

SUPREME COURT OF QUEENSLAND

CITATION: *Cook v The Psychologists Board of Queensland* [2015] QCA 250

PARTIES: **CRAIG STEPHEN COOK**
(applicant)
v
THE PSYCHOLOGISTS BOARD OF QUEENSLAND
(respondent)

FILE NO/S: Appeal No 8470 of 2014
DC No 3194 of 2007

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time/General Civil Appeal

ORIGINATING COURT: Health Practitioners Tribunal at Brisbane – [2008] QHPT 4

DELIVERED ON: 1 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 31 July 2015

JUDGES: Philippides JA and Douglas and Flanagan JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for leave to appeal is refused.**
2. The application for an extension of time within which to appeal is refused.
3. The applications for leave to adduce further evidence are refused.
4. The applicant pay the respondent's costs of and incidental to each application.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant's registration as a psychologist was cancelled by the Health Practitioners Tribunal on 7 October 2008 – where the applicant applied for an extension of time in which to appeal the decision of the Health Practitioners Tribunal on 9 September 2014 – where the applicant sought legal advice immediately following the cancellation of his registration – where the applicant sought further legal advice approximately 10 months after his registration was cancelled – where the applicant filed an originating proceeding in 2011 in relation to the cancellation of his registration and was advised that such issues ought properly be made the subject of an appeal – where the applicant suffered from various health

problems including a persistent major depressive illness at or about 2009 to 2011 – where the applicant, in respect of the merits of the appeal, submits that the Health Practitioners Tribunal failed to comply with the rules of natural justice and impermissibly delegated its decision-making function to an expert psychologist and that there was a reasonable apprehension of bias on the part of the expert psychologist – where the respondent submits it is prejudiced by the extensive delay – whether an extension of time in which to appeal ought to be granted bearing in mind the length of the delay, the explanation for the delay, the prejudice to the respondent and the merits of the substantive appeal

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the applicant’s registration as a psychologist was cancelled by the Health Practitioners Tribunal on 7 October 2008 – where the applicant applied for an extension of time in which to appeal the decision of the Health Practitioners Tribunal on 9 September 2014 – where the applicant applied for leave to adduce further evidence as to the relevant code of ethics and related documents at the time of the original hearing before the Health Practitioners Tribunal – where the applicant applied for leave to adduce further evidence in the form of financial records and correspondence on the ground that he did not understand he was required to tender the documents at the original Tribunal hearing – where the applicant applied for leave to adduce further evidence in the form of further written submissions on the basis that the applicant considered he would have a further opportunity to address the merits of the appeal if leave was granted – whether leave ought to be granted to adduce any forms of further evidence

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where the applicant’s registration as a psychologist was cancelled by the Health Practitioners Tribunal on 7 October 2008 – where the applicant applied for an extension of time in which to appeal the decision of the Health Practitioners Tribunal on 9 September 2014 – where the applicant applied for leave to adduce further evidence as to the relevant code of ethics and related documents at the time of the original hearing before the Health Practitioners Tribunal – where the applicant applied for leave to adduce further evidence in the form of financial records and correspondence on the ground that he did not understand he was required to tender the documents at the original Tribunal hearing – where the applicant applied for leave to adduce further evidence in the form of further written submissions on the basis that the applicant considered he would have a further opportunity to address the merits of the appeal if leave was granted – whether leave ought to be granted to adduce any forms of further evidence

Health Practitioners (Professional Standards) Act 1999
(Qld), s 346, s 348, s 349
Queensland Civil and Administrative Tribunal Act 2009
(Qld), s 244, s 258

Attorney-General for the State of Queensland v Barnes
[2014] QCA 152, applied
Beil v Mansell (No 1) [2006] 2 Qd R 199; [2006] QCA 173,
cited
Chapman v State of Queensland [2003] QCA 172, cited
Psychologists Board of Queensland v Cook [2008] QHPT 4,
related
Psychologists Board of Queensland v Robinson [2004] QCA 405,
applied
Queensland Trustees Ltd v Fawckner [1964] Qd R 153, cited
Spencer v Hutson [2007] QCA 178, cited

COUNSEL: The applicant appeared on his own behalf
C Wilson for the respondent

SOLICITORS: The applicant appeared on his own behalf
Australian Health Practitioner Regulation Agency for the
respondent

