# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Dempsey v Legal Practitioners Admissions Board* [2013] QCA 193 |
| PARTIES: | **PAUL ANTHONY DEMPSEY**<br>(applicant)<br>**v**<br>**LEGAL PRACTITIONERS ADMISSIONS BOARD**<br>(respondent) |
| FILE NO/S: | Appeal No 3517 of 2013 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Admission |
| DELIVERED ON: | 19 July 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 June 2013 |
| JUDGES: | Chief Justice and Holmes JA and Mullins J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **The application for re-admission is dismissed.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – READMISSION TO PRACTICE – AFTER BEING STRUCK OFF – where the applicant's name was removed from the roll of legal practitioners after the Legal Practice Tribunal found him guilty of two charges of unsatisfactory professional conduct, and four charges of professional misconduct – where the applicant's offending conduct included dishonestly transferring funds from his trust account to his general account and charging excessive fees – where the applicant's conduct was deliberate, and involved the sustained deception of clients and in one case, the Legal Practice Tribunal – where the applicant had initially failed to admit any wrongdoing and rejected the findings of the Legal Practice Tribunal but now deposed that he accepted responsibility for his wrong-doing and had sought professional help – where at least one of the applicant's former clients is still owed money under the Legal Practice Tribunal's orders – whether the court can be satisfied that the applicant is a fit and proper person for re-admission<br><br>*Legal Profession Act* 2007 (Qld), s 9, s 31<br>*Queensland Law Society Act* 1952 (Qld), s 48IC<br><br>*Dempsey v Legal Services Commissioner* [2011] HCASL 132, cited<br>*Ex parte Lenehan* (1948) 77 CLR 403; [1948] HCA 45, cited |

*Gregory v Queensland Law Society Incorporated* [2002] 2 Qd R 583; [2001] QCA 499, cited
*Janus v Qld Law Society Inc* [2001] QCA 180, cited
*Legal Services Commissioner v Dempsey* [2009] LPT 20, cited
*Legal Services Commissioner v Dempsey (No. 2)* [2009] LPT 23, cited
*Legal Services Commissioner v Dempsey* [2010] QCA 197, cited
*Re Harrison: Application for Readmission* (2002) 84 SASR 120; [2002] SASC 335, cited

COUNSEL: A Morris QC for the applicant
K N Wilson QC for the respondent

SOLICITORS: The applicant appeared on his own behalf
Legal Admissions Board for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with the order proposed by Her Honour, and with her reasons.

[2] **HOLMES JA**: On 27 August 2009, the Legal Practice Tribunal found the applicant guilty of two charges of unsatisfactory professional conduct and four charges of professional misconduct.[1] On 28 October 2009, the tribunal recommended that his name be removed from the roll of legal practitioners.[2] He now applies for re-admission. The Legal Practitioners Admissions Board recommends that the application be refused on the ground that the applicant is not a fit and proper person for admission to the legal profession.

[3] Section 31(1) of the *Legal Profession Act* 2007 provides that a person is suitable for admission to the legal profession only if he or she is a fit and proper person to be admitted. In deciding that question, the court is required to consider a number of identified matters ("suitability matters") set out in s 9 of the Act and any other matters that the court considers relevant. Among the suitability matters are whether the applicant is currently of good fame and character; whether his name has been removed from a local roll and not since restored; whether his right to practise has been cancelled; and whether he is unable to carry out satisfactorily the inherent requirements of practice.

[4] One cannot assess the applicant's present fitness for admission without a detailed examination of what was found against him in the proceedings which led to the removal of his name from the roll of practitioners. The charges of which he was found guilty related to his conduct in relation to two clients, Ms Simmons and Mrs Oats.

*The Simmons charges*

[5] Ms Simmons had signed a client agreement, which estimated fees and costs in her matrimonial matter at between $10,000 and $15,000, and provided for monthly accounts. The applicant arranged a litigation loan in the amount of $40,000 for her.

---

1 *Legal Services Commissioner v Dempsey* [2009] LPT 20.
2 *Legal Services Commissioner v Dempsey (No. 2)* [2009] LPT 23.

