fitness because of what it may reveal about the character of the applicant and the likelihood of moral regeneration.

[7] Admission proceedings are not adversarial in character. One of their primary objects is the protection of the public.[3]

Delay

[8] Pursuant to an order of Justice Mackenzie made on 25 July 2007 –

(a) the QLS and the LSC were to file affidavits on which they intended relying by 31 July 2007;

(b) the applicant was to respond to any such affidavits by 21 August 2007;

(c) the QLS and the LSC were to file any affidavits in reply by 4 September 2007; and

(d) the parties were to agree a written statement of issues by 11 September 2007.

[9] The QLS and the LSC filed 10 affidavits – eight affidavits on 31 July 2007, one affidavit on 31 August 2007, and one affidavit on 28 September 2007. At the time they served the last one, they said they intended relying upon two further affidavits which they hoped to be able to serve by 5 October 2007.

[10] On 9 November 2009 the solicitors for the applicant served an affidavit in reply. The next day the solicitors for the QLS and the LSC raised the spectre of r 389(2) of the *UCPR*.

[11] Under r 389(2) the Court has an unfettered discretion whether to grant leave to proceed. It is a discretion which must be exercised with regard to the legislative purpose evident from the rule itself and from r 5: to ensure that litigation is conducted in a timely fashion while preserving the fundamental power of the Court to do what is fair and just in all the circumstances. In *Dempsey v Dorber*[4] Connolly J said of O 90 r 9 of the *Rules of the Supreme Court* (a progenitor of r 389(2)) that –

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3 *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 250 - 251.

4 [1990] 1 Qd R 418 at 420.

> "The proper approach...is to identify the relevant factors, assess the weight to be given in the circumstances of the case to each of them, and then to determine whether, on balance, there is good reason for making the order."

[12] In *Tyler v Custom Credit Corporation Ltd*[5] Atkinson J, with whom McMurdo P and McPherson JA agreed, set out a list of twelve factors the Court will take into account in determining whether the interests of justice require a case to be dismissed. The list is not exhaustive, and no single factor is necessarily determinative of the outcome of the application. This is what her Honour said: –

> "When the Court is considering whether or not to dismiss an action for want of prosecution or whether to give leave to proceed under *Uniform Civil Procedure Rules* ("*UCPR*") r 389, there are a number of factors that the Court will take into account in determining whether the interests of justice require a case to be dismissed. These include:
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> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
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> (2) how long ago the litigation was commenced or causes of action were added;
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> (3) what prospects the plaintiff has of success in the action;
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> (4) whether or not there has been disobedience of Court orders or directions;
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> (5) whether or not the litigation has been characterised by periods of delay;
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> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
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> (7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
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> (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
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> (9) how far the litigation has progressed;
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> (10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded

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5 [2000] QCA 178, [2].

as more difficult to explain than delay by his or her legal advisers;

(11) whether there is a satisfactory explanation for the delay; and

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial." (Footnotes omitted.)

[13] The application of r 389(2) is triggered by delay of two years or more from the last step taken in the proceedings. It is usual for the Court to consider delay between the accrual of the cause of action and the commencement of the proceedings, as well as delay in the conduct of the litigation, as relevant to the exercise of its discretion. However, this is an application for admission as a legal practitioner rather than one on an accrued cause of action, and there is no limitation period applicable to it.

[14] There has been delay on both sides of the record. Despite what their solicitors said when they delivered the affidavit on 28 September 2007, the QLS and the LSC have not provided the further affidavits they foreshadowed delivering by 5 October 2007.

[15] The applicant does not contend that she had to await those further affidavits before providing her own affidavit. Her solicitor, Mr Hughes, has taken responsibility for the delay. In an affidavit filed on 14 April 2010 he said: –

"21. Although there is no unique event giving rise to the delay, it is the result of 3 primary interacting factors for which I am responsible:

(a) misjudging the passing of time, not keeping aware that the last of the Respondent's affidavits was filed served on 28 September 2007 and therefore not having kept in mind the deadline for the Applicant's response being 28 September 2009;

(b) having at the back of my mind the impression that the Respondent also intended to file further affidavits to which the applicant may need to reply and that the delay in preparing responses to the Respondent's affidavits was not an issue for them; and

(c) failing to complete the Applicant's affidavit in reply more quickly.