- [1] **PHILIPPIDES JA:** I have had the considerable benefit of reading the reasons for judgment of Flanagan J with which I agree. As his Honour succinctly explains, the application for an extension of time in which to appeal should be refused bearing in mind the lack of satisfactory explanation for the extensive delay, the prejudice that would be suffered by the respondent and that an appeal is not likely to enjoy any prospect of success. I agree with the orders proposed.
- [2] **DOUGLAS J:** I have had the advantage of reading the reasons for judgment of Flanagan J and agree with them and the orders proposed.
- [3] **FLANAGAN J: Introduction:** The applicant seeks both leave to appeal and an extension of time within which to appeal the decision of the Queensland Health Practitioners Tribunal delivered 7 October 2008. The Tribunal was constituted by a District Court judge assisted by Dr B Wiltshire, Dr A Quinn and Mr K MacDougall.
- [4] The decision was in relation to a referral of a disciplinary matter by The Psychologists Board of Queensland pursuant to s 126(1)(b) of the *Health Practitioners (Professional Standards) Act 1999* (Qld) (“**the Professional Standards Act**”).
- [5] The orders made by the Tribunal on 7 October 2008 included an order cancelling the registration of the applicant as a psychologist.
- [6] The applications for leave to appeal and for an extension of time were not filed until 9 September 2014, almost six years from the date of the Tribunal’s decision.
- [7] The applicant has also filed two applications seeking to adduce further evidence. The first was filed 9 September 2014 supported by an affidavit of the applicant sworn 25 July 2014. The second was filed on 10 August 2015 (after the Court had heard the other applications) supported by an affidavit of the applicant sworn 7 August 2015.
- [8] For the reasons which follow all four applications should be refused.

The decision of the Tribunal

- [9] The Tribunal dealt with two bases for disciplinary action pursuant to s 124(1) of the *Professional Standards Act*. The first was that pursuant to s 124(1)(a) the applicant had behaved in a way that constituted unsatisfactory professional conduct. The second was that pursuant to s 124(1)(c) the applicant had failed to comply with certain written undertakings entered into by him on 12 May 2003 pursuant to s 118(1)(c)(iv) of the *Professional Standards Act*.
- [10] Particulars were provided in the Amended Referral Notice which is set out in full at paragraph [2] of the Reasons of the Tribunal.¹
- [11] The applicant represented himself before the Tribunal. The respondent was represented by counsel instructed by solicitors. The Tribunal heard evidence over a four day period from 2 to 5 June 2008. The respondent called 13 witnesses including an expert Mr Dooley, who was a clinical psychologist of more than 20 years standing. Whilst a number of the respondent's witnesses were cross-examined at length by the applicant, the applicant's cross-examination of Mr Dooley only consisted of a few questions.² The applicant gave his evidence-in-chief by way of a sworn affidavit upon which he was cross-examined. Written submissions of both the applicant and the respondent were subsequently delivered on 4 July 2008 and 21 July 2008 respectively.
- [12] The Amended Referral Notice identified and particularised nine grounds. The first seven grounds related to allegations that the applicant had behaved in a way that constituted unsatisfactory professional conduct. Grounds 8 and 9 concerned the applicant's failure to comply with undertakings. The Reasons record that in relation to grounds 8 and 9 the applicant admitted that he was in breach of the relevant undertakings. Accordingly, his failure to comply with the undertakings constituted a ground for disciplinary action in terms of section 124(1)(c) of the *Professional Standards Act*.³
- [13] The complainant in relation to ground 1 was a patient of the applicant from about March 2000 to September 2001. The complainant suffered a mental breakdown which led to his admission to the psychiatric ward of the Bundaberg Base Hospital prior to his referral to the applicant. According to the complainant, the relationship between him and the applicant quickly became something more than simply that of patient and psychologist. The applicant would regularly discuss his own personal problems with the complainant during counselling sessions. These included the applicant's marital problems as well as his problems with alcohol abuse. In or about July or August 2001, the applicant lived with the complainant and his son for approximately three weeks. In the course of one counselling session in January 2001 the applicant sought a loan of \$5,000 from the complainant. Ultimately the complainant advanced the sum of \$2,000 to the applicant in or about February 2001 and subsequently a further amount of \$5,000 was advanced in or about June 2002. From about July 2001 until November 2001 the complainant recalled that he would engage in regular heavy drinking sessions with the applicant. The applicant's response to these allegations was that whilst he disputed the accuracy of the allegations, he acknowledged "that he did have a 'significant problem' in being assertive and in establishing appropriate boundaries".⁴

¹ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [2]; appeal record book, 2124-2127.

² Transcript of proceedings, 4 June 2008, 47-48; appeal record book, 168-169.

³ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [43]; appeal record book, 2144.

⁴ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [7]; appeal record book, 2129.