The tribunal found, in respect of the litigation loan, that the applicant had falsely represented to Ms Simmons that the government had changed the way solicitors could claim payment in family law matters and that it was necessary for her to take out a loan to pay his fees. On the basis of those findings, the tribunal found proved against the applicant a charge that he had dishonestly misled Ms Simmons as to her supposed obligation to take out a litigation loan. The tribunal also found that Ms Simmons had not been told that the loan was for $40,000 and that the applicant's statement in his affidavit that that amount had been recorded in the application on her instructions was untrue.

[6] On 2 October 2006, the applicant sent Ms Simmons a letter in which he said he proposed to change the quote for his professional fees in the client agreement to $30,000 but would continue to send monthly bills for the work actually done and would be paid the total of those billed amounts at the end of the case. He said that if he did not hear from her within seven days or if she disagreed with the proposal, it would be taken that the agreement was accordingly varied. The letter concluded with this paragraph:

> "If you have got any questions please do not hesitate to contact me or come in and see me. I have been trying to get you in to discuss this with you, but we have been missing each other."

Ms Simmons did not respond to the letter. Some small amounts had already been drawn against the litigation loan; on 4 October 2006, the applicant's firm drew a further $27,490.99. On 5 October 2006, $27,867.85 was transferred, on the applicant's instructions, from the firm's trust account for the Simmons matter to its general account. Ms Simmons, however, received invoices for work done in her matter totalling $12,460.86. After she changed solicitors, the discrepancy between what was billed and what was drawn became apparent.

[7] The applicant's explanation for taking the money was that Ms Simmons had agreed to his immediately charging her the lump sum of $30,000 at a meeting he had with her in person on 28 September 2006. Ms Simmons denied that there had been any meeting. The tribunal, noting that the letter of 2 October 2006 did not mention any such agreement or any such meeting, concluded that the applicant's claim made to the Law Society, the Legal Services Commission and the tribunal itself that the meeting had taken place was a false assertion made to justify his subsequent behaviour in transferring the money into his general account. The tribunal found proved a charge that the applicant had dishonestly drawn funds from his trust account to his general account in purported payment of professional fees.

[8] The tribunal also found made out a charge that the applicant had failed to maintain a proper standard of competence and diligence in: changing the client agreement and billing Ms Simmons; failing to advise her to obtain independent legal advice as to the litigation funding agreement; failing to advise her of the amount of the loan; failing to advise her of her right to independent legal advice in relation to changes to the client agreement; and attempting to amend the client agreement by omission.

[9] The applicant had produced a series of invoices to the Queensland Law Society showing amounts of some $35,000 invoiced, although Ms Simmons had received only the invoices amounting to $12,460.86. Some of the invoices received respectively by the Law Society and Ms Simmons bore the same number but varied in content. The tribunal found that a charge that the applicant had recklessly misled

the Law Society in relation to the amount of professional fees and disbursements payable was proved; the applicant had acted recklessly in presenting invoices to the Law Society representative without checking whether they had, in fact, been sent.

*The Oats charges*

[10] In respect of Mrs Oats, the tribunal found made out a charge that the applicant had charged excessive fees for a personal injuries matter. He had conducted a speculative personal injuries action on which he was entitled, under s 48IC of the *Queensland Law Society Act* 1952, to charge a maximum in professional fees of some $14,000 (being half the settlement amount after statutory refunds and disbursements) but, instead, had charged the sum of $32,000. The tribunal was also satisfied that the applicant had not properly explained the rule or the circumstances in which it could be waived. Instead, he had asked Mrs Oats and her husband to sign a handwritten release which said he had given the explanation, representing to them that the document was an "indemnity against negligence". That conduct gave rise to a further charge, which the tribunal found to be proved, that the applicant had preferred his own interests to those of his client.

*Removal from the roll*

[11] The tribunal made the following observation of the applicant:

> "A person who has been found guilty of the counts of professional misconduct and unsatisfactory professional conduct alleged in this matter and displayed such dishonesty on the disciplinary hearing is not a fit and proper person to be entrusted with the duties and responsibilities of a legal practitioner".[3]

Accordingly, the tribunal recommended the removal of the applicant's name from the roll and ordered that he pay compensation to Mrs Oats in the sum of $17,232.72.

