SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Scott* [2014] QCA 266
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **EMANUELA EVE SCOTT** (respondent)
FILE NO/S:	Appeal No 10920 of 2013 SC No 3458 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2014
JUDGES:	Fraser JA and Atkinson and Alan Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**That the respondent pay the applicant's costs of this application to be assessed.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – QUALIFICATIONS AND ADMISSION – JURISDICTION OF SUPREME COURTS – where the respondent was admitted to the legal profession in 2010 – where the respondent failed to declare income to the Australian Tax Office and Centrelink between 2004 and 2008 – where the respondent did not disclose that failure to declare income to the Court at the time of applying for admission – where the undeclared income was brought to the applicant Legal Services Commissioner's attention in 2012 when the respondent was bringing personal injury proceedings following a motor vehicle accident – where, had the respondent disclosed that failure to declare income at the time of her admission application, it may have borne adversely on the question of whether she was a fit and proper person to be admitted to practice – where the Commissioner applies for the Court to make any order it deems appropriate in its inherent jurisdiction as to the admission of the respondent, and for the respondent to pay the Commissioner's costs – whether any orders should be made by the Court as to the respondent's admission to legal practice, and what form any such orders should take

Legal Profession Act 2007 (Qld), s 13, s 31, s 35, s 39, s 51, s 227, s 590, s 659, Pt 2.3, Pt 4.9, Ch 4, Ch 7
Legal Profession (Solicitors) Rule 2007 (Qld)
Supreme Court (Admission) Rules 2004 (Qld), r 13

Cohen v Legal Practitioners Admissions Board (No 2) [2012] QCA 106, cited
In re Davis (1947) 75 CLR 409; [1947] HCA 53, cited
Re: Hampton [2002] QCA 129, cited
Myers v Elman [1940] AC 282, cited
Perpetual Trustee Company Limited v Cowley & Anor [2010] QSC 65, cited
Prothonotary of the Supreme Court of New South Wales v Hendrick Jan van Es [2014] NSWCA 169, cited
Re Warren [1976] VR 406; [1976] VicRp 38, cited
Re Wong [2006] VSC 471, cited

COUNSEL: J Bell QC for the applicant
A J Morris QC, with P Tucker, for the respondent

SOLICITORS: Legal Services Commission for the applicant
Porter Davies for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Alan Wilson J. I agree with those reasons and with the order proposed by his Honour.

[2] **ATKINSON J:** I agree with the order proposed by Wilson J and with his Honour's reasons.

[3] **ALAN WILSON J:** Ms Scott was admitted as a legal practitioner on 27 April 2010, and she has since practised as a solicitor. This application was brought after the Legal Services Commissioner discovered that she might have failed to disclose relevant information in her application for admission in 2010.

[4] The information was of a kind that could have borne adversely, for Ms Scott, upon a question which is (unsurprisingly) central to the admissions process: whether she is a fit and proper person to be admitted to practice, as a lawyer. It involved her failure to disclose, to the Australian Taxation Office and Centrelink, cash income of about $45,000 she had earned from part-time work as a cleaner and a model between January 2004 and July 2008, with which she supported herself while studying law.

[5] The non-disclosure came to light in the course of proceedings she brought for damages for personal injuries suffered in a motor vehicle accident in July 2008 when, as a pedestrian, she was struck by a motor vehicle. The compulsory third party insurer of the vehicle wrote to the Commissioner on 13 January 2012 alleging that while those earnings were detailed in documents filed on Ms Scott's behalf in her damages action, they had not, apparently, been disclosed to Centrelink or included in income tax returns; and neither had Ms Scott disclosed it nor, significantly, possible breaches of tax and social security legislation arising from the non-disclosure, in documents she filed in support of her application for admission.

[6] Ms Scott has fully and frankly admitted the non-disclosure, and taken steps to remedy it. The question for the Court is what, if anything, should now be done about her admission, and her continued practice as a lawyer in light of this new information.