- [14] The applicant also requested the complainant purchase a one half share in the applicant's practice for an amount of \$75,000. The complainant attended his financial institution who urged him to seek independent legal advice, following which the complainant did not proceed with the purchase.
- [15] The standard of proof applied by the Tribunal in relation to these allegations was the *Briginshaw* standard.⁵ As to ground 1 the Tribunal found each of the alleged six particularised matters had been established.⁶
- [16] In being satisfied that ground 1 had been established, the Tribunal observed:⁷
- “... the [applicant's] conduct was of a lesser standard than that which might reasonably be expected of him by the public and by his professional peers. I am further satisfied that his conduct demonstrates a lack of adequate judgment in the practice of his profession. This behaviour constitutes unsatisfactory professional conduct within the meaning of the Act.”
- [17] Grounds 2 and 3 concerned another patient of the applicant. There were five particulars in relation to ground 2. The Tribunal held that the first four particulars but not the fifth were established. The complaint was, in effect, that the applicant would regularly discuss his marital and drinking problems with the complainant and would seek his support and advice in relation to those problems. The applicant would also visit the complainant at his home at night. The two would engage in the drinking of alcohol. One of the allegations established was that the applicant engaged the services of the complainant to conduct a private investigation of the applicant's former wife.
- [18] As to grounds 4 and 5, the Tribunal determined that those matters had not been established.⁸ Grounds 6 and 7 concerned another patient of the applicant. In August 1999 the complainant suffered work related psychological problems and was referred for treatment to the applicant. The complainant was seen by the applicant on or about 43 occasions and then another 59 occasions following a further work place incident. Although ground 6 had six matters particularised, only two were found to have been established.⁹ The first established allegation related to the applicant being engaged in a personal relationship with the complainant and her husband in the period from 1 January 2003 to June 2006. The second established allegation was the making of a verbal threat to the complainant by the applicant in connection with the investigation of the applicant by the respondent. The Tribunal also found that ground 7 had been established. This involved the applicant breaching patient confidentiality by providing the complainant in ground 6a document prepared by the Psychologists Board of Queensland that contained confidential material of various other patients of the applicant.
- [19] The Tribunal in its Reasons, made specific reference to the expert evidence of Mr Dooley:¹⁰
- “In the opinion of Mr Roger Dooley, a very experienced psychologist who gave evidence before this Tribunal, the [applicant's] conduct involved an exploitation of the patient/therapist relationship. As Mr Dooley observed the nature of the treating relationship is necessarily one of

⁵ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [3]; appeal record book, 2127; *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 (Dixon J).

⁶ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [4]-[19]; appeal record book, 2128-2134.

⁷ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [19]; appeal record book, 2133-2134.

⁸ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [26]-[30]; appeal record book, 2137-2139.

⁹ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [31]-[38]; appeal record book, 2139-2140.

¹⁰ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [17]; appeal record book, 2132-2133.

trust and one which invariably creates a power imbalance in favour of the psychologist over the client. When the professional relationship with clients or former clients is blurred into a relationship of another kind ethical problems will inevitably arise. As Mr Dooley points out, dual or multiple relationships are potentially exploitative or harmful. They may impair the judgment or objectivity of the psychologist when, by way of contrast, proper boundaries provide a foundation for a professional relationship by fostering a sense of trust and safety for the client by generating the belief that the psychologist will always act in the client's best interest."

- [20] The Tribunal also referred to the Australian Psychological Society's ("APS") Code of Ethics and the Guidelines for Managing Professional Boundaries and Multiple Relationships. These documents were referred to by Mr Dooley in his report¹¹ and were tendered before the Tribunal.¹²

The application for leave to appeal

- [21] The applicant does not require leave to appeal. This is conceded by the respondent.
- [22] The Health Practitioners Tribunal is a "former tribunal" within the meaning of s 244 and Schedule 1 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("**QCAT Act**").¹³
- [23] Section 258 of the QCAT Act provides:
- "258 Appeal yet to be started
- (1) This section applies if –
- (a) immediately before the commencement, a person could, under a former Act, have appealed to a court against a decision of a former tribunal within a particular period (the *appeal period*); and
- (b) at the commencement, the person has not started the appeal.
- (2) The person may, within the appeal period, appeal to the court against the decision, and the court must hear and decide the appeal, under the former Act as if it were still in force."
- [24] Section 1087 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) omitted ss 348 and 349 of the *Professional Standards Act*. Therefore the former Act for the purpose of s 258 of the QCAT Act is the *Professional Standards Act* that was in force prior to the enactment of the QCAT Act. The relevant reprint was identified by counsel for the respondent as reprint 3A of the *Professional Standards Act*.¹⁴

¹¹ Exhibit RTD2 to the affidavit of Roger Thomas Dooley sworn 23 April 2008, 4; supplementary appeal record book, 19.

¹² Exhibit 8, source documents for Roger Dooley's report; appeal record book, 1918-2072; *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [18]-[19]; appeal record book, 2133-2134.

¹³ The Health Practitioners Tribunal was abolished by s 247 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

¹⁴ Transcript of proceedings, 31 July 2015, 1-20, lines 12-16. On 20 May 2013 the name of the *Health Practitioners (Professional Standards) Act 1999* (Qld) was changed to the *Health Practitioners (Disciplinary Proceedings) Act 1999* (Qld) by s 23 of the *Health Practitioners Registration and Other Legislation Amendment Act 2013* (Qld). However, for convenience, this judgment will identify the Act as the *Professional Standards Act*.

- [25] The appeal is therefore brought pursuant to s 346 of the *Professional Standards Act*.
- [26] Section 348 of the *Professional Standards Act* provided that an appeal to this court lies only in relation to a question of law. The appeal must be filed within 28 days after the appellant receives notice of the decision.¹⁵ However this court may, at any time, extend the period for filing the notice of appeal.¹⁶
- [27] It follows that if the court were to grant the application for an extension of time, no leave to appeal is required. The application for leave to appeal should therefore be refused.