*The conclusions on appeal*

[12] The applicant appealed those findings, arguing that the tribunal could not properly find that he had given false evidence concerning the alleged meeting with Ms Simmons on 28 September 2006, and further asserting that the tribunal had denied him procedural fairness by not telling him that he was, in effect, accused of perjury. This court[4] noted that the content of the applicant's letter of 2 October 2006, in saying that he would take it that the agreement was varied if Ms Simmons did not respond within seven days, was impossible to reconcile with his evidence that they had agreed a change at a meeting on 28 September. Nothing in the letter had alerted Ms Simmons to the possibility that the applicant might take payment for his work before it was done. The evidence suggested that the applicant was in financial difficulties and needed the $30,000; his haste was manifested by his instructions to his bookkeeper, two days after he had sent the letter, to take the balance of that sum out of trust.

[13] It was not demonstrated that the tribunal had erred in making the findings it did. The applicant had been alerted in the course of the hearing to the possibility of a finding that he was being deliberately untruthful. The findings that the appellant

---

3 *Legal Services Commissioner v Dempsey (No. 2)* [2009] LPT 23 at [7].

4 *Legal Services Commissioner v Dempsey* [2010] QCA 197.

had lied to the Legal Services Commission and the Queensland Law Society flowed inevitably from the findings about the meeting with Ms Simmons. The appeal was dismissed. An application for special leave to appeal to the High Court was also unsuccessful.

*Applications for permission to work as a lay associate*

[14] In one of the affidavits filed in support of his application for admission, the applicant deposed to his futile attempts to obtain employment and to his applications to the Queensland Law Society for permission to work as a lay associate. He had made two such applications, the first, unsuccessfully, in March 2012, and the second, as yet unresolved, in August 2012. The material which the applicant provided in support of those applications was put before the court here and is of some relevance, both for and against him.

[15] It is apparent that the applicant was contending in the March application that the adverse findings made against him in the Legal Practice Tribunal were wrong; he asserted that he had not lied, but other witnesses had. In the course of considering that application, the Law Society contacted three retired judges whom the applicant had nominated as referees. One of those retired judges said that the applicant had briefed him when he was a junior barrister (presumably during the 1970s). The applicant had worked hard for his clients and was meticulous in preparation. He had been frank in discussing costs with his clients, who trusted him. The second retired judge had also known the applicant while in practice at the Bar. He said that he was aware the applicant did not accept the tribunal's finding and denied having lied. He did not consider employment of the applicant as a lay associate would be a risk to the public if he were well supervised, had no contact with the public and did not control the billing of clients. He was aware that the tribunal's decision had had a significant impact on the applicant who would, consequently, now regard doing "the right thing" as important. The third judge said that he had too been briefed by the applicant at the Bar. The applicant had recently provided material to him which indicated that he did not accept the tribunal's finding and maintained that he had not lied. However, it was hard to believe that the applicant's acting as a lay associate would adversely affect the standing of the profession, given that he would only be doing clerical work.

[16] In the covering letter for his August application, the applicant said that the Law Society's refusal of his previous application had made him reconsider his position. He had sought help from a psychologist, a Mr Walkley, and had come to accept full responsibility for his actions and that what he did was wrong. The applicant furnished two reports of substance from Mr Walkley, one dated 13 September 2012 and the other 11 February 2013. In the first, Mr Walkley said that he had been treating the applicant since April 2012. He had not initially accepted the tribunal's findings, but had come to accept he was wrong and no longer sought to rationalise or minimise his role. In his report of 11 February 2013, Mr Walkley said that the applicant was under considerable pressure because it was likely that the mortgagee of his house would foreclose. He had realised his culpability, and Mr Walkley had heard his expressions of remorse and regret on many occasions. Also among the material put before the Law Society in that context were letters of apology to Mr and Mrs Oats and Ms Simmons.

[17] In a statement accompanying the August application, the applicant said that, by way of "rehabilitative measures", he had "repaid, of [his] own volition and without

pressure, $19,000.00 to a former client" affected by a Court of Appeal ruling which related to his charging practices and to s 48IC of the *Queensland Law Society Act*. He was asked to provide details of that payment, of the client involved, and of why he made the payment to that client rather than any other affected by the decision. He responded by saying that the client had contacted him when the ruling became known.