The admissions process

[7] The admission of lawyers to practice in Queensland is governed by the *Legal Profession Act* 2007 (Qld), supplemented by the *Supreme Court (Admission) Rules* 2004. The process is described in Part 2.3 of the LPA: it provides for an application, initially to the Legal Practitioners Admissions Board[1] which, in effect, ensures it is ready to go before the Court of Appeal, where a final determination is made.[2] The Board's role is to '… *help the Supreme Court by making a recommendation about each application for admission*'.[3]

[8] The LPA makes an applicant's suitability for admission primarily contingent upon the Court's satisfaction that they are '…*a fit and proper person*'.[4]

[9] The procedure is not inquisitorial and the Board and the Court, in considering the question of suitability, rely heavily upon the candour of, and full and honest disclosure by, applicants of all matters which may be relevant to it.[5]

[10] The legislation, and the documents an applicant must file, emphasise the obligation: the Board's Form 7 is called a '*Statement of Eligibility and Suitability*' and it invites an applicant to say that they are '*...aware of the following matters which may bear adversely on my suitability…*'.[6]

[11] As a former Queensland Chief Justice has observed, an applicant '… *is obliged to approach the Board, and later the court, with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment of fitness for practice*'. He went on to say that an applicant has a '*... pro-active obligation ...to make candid, comprehensive disclosure*'.[7]

[12] Both the governing legislation and the procedures under it make it clear, then, that an applicant must disclose anything adverse to the question of their suitability for admission.

Ms Scott's suitability affidavit

[13] Nothing in her admission papers filed with the Board and the Court referred to the non-disclosure, to relevant tax and social services authorities, of the income mentioned earlier.

[14] Ms Scott did however disclose other relevant adverse matters including two which, on their face, were quite serious: convictions for shoplifting, and unlicensed driving. In her affidavit filed 15 April 2010[8] (in which she addressed 'suitability matters' under s 31 of the LPA) she particularised the following:

---

1 A body pre-dating the *LPA* 2007, but continued under s 659 of that Act.
2 LPA, s 39.
3 LPA, s 39(1).
4 LPA, s 31(1).
5 *Re Davis* (1947) 75 CLR 409; [1947] HCA 53; *Prothonotary of the Supreme Court of NSW v van Es* [2014] NSWCA 169 at paras [38], [39].
6 *Admission Rules*, r 13(2)(j); LPA, s 31.
7 *Re: Hampton* [2002] QCA 129 at paras [26]-[28] per de Jersey CJ.
8 Record Book, p. 5.

(a) A conviction in July 2004 for a shoplifting offence, for which she was fined $100 but no conviction was recorded;
(b) a conviction for unlicensed driving in 2007 for which she was fined $115; and,
(c) that Centrelink had raised a 'debt' against her in December 2008 of $356.67, arising from the receipt of Centrelink benefits while she was also receiving Commonwealth Accommodation Scholarship benefits.

Her response to discovery of the non-disclosure

[15] Upon receipt of the insurer's complaint in January 2012 the Commissioner wrote immediately to Ms Scott, demanding a prompt reply. She did so, admitting the insurer's allegations, and fault, and expressing remorse.

[16] Ms Scott also immediately showed the Commissioner's letter to her employer, solicitor (and senior and experienced practitioner) Mr John Porter, and engaged an accountant who took steps to prepare and file income tax returns for the undeclared income. She also paid $11,000 to the ATO on account of her estimated tax liability for that income. The ATO rejected her amended tax returns, and refunded the amount of $11,000 she had paid by way of her estimated tax liability.

[17] She also made full disclosure to Centrelink and provided it with a total of her earnings in the year 2004-2008. She was informed by Centrelink officers that the matter would be investigated and, if a claim for a refund was raised, it would be about $16,000. Although more than two years have passed since her disclosure to Centrelink nothing has, in fact, occurred, and she has heard nothing further about the matter.

[18] In terms, then, of appropriate efforts to remedy the legal consequences of her non-disclosure Ms Scott appears to have done all she reasonably could.

Did Ms Scott have a satisfactory explanation for the non-disclosure? Her head injury

[19] Reports from medical specialists confirm that Ms Scott suffered a head injury in the 2008 accident which left her with frequent, recurring post-traumatic headaches, and cognitive impairment which included memory loss.

[20] In her affidavit filed in this proceeding she says that her non-disclosure occurred because '*... it simply did not cross my mind at the time of preparing my suitability affidavit and I did not remember it*'.[9] Later she suggests that this lapse of memory, '*... in part at least ... may have been attributable to the residual effects of the head injuries which I suffered as a result of the accident*'.[10] She says that she only recalled these casual earnings, and included them in documents relating to her damages claim, because the lawyer representing her in the action specifically asked her for the information about her past income.