Application for an extension of time

- [28] In support of this application the applicant relied on a 61 page affidavit filed 9 September 2014¹⁷ together with 39 exhibits. The respondent opposes the application.
- [29] The considerations relevant to an application to extend time were recently identified by this court in *Attorney-General for the State of Queensland v Barnes*¹⁸ where Atkinson J observed:

“There is an important public policy which underlines the time limits for filing an appeal. These were set out by Keane JA in *Spencer v Hutson*:¹⁹

‘The prescribed time limits for appeals serve the important purpose of bringing finality to litigation. They are not lightly to be ignored. An applicant for an extension of time for bringing an appeal must show that there is good reason for the court to relieve that party of the consequences of the expiration of the prescribed period for bringing an appeal. A demonstration that there is a good reason to extend time will usually involve an explanation for that party’s delay.’ (citations omitted)

The criteria the court will have regard to on an application to extend time were summarised by Muir J in *Beil v Mansell (No 1)*.²⁰ His Honour observed that the discretion is unfettered but must, like any discretion, be exercised judicially. The factors that may be taken account of include:

- the length of time that has elapsed since a notice of appeal should have been filed;
- a satisfactory explanation for the delay;
- any prejudice suffered by the respondent; and
- the merits of the substantive appeal.”

- [30] In the present application the delay (being approximately six years) is inordinately lengthy. The applicant concedes both in his written and oral submissions that the period of delay is significant.²¹ The applicant’s explanation for this delay is inadequate.

¹⁵ *Health Practitioners (Professional Standards) Act 1999* (Qld) s 349(3).

¹⁶ *Health Practitioners (Professional Standards) Act 1999* (Qld) s 349(4).

¹⁷ Affidavit of Craig Stephen Cook sworn 4 September 2014; appeal record book, 2487-2765.

¹⁸ [2014] QCA 152, [14]-[15].

¹⁹ [2007] QCA 178, [28], citing the judgment of Muir J in *Beil v Mansell (No 1)* [2006] 2 Qd R 199.

²⁰ [2006] 2 Qd R 199, [40], citing *Chapman v State of Queensland* [2003] QCA 172, [3]; *Queensland Trustees Ltd v Fawckner* [1964] Qd R 153.

²¹ Applicant’s outline of argument, [9]; transcript of proceedings, 31 July 2015, 1-8, lines 40-41.

- [31] Immediately following receipt of a copy of the Tribunal's judgment, the applicant sought legal advice.²² He was advised that it would not be in his interests to appeal. The applicant sought and on 2 March 2009 received certain written assistance from the Registry of the Court of Appeal concerning the instigation of any appeal.²³ In August 2009 he sought further legal advice from a firm of solicitors.²⁴
- [32] At or about this time the applicant was suffering from various health problems including a persistent major depressive illness which led to the applicant being granted a disability support pension.²⁵
- [33] On 2 June 2011, the applicant filed a claim and statement of claim in relation to the proceedings before the Tribunal.²⁶ In a letter dated 20 July 2011 the acting Assistant Crown Solicitor identified that the applicant's claim and statement of claim were an abuse of the court's process and that the issues sought to be agitated, if properly made, ought to have been the subject of an appeal to the Court of Appeal.²⁷ This advice was repeated in a letter received by the applicant on or about 17 January 2012.²⁸
- [34] Whilst the applicant's health problems and his lack of legal training may constitute an explanation for some of the delay, it does not explain the applicant's delay from 17 January 2012 to the filing of the application for an extension of time on 9 September 2014.
- [35] The length of the delay and the absence of a satisfactory explanation for the delay, (in particular for the period 17 January 2012 to 9 September 2014) do not in themselves impose "an insuperable obstacle to an extension of time".²⁹ The applicant submits that the merits of his appeal warrant an extension of time.
- [36] In his written outline the applicant identifies three "legal questions":
- (a) did the Tribunal comply with the requirements of natural justice?³⁰
 - (b) did the Tribunal delegate its decision-making function to Mr Dooley?³¹
 - (c) was there a reasonable apprehension of bias that Mr Dooley may not bring an independent and impartial mind to matters he provided comment on at the Tribunal?³²

The question posed in (c) above is premised on the question posed in (b) being answered in the affirmative.

- [37] As to the first legal question, the applicant submits that the Tribunal breached the rules of natural justice in a number of respects. First, the applicant submits that he was not informed of the case he had to meet either in terms of knowing what law he had breached nor the particulars of such breaches. This submission should be rejected.

²² Affidavit of Craig Stephen Cook sworn 4 September 2014, [285]; appeal record book, 2537-2538.

²³ Affidavit of Craig Stephen Cook sworn 4 September 2014, [286]; appeal record book, 2538.

²⁴ Affidavit of Craig Stephen Cook sworn 4 September 2014, [287]; appeal record book, 2538.

²⁵ Affidavit of Craig Stephen Cook sworn 4 September 2014, [289]; appeal record book, 2538.

²⁶ Affidavit of Craig Stephen Cook sworn 4 September 2014, [298]; appeal record book, 2540.