[18] The Law Society, however, made inquiries and established that the applicant had given an undertaking to the Legal Services Commissioner to pay any refunds due as a result of the decision, in consequence of which the Commissioner did not pursue disciplinary action for overcharging. The Commissioner's 2009 audit of the applicant's files revealed that refunds totalling $246,983.30 were due to clients as a result of the ruling; two clients were known to have been reimbursed, leaving a balance outstanding of $228,334.62.

[19] Those facts were pointed out to the applicant in a letter of 16 October 2012, and it was put to him that he had attempted to mislead the Law Society. In response, he said that he had not done so, and that the client had, to his recollection, been paid in full. In a further letter, the manager of professional standards for the Law Society indicated that the concern was as to the statement that the payments were made of the applicant's own volition and without pressure. The applicant said that he meant in his earlier reply no more than that he had responded to that client's position independent of the agreement with the Commissioner.

*The application for re-admission*

[20] The principal affidavit filed in support of the present application contained statements to similar effect to those made in the August application to the Law Society. The applicant deposed that the Law Society's decision of 4 April 2012 to refuse him permission to work as a lay associate had made him reconsider his view of the Legal Practice Tribunal proceedings. He had sought help from Mr Walkley. As a result, he said, he had come to realise that he was responsible for his actions, that what he did had an adverse impact on others' lives which was his responsibility, that he had to accept what he did was wrong and that the Law Society was right in its decision to refuse his application to work as a lay associate.

[21] The applicant filed a further affidavit annexing a report from Professor Basil James, psychiatrist, dated 18 May 2013. Professor James said that he had known the applicant since 1997; the latter had referred clients in personal injuries matters to him for report. He provided his views of the applicant's "core personality structure": he considered him "to have been an invariably conscientious and meticulous person", appearing "at all times to be formal, proper and punctilious". Professor James considered those judgments valid, notwithstanding the findings which led to the applicant being struck off the roll. It was clear, he said, from Mr Walkley's report of 11 September 2012, that the applicant had accepted the findings of the Legal Practice Tribunal. Mr Walkley's report confirmed his own opinion after a two hour meeting with the applicant in May 2013, the first after some four years, that his striking off had been a salutary experience and that should he be readmitted as a solicitor he would "manifest the utmost vigilance". The effect of the tribunal's decision would be to reinforce the "positive aspects of [the applicant's] value system", ensuring that there was no future risk to the community of any untoward conduct.

*The submissions for the applicant*

[22] Notwithstanding the realisation and insight deposed to by the applicant, his counsel said in submissions that he remained "of the belief that the evidence he gave [in the Legal Practice Tribunal] was true". Psychiatric assistance, however, had brought him to accept that he must be wrong. The applicant had the benefit of Professor James' report and his opinion that the applicant posed no risk to the community. Three retired judges had supported him in his application to work as a lay associate. The applicant wished to comply with his undertaking to repay his former clients, but it was impossible to do so unless he could obtain employment in the legal profession.

*The position of the Legal Practitioners Admission Board*

[23] The Legal Practitioners Admission Board contended that the applicant could not properly be re-admitted, having regard to his relatively recent striking off the roll on 28 October 2009 and the nature of the findings of the Legal Practice Tribunal. The Board expressed particular concern that in making the August 2012 application for permission to work as a lay advocate, the applicant asserted that he had "repaid, of [his] own volition and without pressure, $19,000.00 to a former client" when, in fact, the payment was made pursuant to an undertaking given in return for the Legal Service Commission's desistence from pursuing disciplinary action for overcharging. The Board also raised the fact that as at April 2012, the applicant had repaid only some $7,500 of the compensation ordered to be paid to Mrs Oats, and his current affidavit material was silent as to whether he had since complied with the order of the tribunal.