22. The factors referred to in paragraphs 21(a) and (b) reflect my state of mind.

23. As for the actual delay in completing the Applicant's affidavit, referred to in paragraph 21(c), having carefully reviewed my file for the purposes of preparing this affidavit, it can essentially be put down to these causes:

(a) the key task during the period since the last step was taken by the Respondents in 2007 was to prepare the Applicant's affidavits in response. It was a large and complicated task to review the Respondents' affidavits and to then extract the relevant response from a wide range of the background matters which needed to be understood in detail, including evidence from a series of proceedings, commencing with the civil proceedings from which the initial charges against the Applicant derived, the disciplinary proceedings which led to her striking off, the application for a stay, and the Applicant's appeal to the Court of Appeal;

(b) at numerous junctures during preparation of the Applicant's affidavit further queries about the Applicant's instructions emerged, requests for additional information became necessary and then, generally, some time was needed for the Applicant to obtain it. I do not suggest that there was any unreasonable delay by the Applicant in providing instructions – it was simply a case of that process of information gathering slowed the task of preparing material and led to "stop and start" difficulties (such as having to pick up my train of thought again after periods away from the file) due to the inherent complexities referred to in paragraph (a) above;

(c) given the nature of the material, on 2 occasions Senior Counsel's assistance was sought in relation to aspects of the affidavit, which entailed delays of several months due to his availability. Again, I do not suggest that there was any unreasonable delay by the Senior Counsel in providing his advice but it also slowed the task of preparing material and led to other instances of those same "stop and start" difficulties;

(d) the size and complexity of the task of preparing the Applicant's affidavit in a relatively simple and concise manner, of putting the additional information into context, and of incorporating counsel's recommendations required quite the substantial "clear thinking time" which I found difficult to find or make, and failed to adequately prioritise, given the false assumption that I had more time to complete the Applicant's primary response affidavit that was in fact the case;

(e) when I first assumed conduct of this matter I was a partner of Deacons Lawyers. In the midst of the above process I left Deacons Lawyers and moved to

> ClarkeKann Lawyers. From about early December 2008 until 18 February 2009, while arrangements were made for it to be transferred, I did not have physical possession of the relevant files.
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> 24. Had I been alert to the fact that the Applicant's affidavit was due (or at least some step was required to be taken) by 28 September 2009 I could and would have ensured it occurred by that date."

Utility

[16] As I have said, there is no limitation period applicable to an application for admission as a legal practitioner. From the applicant's perspective, the substantive application is now ready for hearing, subject to the possibility of her having to respond to any further affidavits relied on by the QLS and the LSC.

[17] If leave to proceed were refused, the applicant might well commence a fresh application, and the consequence of leave to proceed having been refused might be the prolongation of the ultimate determination whether the applicant should be readmitted to practise.

Prospects of success

[18] On the hearing of this application for leave to proceed, considerable time was spent debating the applicant's prospects of success on her application for admission. Of course it is not the function of the Court on this application finally to determine the merits of the substantive application, and indeed it could not do so without the evidence being fully tested by cross-examination. Nevertheless, it can undertake some preliminary assessment of a party's prospects, and on the Queensland authorities the result of such a preliminary assessment is a factor which may be taken into account in the exercise of the discretion under r 389(2).[6]

[19] In order to make some preliminary assessment of the applicant's prospects of success, it is necessary to review why she was struck off the roll in 1999.