²⁷ Exhibit 21 to the affidavit of Craig Stephen Cook sworn 4 September 2014; appeal record book, 2698-2699.

²⁸ Affidavit of Craig Stephen Cook sworn 4 September 2014, [310]; appeal record book, 2542.

²⁹ *Beil v Mansell (No 1)* [2006] 2 Qd R 199, 207 [40] (Muir J).

³⁰ Applicant's outline of argument, [15]-[64].

³¹ Applicant's outline of argument, [65]-[80].

³² Applicant's outline of argument, [81]-[90].

The identified grounds for disciplinary action against the applicant were that he behaved in a way that constituted unsatisfactory professional conduct and that he breached certain undertakings. These breaches were admitted.

[38] “Unsatisfactory professional conduct” is a defined term in the Schedule to the *Professional Standards Act* and includes the following:

- (a) professional conduct that is of a lesser standard than that which might reasonably be expected of the registrant by the public or the registrant’s professional peers;
- (b) professional conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care, in the practise of the registrant’s profession;
- (c) infamous conduct in a professional respect;
- (d) misconduct in a professional respect;
- (e) conduct discreditable to the registrant’s profession;
- (f) providing a person with health services of a kind that are excessive, unnecessary or not reasonably required for the person’s wellbeing;
- (g) influencing, or attempting to influence, the conduct of another registrant in a way that may compromise patient care;
- (h) fraudulent or dishonest behaviour in the practise of the registrant’s profession;
- (i) other improper or unethical conduct.

[39] The Notice to Registrant about Referral dated 1 December 2005³³ stated that the grounds for disciplinary action were under s 124(1)(a) of the *Professional Standards Act* and particularised the unsatisfactory professional conduct by reference to paragraphs (a), (b), (d), (e) and (i) of the above quoted definition. The Amended Referral Notice identified and particularised nine grounds of unsatisfactory professional conduct.³⁴ The grounds for disciplinary action and the particulars of those grounds were therefore communicated to the applicant for the purposes of the referral of the applicant by the Psychologists Board of Queensland to the Tribunal.

[40] The applicant’s submission may be better understood by reference to his written submissions in reply and his oral submissions. The applicant identifies the “most critical issue” upon which the entire appeal rests as being the relevant provisions of the APS Codes.³⁵ The applicant submits that by not enforcing s 374 of the *Professional Standards Act* or the APS Code of Ethics consistently when the need arises results in “public harm”.³⁶

[41] Section 374(1) of the *Professional Standards Act* provides that a board may develop codes of practice, or adopt another entity’s code of practice, to provide guidance to its registrants as to appropriate professional conduct or practice. Section 374(3), however, provides that a code of practice or an amendment of a code of practice has no effect until it is approved by the Minister by gazette notice. Section 376(1) provides that a code of practice developed or adopted by a board and approved under s 374 is admissible as evidence in disciplinary proceedings brought by the board against one

³³ Exhibit 1 to the affidavit of Craig Stephen Cook sworn 4 September 2014; appeal record book, 2549-2550.

³⁴ *Psychologists Board of Queensland v Cook* [2008] QHPT, [2]; appeal record book, 2124-2125.

³⁵ Applicant’s reply submissions, [6], [29]-[41]; transcript of proceedings, 31 July 2015, 1-22, lines 7-19.

³⁶ Applicant’s reply submissions, [31].

of its registrants under the *Professional Standards Act*. Section 376(2) provides that the code may only be used to provide evidence, in the disciplinary proceedings, of appropriate professional conduct or practice for the profession.

- [42] Section 219 details the procedure for hearing by the Tribunal. The Tribunal, whilst it must comply with natural justice, is not bound by the rules of evidence and may inform itself of anything in the way it considers appropriate.³⁷ Section 240(2)(a), however, requires the Tribunal in making a decision about whether a registrant has behaved in a way that constitutes unsatisfactory professional conduct to have regard to any relevant codes of practice. The term “code of practice” is defined in the Schedule to the *Professional Standards Act* to mean a code of practice approved by the Minister under s 374(3).
- [43] It is common ground that the APS Code of Ethics had not been approved by the Minister pursuant to s 374(3). The effect of these provisions is that the Tribunal was entitled, but not required, to have reference to the APS Code of Ethics for the purposes of assessing whether the applicant had behaved in a way that constituted unsatisfactory professional conduct. Given that there was no legislative mandatory requirement for the Tribunal to have regard to the Code of Ethics it cannot be accepted that the grounds for disciplinary action had to be particularised by alleged breaches of the APS Code of Ethics.
- [44] The correct approach to the application of the APS Code of Ethics, and indeed the expert evidence of Mr Dooley, is that identified by Chesterman J (as his Honour then was) in *Psychologists Board of Queensland v Robinson*:³⁸

