SUPREME COURT OF QUEENSLAND

CITATION:	*In the matter of an application for admission as a legal practitioner by JY* [2016] QCA 324
PARTIES:	**JY** (applicant) **v** **LEGAL PRACTITIONERS ADMISSIONS BOARD** (respondent)
FILE NO/S:	Appeal No 12252 of 2016 SC No 769 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Admission
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2016
JUDGES:	Holmes CJ and Dalton and North JJ Judgment of the Court
ORDER:	**The application for admission to the legal profession is refused.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – QUALIFICATIONS AND ADMISSION – FIT AND PROPER PERSONS – where the applicant applies for admission as a legal practitioner – where the applicant has met the academic and practical training requirements for admission – where the applicant failed to disclose to the Legal Practitioners Admissions Board all matters relating to his suitability for admission – whether the applicant is a fit and proper person to be admitted to the legal profession in Queensland *Legal Profession Act* 2007 (Qld), s 9(1)c), s 31, s 32, s 34, s 35(1)(a) *Supreme Court (Admission) Rules* 2004 (Qld) *Ex parte Lenehan* (1948) 77 CLR 403; [1948] HCA 45, cited
COUNSEL:	W Sofronoff QC for the applicant P Mylne for the respondent
SOLICITORS:	No appearance for the applicant Legal Practitioners Admissions Board for the respondent

[1] **THE COURT:** On 20 October 2014, the applicant filed an application for admission to the legal profession under s 34 of the *Legal Profession Act* 2007. Section 35(1)(a)

of the Act gives this Court a discretion to make an order admitting an applicant as a legal practitioner if it is satisfied that he or she is eligible for admission and is a fit and proper person to be admitted.[1] In deciding whether that is the case, the Court must consider suitability matters and any other matters considered relevant; although the Court may consider a person to be fit and proper, notwithstanding the existence of suitability matters, because of the surrounding circumstances.

The Legal Practitioners Admissions Board's opposition to the application

[2] The Legal Practitioners Admissions Board has opposed the applicant's admission, advancing these reasons:

1. The applicant committed criminal offences in 2000 and 2005, some of which entailed dishonesty.

2. In 2005, while serving in the Australian Defence Force, the applicant committed military offences, entailing dishonesty.

3. The applicant failed to disclose to the Board all matters relating to his suitability for admission until the provision of his third supplementary affidavit sworn on 15 January 2015.

4. In an affidavit sworn on 15 January 2015, the applicant made a statement inconsistent with statements made in later affidavits sworn on 21 August 2015 and 14 July 2016, in respect of his failure to disclose matters relevant to suitability.

The affidavit filed on 31 October 2014

[3] The applicant, who is 34 years of age, graduated with a Bachelor of Laws degree in March 2014. On 31 October 2014, he filed an affidavit in support of his application for admission in which he disclosed, as matters which could bear adversely on his suitability for admission, two sets of criminal offences. The first comprised two offences of larceny, committed in 2000 when he was 19 years old. He was dealt with in a Magistrates Court in another State and no convictions were recorded. A second group of offences was committed in April 2005, in a single series of events. That offending consisted of two offences under the *Police Powers and Responsibilities Act* of failing to stop a vehicle and obstructing a police officer, two offences of trespass, one offence of unlawful use of a motor vehicle and one offence of dangerous operation of a vehicle, as well as one traffic offence of driving under the influence of liquor. All were dealt with in the Magistrates Court. The applicant was placed on probation for two years without a conviction being recorded and disqualified from holding or obtaining a driver's licence for 15 months. He was then 23 years old. He explained in his affidavit that when the offences occurred he was in a "tumultuous long-distance relationship", which had ended shortly after April 2005, and it was a time in which he had lacked maturity. In that affidavit, the applicant also disclosed traffic offence histories from South Australia and Queensland. No further suitability matters were mentioned.