[20] The Court of Appeal reviewed the six counts of professional misconduct of which she was found guilty. They can be summarised as follows: –

> **Count 5**
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> The applicant represented the developer of a town house complex in proceedings in the District Court. She was a substantial investor in the development through a family trust. The developer defended the builder's claim for unpaid progress moneys on the basis of the work having been defective. The builder brought an application for summary judgment which came before the District Court on 20 May 1996. The applicant applied for an adjournment. There was evidence that "engineers" had expressed the opinion that the work was of such poor standard that it would require $200,000 for rectification, and the developer intended to counter-

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6 Contrast *Monaveen Pty Ltd v ABB Service Pty Ltd* [2007] WASCA 273.

claim. The "engineers" neither gave evidence nor were identified. The judge stood the matter down, and during the break the applicant contacted an engineer, Mr Hendriks, to ascertain how long was needed to prepare necessary material to prove the need for and cost of any rectification works. Ultimately the judge granted the adjournment. In giving his reasons he laboured under the misapprehension that the engineers first referred to were in fact Mr Hendricks' firm. The applicant did not correct that misapprehension. The Solicitors Complaints Tribunal found that she knowingly misled the judge on the summary judgment application.

Count 1

The application for summary judgment came back before the District Court on Monday 27 May 1996.

On 22 May 1996 Mr Hendriks informed the applicant that rectification work to the value of $5,200 was required. In an affidavit sworn the next day he said he would need to obtain detailed approved design levels from the local Council in order to determine any significant deviation from the design; and if there were such deviation he would need three months to prepare a report on its effects and the costs of rectification. Then on Friday 24 May 1996 Mr Hendriks inspected the Council file and concluded that there was no material deviation, and thus that no additional rectification work would be required beyond the $5,200 previously outlined. That day he informed the applicant of those matters.

On Monday 27 May 1996 Mr Hendriks attended at the forecourt of the Law Courts Complex as arranged with the applicant. She told him he would not be required to attend Court, and he left. She subsequently appeared before a judge of the District Court and obtained a further adjournment relying on the affidavit Mr Hendriks had sworn on 23 May 1996.

The Tribunal found that in so doing she knowingly misled the Court.

Count 2

The Tribunal found that the applicant made false oral submissions during the hearing on 27 May 1996 – including a submission that she could not secure Mr Hendriks' attendance at Court at short notice.

This was contrary to Mr Hendriks' evidence to the Tribunal of his having attended at the forecourt and being told he was not required. His evidence was corroborated by a car park receipt from King George Square Car Park showing that he left the car park at 10.15 am on the day in question.

Count 4

This arose out of the applicant's statement to the District Court judge that the developer "was not in financial strain". The Tribunal found that she had no reasonable basis for saying that and that she did so recklessly.

Count 6

The Tribunal found that in August 1998 the applicant attempted to suborn Mr Hendriks to swear a false affidavit in order to deceive the QLS in relation to a complaint against her.

Count 7

The Tribunal found that in August 1998 the applicant knowingly made false claims to the QLS concerning the complaint against her. This related to when she became aware of his presence at the Court on 27 May 1996 – whether before or after the adjournment was granted.

[21] A person who seeks readmission after having been struck off the roll of legal practitioners for professional misconduct must generally acknowledge his or her past misconduct and demonstrate genuine remorse for it. While confession is not a necessary precondition to readmission, it is usually indicative of insight, which is in turn relevant to the Court's assessment of whether there has been moral regeneration such that the applicant is now a fit and proper person to be admitted as a legal practitioner. There may be cases where an applicant has no remorse because of a genuine belief that the findings of the disciplinary tribunal were wrong. An applicant may accept the authority and binding character of the decision made by the disciplinary tribunal but nevertheless genuinely believe its findings were wrong. Whether a particular case falls within that category depends upon an assessment of all of the circumstances. But as Mason P observed in *Zaidi v Health Care Complaints Commission*[7]:

> "...there is no error in concluding in a particular context that continuing vigorous challenge to clearly established guilt may be indicative of continuing unfitness on one or other of the grounds indicated in the sentence underlined."[8]

[22] In the present case the applicant claims to have remorse in relation to counts 2, 4 and 5, but to have no remorse in relation to counts 1, 6 and 7 because she genuinely believes the findings were wrong.