“The question for the Tribunal was whether the appellant had engaged in unsatisfactory professional conduct, as particularised in the reference. The answer was to be found by the test described in the cases. It is the test which the Tribunal did apply. Whether the appellant’s conduct, the subject of the referral, was of a lesser standard than that to be reasonably expected by the appellant’s peers, or was discreditable to her profession, or was unethical, was, obviously a question of fact to be determined on the evidence. The Tribunal had evidence before it, principally from Dr Dooley, that the appellant’s conduct did satisfy that description. Both Dr Dooley, and the Tribunal, relied upon the contents of the APS code and the Position Statement. There can be no possible objection to this use of the APS code, or the Position Statement, by the Tribunal. It is to miss the point entirely to say that neither document was ‘binding’ on the appellant by force of law. The point is that psychologists of good repute and standing regarded the rules in question, the APS code and Position Statement concerning sexual relationships between psychologists and former patients, as setting forth standards to which they, as professionals, should adhere. They regarded those rules as ‘binding’ on themselves and their conduct notwithstanding that the rules had no statutory force and breach of them could not result in a prosecution. This is the very nature of an ethic. It is a voluntarily observed rule which is obeyed because obedience to it is seen to be good for the reputation of the profession and the proper performance of its members’ functions.”

³⁷ *Health Practitioners (Professional Standards) Act 1999* (Qld) ss 219(1)(a), (c), (d).
³⁸ [2004] QCA 405, [24].

[45] As observed by Chesterman J, even a contravention of any of the provisions of a code developed under s 374 could not result in a prosecution brought under the *Justices Act* 1886 (Qld). The only legal consequence of the development of a code of practice and its approval by the Minister and subsequent gazettal is that the process provides definitive evidence of what constitutes ethical and proper professional conduct for psychologists.³⁹ Accordingly, where a code has not been adopted and gazetted in accordance with s 374, the content of the rules of ethics for a profession have to be established “by less certain means of proof”.⁴⁰ In the present case the respondent’s means of proof was through the report and evidence of Mr Dooley and the tendering into evidence of the relevant APS Code and Guidelines.

[46] The second aspect in which the applicant submits the Tribunal breached the rules of natural justice is that he was denied a right to be heard. Before the Tribunal the applicant sought to cross-examine certain witnesses as to the propriety of the investigation into the applicant’s conduct and whether there had been compliance with the *Professional Standards Act* in the establishment of the Professional Conduct Review Panel. That panel considered only whether to refer the matter to the Tribunal as requested by the applicant. Having read the transcript of the proceedings before the Tribunal it is evident that the learned primary Judge viewed such lines of inquiry in cross-examination as irrelevant to the issues to be determined by the Tribunal. Given the limited nature of what the Tribunal was determining, namely whether the applicant’s conduct constituted unsatisfactory professional conduct, his Honour’s rulings in these respects were correct. As stated by the learned primary Judge to the applicant:⁴¹

“... this Tribunal isn’t here to investigate the investigator, you see.
We’re here to decide this on the evidence that’s before us.”

[47] The applicant also alleges that the respondent’s legal representatives communicated privately with the learned primary Judge regarding the hearing.⁴² There is no basis for such an allegation. The allegation appears to be based on the following exchange between the learned primary Judge and counsel for the respondent on the second day of hearing:⁴³

“HIS HONOUR: All right. Can I just confirm, whilst that’s being attended to, Mr Cook, that you do not require [patient LAL] for cross-examination?

REGISTRANT: Your Honour, I’ve treated [patient LAL] for some period of time and-----

HIS HONOUR: Yes, I know.

REGISTRANT: And I’m not comfortable.

HIS HONOUR: Well, it’s entirely a matter for you but I’m told by Ms Gallagher that you no longer require her for cross-examination. Is that right?

REGISTRANT: Yes.”

³⁹ *Psychologists Board of Queensland v Robinson* [2004] QCA 405, [21].

⁴⁰ *Psychologists Board of Queensland v Robinson* [2004] QCA 405, [21].

⁴¹ Transcript of proceedings, 2 June 2008, 20, lines 6-8; appeal record book, 20.

⁴² See generally the affidavit of Craig Stephen Cook sworn 4 September 2014, [93]-[94]; appeal record book, 2401-2402.

⁴³ Transcript of proceedings, 3 June 2008, 4, lines 40-55; appeal record book, 99.

- [48] A further passage relied on by the applicant in this respect occurred on day three of the hearing:⁴⁴

“HIS HONOUR: Right. Now, Ms Gallagher tells me that you’ve indicated that there may be some matters you want to think about.”

- [49] When one has regard to the statements in context it is readily apparent that the learned primary Judge’s knowledge of these matters arose from statements made in open court by counsel for the respondent.⁴⁵

- [50] The third aspect in which it is alleged the Tribunal breached the rules of natural justice is that the “relevant statutory instruments” were not before the Tribunal. From the applicant’s written submissions it would appear that the reference to the “relevant statutory instruments” is a reference to the APS Code of Ethics. As previously stated, this Code of Ethics was referred to in the expert report of Mr Dooley, admitted into evidence as part of Exhibit 8 and cited in the Reasons. If, however, the applicant’s submission is to be understood as suggesting that the Tribunal should not have had reference to the APS Code of Ethics because it was not approved by the Minister by gazetted notice pursuant to s 374(3) of the *Professional Standards Act*, then the submission is misconceived.