The affidavit filed on 10 November 2014

[4] Shortly after that affidavit was filed, the Secretary of the Board telephoned the applicant and advised him that it was necessary for him to give a summary of the circumstances

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[1] Section 31 of the *Legal Profession Act* 2007 provides that a person is suitable for admission only if he or she is a fit and proper person to be admitted.

surrounding the offences he had disclosed. As a result, on 10 November 2014 the applicant filed a supplementary affidavit in which he explained, in relation to the 2000 offences, that he had entered pleas of guilty to one count of larceny of a pizza and one count of larceny of a spark plug from a service station. In relation to the April 2005 offences, he had entered pleas of guilty in February 2006. He elaborated to the extent of saying that his blood alcohol content in relation to the driving under the influence of liquor charge was 0.101; the stolen vehicle was a Holden Commodore; the failure to stop charge concerned his continuing to drive for about 600 metres after police had activated a siren; the dangerous operation was driving erratically; the obstruct charge involved his leaving the vehicle and running away; and the trespass, his entering a stranger's front yard. He had written letters of apology to the owner of the vehicle, which was not damaged, and to the owner of the yard he had entered. This was, he said, a turning point in his life; subsequently he had completed four years of service in the Australian Defence Force.

The affidavit filed on 17 November 2014

[5] On 17 November 2014, an employee of the Board telephoned the applicant advising him that he would need to provide, inter alia, a transcript of proceedings and further particulars in relation to the 2005 Queensland offences. In response, the applicant prepared a further supplementary affidavit which he read, in draft form, to the Board's employee over the telephone. In this affidavit, which was sworn and filed that day, he said that he had been posted to Townsville with the Australian Defence Force on 30 September 2004. On 16 April 2005, he went drinking with others and became extremely intoxicated, something he attributed to missing his girlfriend, whom he was not able to see at that time. Leaving the tavern where he had been drinking, he was unable to find a taxi. He stole a car parked nearby, with the intention of driving it back to barracks. A police vehicle began to follow him, and the sequence of events described in his earlier affidavit took place. The applicant repeated in this affidavit that he had written letters of apology, and deposed that he was remorseful for his actions and had "been a law abiding citizen since this offending". According to the applicant, in a subsequent affidavit of 15 January 2015, the Board's employee, having heard the contents of the draft affidavit, said that it was "more than what was required".

[6] As it transpired, the Board resolved to oppose the applicant's application for admission because: he had not provided full and frank disclosure, giving information on a piecemeal basis after various requests; the offences disclosed occurred six years apart, were serious and involved dishonesty; there was an apparent inconsistency between assertions about his relationship as at April 2005 as between his affidavits of 31 October 2014 and 17 November 2014;[2] he had not disclosed whether the Australian Defence Force had taken any disciplinary action against him in respect of the 2005 offences; and copies of his Australian Defence Force personnel file and sentencing remarks relating to the 2005 offences were required.

The affidavit filed on 20 January 2015

[7] As a result, the applicant filed yet another supplementary affidavit on 20 January 2015. He set out the history of his dealings with the Board and pointed out that he had only twice been asked to provide further information and in each case had done so promptly; he denied, therefore, that information had been provided on a "piecemeal

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[2] This seems to have involved a misreading of the relevant statements; at any rate, the Board no longer makes this criticism of the applicant's material.

basis after various requests". As to the reference to the offences being serious and involving an element of dishonesty, he provided a copy of the Magistrate's sentencing remarks in 2006, which recorded his remorse; noted that he had previously been advised that the 2000 offences were not of concern to the Board; and submitted that the fact he had committed no other offences since 2005 indicated that he had learnt his lesson. He denied any inconsistency between affidavits. To the question whether any disciplinary action had been taken against him in respect of the 2005 offences, he responded that he had received a formal warning. He said that he had not previously exhibited his Australian Defence Force personnel file because he was confused by the Board's previous advice that he had provided "more than what was required", even though he had disclosed that he had been a soldier.