[23] The respondents have pointed to inconsistencies in her affidavits since the Tribunal decision and in her conduct in relation to Mr Hendriks in support of submissions that her remorse is not real and that what she is seeking to do is to mount a collateral attack on the findings of the Tribunal.

[24] As counsel for the QLS and the LSC submitted, counts 1, 2, 6 and 7 were concerned effectively with who was telling the truth – the applicant or Mr Hendriks.

[25] In an affidavit sworn on 22 November 2006 in a proceeding before the Legal Practitioners Admission Board the applicant swore:–

> "20. It is difficult to put into words the shame and guilt I felt when the Order for strike off was made. Up until then I had

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7 (1998) 44 NSWLR 82, 100.

8 See also re: *Alger Hiss* (1975) 333 NE 2d 429, 437; *Watt v The Law Society of Upper Canada* (2005) (2005) CarswellOnt 7055; 205 OAC 289.

> regarded myself as a successful person who had succeeded as a result of my own endeavours supported at all times by my close family. It was, and remains, a source of continuous concern that I have, by my conduct, let down my family and myself. I came from a family that took great pride in its service to its country and the thought that I may not be as good a citizen as other members of my family has been a very sobering experience and lesson to me.
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> 21. Since the strike off I have endeavoured to conduct my business with unstinting propriety so that I may redeem myself in the eyes of my family, legal community, the commercial community and myself. I have a very strong desire to return to legal practice. I accept unequivocally the decisions of the Tribunals [sic] abovementioned and am deeply regretful of the circumstances which bought [sic] me before them." (Emphasis added)

[26] In fact the day after the Tribunal decision was delivered, the applicant commenced defamation proceedings against Mr Hendriks. She discontinued these after he delivered his defence. Then in June 2000 she made complaints against him to the Institution of Engineers Australia and the Board of Professional Engineers. She made a further complaint to the Board of Professional Engineers in January 2004. Both bodies ultimately determined that the complaints were not substantiated.

[27] In her affidavit sworn on 6 November 2009 and served three days later[9] the applicant deposed:–

> "12. Since my striking off at the conclusion of the proceedings before the Tribunal ("**Tribunal Proceedings**") I have always maintained that Hendriks' evidence was unreliable in certain key respects and that, in other relevant respects, I was justified in having a different understanding of events from that which Hendriks deposed to. That belief lay behind my appeal to the Court of Appeal and then my application to the High Court for Special Leave to Appeal. It is integral to my decision to make this application for readmission.
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> 13. After the Tribunal Proceedings I attempted to place before the Court of Appeal evidence not presented in the Tribunal Proceedings ("**Further Evidence**") to demonstrate the unreliability of Hendriks' evidence.
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> 14. The Further Evidence comprised:
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> (a) affidavit of James Tonge sworn 9 August 2000;
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> (b) affidavit of George Frame sworn 18 August 2000;

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9 A copy of which is Exhibit 3 in this application.

(c) affidavit of Owen Cooper sworn 25 August 2000;

(d) affidavit of Owen Cooper sworn 4 October 2000; and

(e) relevant phone records.

15. In its decision dated 27 February 2001 the Court of Appeal refused to admit any of the Further Evidence. A true copy of the decision of the Court of Appeal is exhibit **WAW-4**.

16. Although the Court of Appeal dismissed my appeal, and the High Court refused to grant special leave to appeal, I maintained Hendriks' evidence should not have been accepted in preference to mine.

17. I wanted Hendriks to answer for what I believed to be serious defamation and professional misconduct on his part.

18. I also wanted to be vindicated in relation to my striking off, as far as was possible in the circumstances, by showing that Hendriks' evidence was unreliable.