- [51] This misconception flows through to the second legal question identified by the applicant, namely did the Tribunal delegate its decision-making function to Mr Dooley? Mr Dooley was requested to provide a report about the professional standards of the respondent in the proceedings.⁴⁶ Mr Dooley noted the respondent endorses the APS Code of Ethics and Guidelines. In its registration kit to psychologists, the respondent draws attention to this Code and advises probationary and general registrants that it uses these documents as a guide in its expectations of psychologists to act ethically. Mr Dooley also stated that the APS Code of Ethics and Guidelines are recognised by psychologists of good repute and competence in Australia as a predominant guide to the standards of conduct for practitioners in the profession of psychology.⁴⁷ He also referred to the fact that the application of the APS Code of Ethics in consideration of the behaviour of psychology registrants in Queensland carries the authority of the Queensland Court of Appeal in *Psychologists Board of Queensland v Robinson* [2004] QCA 405.⁴⁸ Mr Dooley’s report proceeds on the basis that the particulars of each ground would be established. Whether the factual basis for the particulars of each ground was established remained a matter for the Tribunal.

- [52] Mr Dooley was called as a witness and was available for cross-examination by the applicant. The Tribunal accepted the evidence of Mr Dooley including the following evidence in respect of ground 1:⁴⁹

- “• The discussions by the registrant of his personal life, particularly his marital and drinking problems, went well beyond the levels of a conventional psychotherapy practice. Indeed the purpose of such discussions appeared to be to meet the registrant’s need to a significant degree.

⁴⁴ Transcript of proceedings, 4 June 2008, 61, lines 43-45; appeal record book, 182.

⁴⁵ See transcript of proceedings, 3 June 2008, 2, lines 23-24; appeal record book, 97; transcript of proceedings, 4 June 2008, 61, lines 7-13; appeal record book, 182.

⁴⁶ Affidavit of Roger Thomas Dooley sworn 23 April 2008, [3]; supplementary appeal record book, 1.

⁴⁷ Exhibit RTD2 to the affidavit of Roger Thomas Dooley sworn 23 April 2008, 4; supplementary appeal record book, 19.

⁴⁸ Exhibit RTD2 to the affidavit of Roger Thomas Dooley sworn 23 April 2008, 4; supplementary appeal record book, 19.

⁴⁹ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [19]; appeal record book, 2133.

- The establishment of a social relationship complicated and confused the treating relationship both during and after its termination. The registrant knew of RMH's vulnerability and failed in his responsibility to establish clear boundaries in respect of both current and past treatment contact.
- For the registrant to have resided with RMH at a time when RMH was receiving treatment from the registrant or at least from the registrant's employee and supervisee Ms Sleep, represented a clear boundary violation.
- The borrowing of money from a former client and the offer to purchase a share of the registrant's practice represented an ethical violation and a breach of the obligation owed by the registrant to RMH."

[53] The Tribunal was entitled to have regard to the APS Code of Ethics and Guidelines. It made no error in accepting the evidence of Mr Dooley. As a longstanding, experienced psychologist Mr Dooley was able to identify professional conduct that was of a lesser standard than that which might reasonably be expected of the applicant by his professional peers.⁵⁰ The applicant has not demonstrated any error in this respect.

[54] As the third legal question identified by the applicant, posed in (c) above, is premised on an affirmative answer to the question posed in (b), it is strictly unnecessary to further consider this question. In any event, the question as to whether or not there was a reasonable apprehension of bias in respect of Mr Dooley misunderstands his role. His report constituted evidence before the Tribunal. He was not the decision-maker. Any association that Mr Dooley may have had with the Chair and Deputy Chair of the respondent is irrelevant. The merits of the appeal do not therefore justify the granting of an extension of time.

[55] The respondent also submits that it is prejudiced by the extensive delay, given the need, if the matter is set for a new hearing, to locate and proof witnesses and incur the significant expense of preparing for a further hearing. The respondent is a statutory body with funding sourced solely from registration fees with no expectation of any additional or ongoing Government funding.⁵¹ The applicant, in his written submissions, did not address the issue of prejudice. The applicant did however, in oral submissions, concede that the issue of prejudice is a significant one.⁵² The applicant submits that any re-hearing would primarily concern the questions of law he has raised rather than any further challenge to witnesses' evidence. Given the nature of the legal questions identified by the applicant, it is evident that this concession would not extend to challenging the expert evidence of Mr Dooley. It must be accepted that, given the lengthy delay of approximately six years, the respondent will suffer real prejudice if the appeal was successful and a re-hearing ordered.

[56] Given the combination of the inordinate delay, the applicant's poor prospects of success on appeal and the prejudice to the respondent, it is appropriate that the application for an extension of time within which to bring the appeal be refused.

The applications to adduce further evidence

[57] It is convenient to first deal with the second application to adduce further evidence filed on 10 August 2015. This was filed after the Court had heard the other applications.

⁵⁰ *Health Practitioners (Professional Standards) Act 1999* (Qld), Schedule (a) (definition of "unsatisfactory professional conduct").