[21] Mr Porter saw, and confirms, the debilitating effects of the head injury. He originally employed Ms Scott as a law clerk at the end of 2008, about five months after her accident. He observed that she appeared to suffer recurring severe and debilitating headaches, and memory loss. He also observed that she attempted to

---

9 Affidavit of EE Scott, sworn 12 March 2014, para [14], RB p 317.
10 Ibid para [18], RB 318.

deal with her lapses of concentration, and memory loss, by constantly taking detailed notes.

[22] Despite that disadvantage he employed her full time from June 2009. After she was admitted in April 2010 she was offered a position at Minter Ellison, and worked there until 2012 when Mr Porter reemployed her as a senior associate in his litigation section, where she remains.

[23] Mr Porter deposes[11] that the most likely explanation for Ms Scott's non-disclosure was her '…*significant memory loss issues*' which, he said, he had witnessed on an almost daily basis during her employment with him between December 2008 and October 2010, and, later, February 2012 and the present time. He says '*… her frequent lapses in both concentration and memory were real and most debilitating*'.

[24] Despite those problems, he speaks of her as intelligent, hard-working, quick to learn, and dedicated; and, as '*…entirely honest, totally reliable, and possessed a level of personal integrity which, to my mind, distinguished her from many other lawyers with whom I have dealt during the course of my career in the legal profession*'.[12]

[25] Mr Porter says that in light of his observations of her personal and professional qualities, he '*… could not conceive of any circumstance in which … Ms Scott would deliberately have omitted relevant information from the affidavit she filed in support of her application for admission*'.[13]

The position taken by Ms Scott's professional association, the Queensland Law Society

[26] Ms Scott holds an Unrestricted Employee Practising Certificate, and that certificate was renewed by the Queensland Law Society in May this year.

[27] When Ms Scott applied for renewal of her practising certificate in 2014 her non-disclosure, and these proceedings and affidavit material related to them, was brought to the attention of the QLS. Its acting General Manager, Professional Standards (Mr Craig Smiley, the delegate of the QLS Council) considered Ms Scott's application with particular reference to s 51(5) of the LPA, which provides that a local practising certificate must *not* be renewed if the Society is satisfied that the applicant is not a fit and proper person to continue to hold a certificate.

[28] In a long and thoughtful memorandum to the QLS,[14] Mr Smiley considered all of the circumstances mentioned above and, it appears, all of the evidence which has now been filed in this application. He was, of course, addressing the matter in a particular context – i.e., whether this non-disclosure in 2010 meant that Ms Scott was not now, in 2014, a fit and proper person to hold a practising certificate.

[29] Mr Smiley recommended that the Council renew her certificate. He found that her explanation for the non-disclosure was '*… reasonable and acceptable*',[15] and concluded

---

11 Affidavit JB Porter, sworn 13 March 2014, paras [25]-[27], RB 313.
12 Ibid para [8], RB 310.
13 Ibid para [27], RB 313.
14 Affidavit of the applicant Ms EE Scott, sworn 27 May 2014, ex EES-6, RB 353-360.
15 RB 539.

that she had taken all necessary and appropriate remedial steps. He accepted that she had now given what appeared to be full disclosure; noted that she has no other complaints or disciplinary matters arising against her since 2010; and, also noted that Mr Porter held the strong view that she remains a fit and proper person to continue in practice. The QLS Council followed Mr Smiley's recommendation.

The Commissioner's power to bring this application

[30] The Commissioner's functions include appearing in relation to the Court's jurisdiction, and the exercise of its powers.[16] That will include the Court's functions in hearing and deciding every application for admission.[17] The Commissioner has a statutory interest in matters of this kind, and it is right that it should bring a proceeding here, and appear.

[31] Senior Counsel who appeared for Ms Scott raised, as what was said to be an 'important point of principle', two questions: first, the absence of any legislative mechanism enabling an assessment whether this matter needed to be brought back before the Court; and, secondly, how, if necessary, that should be done.[18]

[32] Under s 590(2) ('*Functions*') of the LPA, the Commissioner clearly has a discretion to decide whether it will appear and be heard on a matter within the Court's jurisdiction. Correspondence between the parties indicates the Commissioner took time to consider whether or not to apply, and the nature of that application.