[24] It was pointed out that the applicant had not in his affidavits in support of his application for re-admission expressed anything amounting to remorse. His psychologist had provided no opinion as to his capacity to cope with actual practice as a solicitor. Dr James' report was given after a single two hour consultation and did not explain the basis for his conclusions. Given the seriousness of the conduct which had led to the applicant's striking off and the relatively short time which had passed, the evidence was not sufficiently convincing to satisfy the court that the applicant should be re-admitted to practice.

*The court's approach to re-admission*

[25] In *Ex parte Lenehan*,[5] the High Court majority observed of a solicitor who, having been struck off the roll, applied for reinstatement:

> "[H]e is in a more disadvantageous position than an original applicant because he must displace the decision as to probable permanent unfitness which was the basis of his removal. A solicitor may be restored to the roll after he has been struck off, but the power to reinstate should be exercised with the greatest caution and only upon solid and substantial grounds."[6] (Citations omitted.)

[26] The burden of establishing that he should be re-admitted is on the applicant.[7] The court's role is not punitive; it is to protect the public interest and the interests of

---

5 (1948) 77 CLR 403.

6 At 422.

7 *Janus v Qld Law Society Inc* [2001] QCA 180 at [12].

the profession.[8] One consideration is whether public confidence in the legal profession would be eroded if the individual in question, despite his past conduct, were admitted again to practice.[9] There is no set period which must elapse before such an application can be successfully made; the question is whether there has been rehabilitation of an applicant to an extent which allows the court to be satisfied of his or her fitness.[10]

*Conclusions*

[27] I would not assume that the applicant's statement of having repaid $19,000, and the subsequent correspondence about it, were designed to mislead, rather than reflecting an inability to grasp what was at issue. But given that the question of the moneys owed to clients as the result of the s 48IC ruling was raised in the Law Society's correspondence, it is entirely unsatisfactory that the applicant has given no indication in his affidavit material of what was done to repay the balance of what was due; the court is left in a state of uncertainty. More importantly, the applicant has had nothing to say about the $10,000 still owed to Mrs Oats. One must question whether this court could properly hold the applicant out to the public as a reliable practitioner when there remains at least one client out of pocket from his previous practice.

[28] The findings of the Legal Practice Tribunal remain of very considerable concern. The conduct which was their subject did not consist of isolated aberrations but deliberate and relatively sustained deception of clients, and in the case of the Simmons charges, of the Law Society, the Legal Services Commission and the Legal Practice Tribunal. Professor James' opinion that the applicant was "invariably conscientious" is impossible to reconcile with that conduct. Whether that opinion was the product of Professor James' psychiatric expertise is not apparent; it may have been more in the nature of a character reference. The opinion, of course, is hearsay; Professor James did not provide any affidavit for the purposes of this application and, accordingly, was not cross-examined. Had he been, one might have expected that his assertion that there was no future risk to the community, and the basis for it, would have been the subject of considerable attention.

[29] The fact that the applicant was highly regarded by one retired judge many years ago, and that two others thought that he could work as a lay associate, can hold very little weight on consideration of an application for admission as a solicitor. Indeed, the view attributed to one of them, that the applicant would not be a risk to the public if he were well supervised, kept away from the public and had no control over billing, is hardly encouraging for the applicant's return to practice as a solicitor.

[30] The fact that the applicant may have gone some way to recognising that what he did was wrong is a necessary first step in the kind of rehabilitation which might ultimately persuade this court that he was a fit and proper person; but of itself, it does not give confidence that conduct of the type would not be repeated. There has been nothing placed before this court which could satisfy it that the applicant would no longer exhibit the kind of disregard of his clients' interests in favour of his own, with whatever accompanying dishonesty he thought necessary to achieve his ends,

---

8 *Gregory v Queensland Law Society Incorporated* [2002] 2 Qd R 583 at 587.

9 *Re Harrison; Application for Readmission* (2002) 84 SASR 120 at 131.

10 *Gregory v Queensland Law Society Incorporated* [2002] 2 Qd R 583 at 592.

which led to the tribunal's recommendation that he be removed from the roll. This court would be reckless, indeed, to hold him out to the public as a fit and proper person to practise on the current state of evidence.

[31] I would dismiss the application for re-admission.

[32] **MULLINS J:** I agree with Holmes JA.