⁵¹ Respondent's outline of argument dated 12 June 2015, [20].

⁵² Transcript of proceeding, 31 July 2015, 1-13, lines 9-10.

Upon proper analysis of the applicant's affidavit filed 10 August 2015, it is readily apparent that this application is not one to adduce further evidence. The material exhibited to the affidavit takes the form of detailed written submissions. Even though the applicant's filed written submissions address the merits of the appeal, he asserts that he misunderstood the nature of the hearing before this Court believing that he would have a further opportunity to more fully address the merits of the appeal.⁵³ The notes exhibited to the applicant's affidavit seek to expand upon matters already identified in paragraphs 12, 30 and 84 to 87 of his filed written submissions. Exhibits 6 to 12 of his affidavit constitute notes he prepared to assist the Court in explaining a number of questions, including the length of delay and the reason why he did not cross-examine Mr Dooley. A number of these matters have already been addressed at length in both his filed written submissions and his very lengthy affidavits in support of the various applications. The contents of these further notes do not, in my view, enhance the applicant's prospects of success on appeal. Further, the notes constitute submissions and arguments rather than evidence. Accordingly, the application should be refused.

- [58] As to the application to adduce further evidence filed 9 September 2014, there are two aspects that need to be considered. In paragraphs 1 to 11 of his affidavit the applicant seeks to lead evidence as to the relevant Code of Ethics and related documents.⁵⁴ The applicant exhibits the APS Code of Ethics dated 2 October 1999, 4 October 2003 and May 2005. In oral submissions the applicant suggested that Mr Dooley referred incorrectly to the 2007 APS Code of Ethics rather than to the version of the Code applicable to the applicant's alleged conduct. The applicant should not be permitted to adduce this evidence. First, the various versions of the APS Code of Ethics were available to the applicant at the time of the hearing in 2008. Secondly, the applicant could have, but did not cross-examine Mr Dooley in relation to the applicable APS Code of Ethics. Thirdly, and most importantly, the applicant has not demonstrated that Mr Dooley or the Tribunal had reference to the wrong 2007 version of the APS Code of Ethics. The version of the APS Code of Ethics to which Mr Dooley referred is identified as being:⁵⁵

“Code of Ethics, the Australian Psychological Society (APS), October 1999, Revised October 1999, Revised September 2002, Revised October 2003 (the Code)”.

- [59] This is the same Code referred to by the Tribunal at [18] of the Reasons.⁵⁶ The provisions referred to by the Tribunal, namely section B(7), section B(8) and section B(18) are all references to the provisions of this Code.⁵⁷

- [60] In the preface to the APS Code of Ethics the relevant version is identified as follows:⁵⁸

“4 October 1997; revised 2 October 1999; reprinted April 2001; revised 29 September 2002; reprinted December 2002; revised 4 October 2003; reprinted February 2004; reprinted May 2005.”

⁵³ Affidavit of Craig Stephen Cook sworn 7 August 2015, [2].

⁵⁴ Exhibits 1-5 to the affidavit of Craig Stephen Cook sworn 25 July 2015.

⁵⁵ Exhibit RTD2 to the affidavit of Roger Thomas Dooley sworn 23 April 2008, 4; supplementary appeal record book, 19.

⁵⁶ *Psychologists Board of Queensland v Cook* [2008] QHPT 4, [18]; appeal record book, 2133.

⁵⁷ Exhibit 8, source documents for Roger Dooley's report, APS Code of Ethics; appeal record book, 2012-2013.

⁵⁸ Exhibit 8, source documents for Roger Dooley's report, APS Code of Ethics; appeal record book, 2009.

The mere fact that the Code was reprinted in 2004 and 2005 does not demonstrate that Mr Dooley or the Tribunal relied on the wrong version of the Code. The Code in any event is simply one evidentiary aid in assisting the Tribunal in determining whether in all the circumstances the applicant's behaviour constituted unsatisfactory professional conduct within the meaning of the *Professional Standards Act*.

[61] The second aspect of the applicant's application to adduce further evidence is that the evidence identified in his affidavit, namely certain financial records and correspondence,⁵⁹ were all documents available to the applicant at the time of the hearing before the Tribunal. The applicant in oral submissions submitted that even though he had disclosed these documents for the purposes of the hearing before the Tribunal, he did not understand that he was required to tender these documents.⁶⁰ Not only were these documents available to the applicant at the time of the hearing, he had every opportunity to put these documents to witnesses in cross-examination. Further, having considered the further evidence, it does not in my view enhance the applicant's prospects of success on appeal.

[62] This application should also therefore be refused.

Disposition

1. The application for leave to appeal is refused.
2. The application for an extension of time within which to appeal is refused.
3. The applications for leave to adduce further evidence are refused.
4. The applicant pay the respondent's costs of and incidental to each application.

⁵⁹ Including correspondence going to the issue of the alleged bias of Mr Dooley.

⁶⁰ Transcript of proceedings, 31 July 2015, 1-4, lines 1-8.