[33] The limited case-law on the point suggests that the procedure it ultimately adopted – simply applying in a manner which brought the matter to the Court's attention – is appropriate. As the Victorian Full Court said in *Re Warren*:

> '*The Board moves the Court merely to consider its report and to make such order as the Court thinks fit… the Court is obliged to the Board for bringing this matter to its attention…*',[19]

[34] Ms Scott did not apply herself, although the Commissioner suggested that to her. It would have been appropriate, and creditable, for her to have done so. Solicitors (and barristers) always operate under a strong continuing obligation to the Court to correct any falsehood or misinformation they have allowed to be placed before it, whether on behalf of clients,[20] or themselves:

> '*If it comes to the legal practitioner's attention that [he or she] has unintentionally misled the court then the duty of the legal practitioner is to inform the court to correct the error*'.[21]

[35] The fact she did not apply appears to be the product of legal advice she received; perhaps unsurprisingly, there was some uncertainty about what kind of relief an application brought by her would seek. That, with respect, misses the point: s 13 of the LPA confirms the Court's '*inherent jurisdiction and power… in relation to the*

---

16 LPA, s 590.

17 LPA, s 35(1).

18 Transcript, Court of Appeal hearing 10 September 2014, pp. 1-9.

19 [1976] VR 406, at 408.

20 *Myers v Elman* [1940] AC 282, per Viscount Maugham at 294; and, see the 'Solicitors Rule': *Legal Profession (Solicitors) Rule* 2007 (a statutory instrument which is made binding by s 227 of the LPA).

21 *Perpetual Trustee Company Limited v Cowley & Anor* [2010] QSC 65, at para [17] (Atkinson J).

control and discipline of local lawyers and local legal practitioners…'. A practitioner in Ms Scott's position, alert to a matter which may have compromised the decision the Court made under s 31 – that they were a '*fit and proper person to be admitted*' – has a positive obligation to bring the matter to the Court's attention and would not be criticised for doing so.

[36] In light, however, of her frank admissions in response to the LSC's first letter, her immediate disclosure to her employer, the other remedial steps she has taken, and the possibility that her failure to apply was the product of advice from senior practitioners, the fact she was not primarily instrumental in bringing the matter to the Court's attention should not tell against her.

The powers of the Court

[37] This Court admitted Ms Scott to the legal profession. An order of that kind is made *ex parte*. The Court has an inherent power to review *ex parte* proceedings,[22] and has power to revoke Ms Scott's admission if it reaches the view that it should:

> '*There can be no doubt that if a candidate is admitted to practise as a barrister and solicitor of this Court and it is afterwards discovered that the certificate of the Board upon which he was admitted ought not to have been granted, because the candidate has not complied with the Rules, this Court has ample power in its inherent jurisdiction to revoke the admission …*'.[23]

[38] This is, in effect, an application to review the *ex parte* order admitting Ms Scott on 27 April 2010 under s 35 of the LPA.

[39] The Court also has power to impose '*any order the committee may make under this Act; or …any order or direction the tribunal may make under this Act or the QCAT Act*': LPA, s 13(2)(b). Those disciplinary bodies (e.g., QCAT and the Legal Practice Committee[24]) have very broad powers including striking off, suspension from practice, fines, supervision, and re-education.[25]

The Commissioner's position

[40] In its submissions the Commissioner does not contend for any specific order in respect of Ms Scott's breach of duty to the Court in April 2010 but, only, an order that she pay the Commissioner's costs.

[41] The Commissioner's written submissions do however critique, as it were, some aspects of Ms Scott's conduct. In its original outline the Commissioner noted that the information Ms Scott provided in the course of her personal injuries action was prepared in June 2010, i.e., only two months after her admission and less than three months after she had prepared the affidavit featuring the relevant non-disclosure.

[42] The Commissioner's submissions also suggest that her '… *explanations for her failure do her no particular credit*'.[26]

---

22 *Re Warren* (supra), at 408; *Re Wong* [2006] VSC 471, at para [5]; and, see LPA, s 13.

23 *Re Warren* (supra), at 408.

24 LPA, Chapter 7.

25 LPA, Chapter 4, Part 4.9.

26 Applicant's outline of submission filed 28 March 2014, para [18] p. 4.

[43] It is said, firstly, that her revised estimates of income do not fully or properly address her breach of duty to the Court, and the Board. But Ms Scott's affidavit sworn 12 March 2014 directly addresses the circumstances leading up to and including the non-disclosure and contains an explanation for it. Moreover, in her letter to the Commissioner of 1 February 2012, she unreservedly acknowledged the occurrence of the non-disclosure, her responsibility for it, and her remorse. Everything she has said or written since the non-disclosure was brought to her attention suggests insight into, and full comprehension of, her past mistake.