19. Specifically, I have never accepted Hendriks' evidence should have been preferred to mine in relation to the following matters:

(a) that, by 24 May 1996, I should have been aware that Hendriks did not believe any further investigations were necessary and that his estimate (of $5200) to repair the defects in the road works was final;

(b) that I met Hendriks outside Court at about 10.10am on 27 May 1996 and told him he could leave because he was no longer required;

(c) that I attempted to improperly change Hendriks' evidence contained in an affidavit dated 3 August 1998;

(d) that I gave a false and misleading response to a complaint to the Queensland Law Society by my letter dated 21 August 1998.

20. I believed the justification for rejecting Hendriks' evidence was even stronger in light of the Further Evidence the Court of Appeal declined to admit.

21. I considered I was justified in commencing the Defamation Claim and making the Professional Complaints because they were the only remaining processes I could think of that

could bring him to account and deliver findings that reasonable people would regard as “official”.

22. I had the Defamation Claim framed in a manner which I considered pleaded facts material to that cause of action. After receiving Hendriks’ defence, I decided not to pursue the Defamation Claim on legal advice.

23. I instructed my solicitors to frame the Professional Complaints in a manner which I considered were relevant to Hendriks’ professional conduct as a registered professional engineer.

24. Paragraphs 123-129 further explain my state of mind regarding these findings against me, the effect of the Further Evidence and the justification for bringing the Defamation Claim and making the Professional Complaints." (Emphasis added)

[28] Under the subheading "Remorse" she deposed:–

"123. I am aware that an applicant for readmission as a solicitor must address the issue of remorse for the actions which led to his or her name being struck from the Roll.

124. Certain aspects of this issue did not cause me some difficulty. I appreciate the candour expected of applicants for readmission, and believe that candour requires me to address this issue in some detail.

125. I find it difficult to express remorse with respect to any of the findings which were based on acceptance of Hendriks’ evidence. I wish to elaborate on that aspect of my state of mind.

126. I do not quarrel with the Tribunal’s findings which led to my striking off in the sense that I accept the Tribunal’s decision was based upon the best assessment of the evidence it was able to make in the circumstances.

127. I nevertheless adhere to the position I have always taken, that evidence crucial to the Tribunal’s decision, given by Hendriks in his affidavit sworn 18 November 1999 and viva voce to the Tribunal on 14 December 1999, should not have been accepted and that, in other respects, I was justified in having a different understanding of the facts from that claimed by Hendriks in his evidence.

128. The understanding of the facts I adhere to has not materially changed since I spoke to Mr Hendriks, and presented him

> with an affidavit to sign, in August 1998, immediately upon receiving the complaint in the mail.
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> 129. I believe the Tribunal's preference for Hendriks' evidence over mine in certain respects was crucial to its findings of credit against me. That is why I appealed the Tribunal's decision and why I continued to complain about Hendriks' conduct.
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> 130. Furthermore, in recent months some further insight has been obtained into Hendriks' evidence which also adds to difficulty expressing remorse where findings based on acceptance of his evidence are concerned." (Emphasis added)

[29] She maintained that she had difficulty expressing remorse in relation to Tribunal findings concerning Mr Hendriks' evidence because her evidence in the Tribunal proceedings was truthful.[10]

[30] She has made other assertions that Mr Hendriks lied – in an oral examination before a magistrate on 5 June 2001[11] and in a conversation with Mr Smiley (a QLS investigator) on 6 January 2006.[12]

[31] In submissions in reply counsel for the applicant said:–

> "6. Neither seeks to overturn the effect of findings made against the applicant, by collateral attack. The Court could not, and is not being asked to, conclude that any of those findings ought not to have been made. Indeed, as the applicant's affidavit material shows, many of the factual matters on which she relies in addressing the foregoing tasks were not presented to the Tribunal, the Court of Appeal or the High Court.
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> 7. A genuine belief that a finding made by a Court is wrong does not demonstrate a lack of acceptance of those findings. It is hardly unusual even for practitioners to genuinely believe that a finding was wrongly made. That does not mean that they cavil with the validity of that finding, or do not accept it.
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> 8. It is impossible and impermissible at this stage for the Court to reach any adverse conclusion as to the validity and genuineness of the applicant's belief in the incorrectness of the contested findings made against her, or of the weight which ought to be given to those findings when assessing the bearing that her continued contest has on her fitness to

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10 At [139].