[44] Secondly, the Commissioner expresses reservation about her claim that she had forgotten the matter when she prepared her suitability affidavit, but remembered it when giving instructions for material to be filed in her personal injuries action less than three months later. As canvassed earlier, she attributes this to the consequence of her head injury. She produces medical evidence confirming the existence of that injury; and, Mr Porter has given very persuasive evidence about his observations of her memory loss and lapses of concentration in her employment, and the way she deals with that problem.

[45] It is also material that her suitability affidavit did disclose material which was serious, embarrassing, and potentially damaging to her prospects of obtaining admission: her conviction for shoplifting, and for driving whilst unlicensed.

[46] Thirdly, it is said for the Commissioner that her explanation – memory lapse – is less than persuasive, or convincing. Again, however, the evidence of a specialist neurologist and Mr Porter means her explanation is corroborated. Neither was required, by the Commissioner, for cross-examination; nor was Ms Scott.

[47] Fourthly, she is criticised for delay in approaching the ATO and Centrelink, but that seems to have occurred within a few months, and in circumstances where it was necessary for her to have an accountant prepare and lodge tax returns for the years 2004-2008. The criticism, in those circumstances, seems a little harsh.

[48] Finally, it is said that she should have brought this application herself. That would, for reasons explored earlier, have been desirable, but it is not clear that her failure to do so should necessarily be sheeted home to her personally.

What should this Court do?

[49] The question which confronts this Court is whether it should take any steps as a consequence of Ms Scott's non-disclosure and, in particular, revisit her admission to consider whether it should stand.

[50] The non-disclosure was serious. Absent a satisfactory explanation, the admissions process was tainted to a degree which would warrant setting it aside.

[51] Ms Scott has, however, proffered an explanation. That explanation is corroborated, and indeed strongly supported, by evidence from a neurologist and an experienced practitioner who has been her employer over four of the past six years. There is no basis for rejecting that explanation, and there are persuasive evidentiary grounds for accepting it.

[52] The material filed on her behalf shows full and untrammelled insight, and remorse; and, also, that she has taken all proper and necessary steps to remedy the legal consequences of her oversight.

[53] In those circumstances there is no cause for setting Ms Scott's original admission aside. To do so would be to punish her for an oversight for which, on the available evidence, she was blameless. That consideration is reinforced by her response when she was alerted to the matter, which was prompt and proper.

[54] It would also be wrong to consider the matter in a vacuum, e.g., by focussing only upon the event and ignoring what has happened in the four years since her admission. She has been in continual practice as a solicitor and in that time shown herself to be, by all accounts, a fit and proper person. As McMurdo P has said, '*... the Court is not concerned to punish an applicant for past misconduct but seeks to ensure the public is well served by the legal practitioner in whom they place their trust...*'.[27] While that observation was made in the context of an application for admission at first instance, it may fairly be applied here: to set aside Ms Scott's admission would involve ignoring her apparently good conduct since admission, and a glowing reference from her current employer.

[55] Nor would any apparent purpose be served by impinging upon her right to work as a lawyer in any of the lesser ways contemplated under the LPA – suspension from practice for a time, a fine, supervision, or re-education. The experience of facing these proceedings, addressing the consequences of her non-disclosure, and paying the Commissioner's costs is sufficient in terms of ensuring Ms Scott is personally deterred from any other offending conduct; and, in the unusual circumstances of this case, also sufficient general deterrence by way of reminding all practitioners that the disclosure requirements surrounding admission as a legal practitioner are highly important, and very stringent.

[56] In light of the fact her explanation has been accepted, and that its acceptance involves acknowledging the presence of mental deficits consequent upon a serious head injury, it may seem harsh to require her to pay costs or to impose any sanction at all. For the reasons noted earlier it would have been preferable for Ms Scott to apply herself, and in that event she would most likely have borne her own costs. Secondly, while accepting her explanation, it is critical that all practitioners understand that the burden of full and frank disclosure is extremely onerous and must be met in full and with all necessary particulars, regardless of an individual applicant's circumstances.

[57] The only order I would make is, then, that Ms Scott pay the Commissioner's costs.

---

[27] *Cohen v Legal Practitioners Admissions Board (No 2)* [2012] QCA 106, at para [12] per McMurdo P.