11 Affidavit of Ross Graham Perrett (court document no 29, filed 7 May 2010) Exhibit "RGP-1," p 9.

12 Affidavit of Wendy Anne Wright Exhibit 4, [120].

> practice. It is impossible to conclude that her application is hopeless." (footnote omitted).

[32] These are matters of fine, but, in the applicant's submission, potentially critical, distinction. To investigate the applicant's belief would involve a re-litigation of many questions determined by the Tribunal. It has been estimated that the trial would take five days and 15 witnesses would be called.

[33] While it is not for me to predetermine what attitude the Court would take to the applicant's attempt to re-ventilate issues determined against her by the Tribunal (albeit for the purpose of explaining her lack of remorse), I think her prospects of succeeding in her application for readmission are poor. Suffice it to say that I think there would be a powerful argument that her attempt to explain her lack of remorse would amount to a collateral attack on the findings of the Tribunal and that it should be disallowed as an abuse of process.

Outstanding costs orders against applicant

[34] There were four costs orders made in favour of the QLS against the applicant arising from the proceedings whereby she was struck off –

(a) 22 December 1999 – order of the Solicitors Complaints Tribunal;

(b) 28 February 2000 – order of the Court of Appeal on application for stay;

(c) 27 February 2001 – order of the Court of Appeal dismissing the appeal; and

(d) 28 June 2002 – order of the High Court dismissing the application for special leave.

[35] The applicant has been served with costs statements concerning the orders for costs made by the Court of Appeal. The QLS has not had those costs assessed. She has not been served with any other costs statement.

[36] The applicant was orally examined as to her financial affairs before a magistrate at Caboolture on 5 June 2001. She swore to having no assets and to being a married woman supported by her husband. According to Mr Perrett, the QLS' solicitor, upon receipt of the transcript of that examination in November 2001 the QLS decided not to incur further expense and cost in the quantification of the costs orders.

[37] In the circumstances, the applicant's non-satisfaction of the costs orders is of little weight in the determination of this application for leave to proceed.

Prejudice

[38] With the passage of time it is all but inevitable that witnesses' memories will have faded. While the evidence-in-chief is to be by affidavit, cross-examination may be affected by this factor. Mr Hendriks, whose credit has previously been attacked both before the Tribunal and in the defamation and disciplinary proceedings, would be further vexed.

[39] There would be an imposition on the resources of three regulatory bodies. There is evidence that the QLS and the LSC's costs occasioned by the delay and the application for leave are in excess of $65,000 on the standard basis.

[40] And, of course, there is the question of the Court's resources, which are limited and for which there are competing demands by other litigants.

Conclusion

[41] The applicant bears the onus of persuading the Court that she should be given leave to proceed. Parties on both sides of the record have failed to comply with directions of the Court. The applicant's solicitor has accepted responsibility, which lessens her personal culpability for the delay.

[42] That the applicant's prospects of succeeding on the substantive application are poor is a factor weighing against the exercise of the discretion to give leave to proceed.

[43] The respondents are regulatory bodies, and they assert that they would be prejudiced by having to expend of their limited resources on an application they regard as unmeritorious. They also point to diminution in the quality of the evidence by the fading of memories with the passage of time, and the effect upon Mr Hendriks, whose credit was previously upheld. These are valid examples of likely prejudice in the circumstances.

[44] On the other hand, the nature of the substantive application is such that there would be little utility in refusing the applicant leave: the applicant could commence a fresh application immediately.

[45] Having weighed all of these factors, I have determined to grant leave to proceed. I will hear the parties on the form of the order and on costs.