[8] The applicant provided a copy of his file, which included his service history and the reasons for his 2008 termination, which occurred principally because he had been convicted of four military offences, two of signing false service documents and two of obtaining financial advantage, although the April 2005 offences were also taken into account in the reasons for termination. The military offences related to misuse of cab charge vouchers on two separate occasions over a one-week period in September 2005. The vouchers were issued to enable the applicant to travel by taxi between the airport and his home when he was on leave; instead he had used them in each case to take taxis from a hotel to his home. Those incidents had, he deposed, occurred at a time when he was involved in a long distance relationship and as a 23 year old was away from his home for the first time.

[9] On 27 January 2015, the Board resolved once more to oppose the applicant's application for admission, this time on the basis that he had not disclosed all suitability matters until the recent affidavit and then only as a result of the Board's enquiries; that the matters now disclosed were serious and went to his suitability; and that he had not met the standard of honesty and candour expected of an applicant for admission. The applicant was advised accordingly by letter dated the following day.

The application for a suitability declaration and the affidavits served in August 2015

[10] For a five month period in 2014, the applicant had undertaken work experience for the purposes of obtaining his Diploma in Legal Training with the Aboriginal and Torres Strait Islander Legal Service in Townsville. In March 2015, he began again to work full-time at the service on an unpaid basis. In June 2015, it appears he made further enquiries about admission. A Board employee suggested to him that he could apply under s 32 of the *Legal Profession Act* for a declaration that the matters he disclosed would not, without more, adversely affect the Board's assessment of his suitability for admission. That advice was mistaken; the procedure is, in fact, only available prior to the making of an application for admission and was not apposite here.

[11] The applicant made the application and provided the Board with an affidavit, sworn on 21 August 2015, in which he set out the history of his offending with details of how it had occurred. He pointed out that all his offending (other than the 2000 incidents) had occurred in a five month period in 2005. He acknowledged that he had demonstrated a lack of understanding of what was required by way of disclosure and that he had "demonstrated a serious and reckless lack of attention to [his] duties of honesty and candour". He said that he had been worried that his military offences, in combination with the criminal offences, might prevent his admission and had therefore decided not to disclose the military offences. He apologised to the Board and the court for not disclosing relevant material and acknowledged that it was his

duty to do so. He had had discussions with two senior practitioners at the Aboriginal and Torres Strait Islander Legal Service who had given him an insight into his duties and provided him with mentoring. He was still working on a voluntary basis at the Service, which meant that his fiancée had to support him.

[12] The applicant also provided the Board with affidavits from two senior lawyers working for the Aboriginal and Torres Strait Islander Legal Service in Townsville: Mr O'Dea, its regional manager, and Mr Scott, its principal family lawyer. Both confirmed that he had revealed the circumstances relating to the refusal of his admission. Mr O'Dea said that, on the basis of his involvement with the applicant, he had concluded that he was a fit and proper person for admission as a legal practitioner and would recommend consideration of his employment if a position were available. Mr Scott said that he believed that the applicant now realised the importance of his duty of candour generally and specifically in respect of his application for admission. He believed that the applicant would appropriately be found to be a fit and proper person for admission as a practitioner.

[13] In September 2015, the Board decided to refuse to make the declaration and the applicant appealed that decision. In June 2016, when it came on for hearing before this court, it was recognised that the application under s 32 was misconceived. The appeal was, consequently, dismissed by consent and the application for admission adjourned to 1 August 2016. The court made some observations about the appropriateness of further updating material, particularly in relation to any prospective mentoring of the applicant.

The affidavit filed on 20 July 2016

[14] The applicant filed a further affidavit in support of his renewed application for admission on 14 July 2016. In it, he deposed that he had been forced to give up volunteering for the Aboriginal and Torres Strait Islander Legal Service in November 2015 because of his mother's terminal illness. Since that time he had been living between New Zealand (where she was hospitalised) and Townsville, working in non-legal roles. His intention was still to return to Townsville and marry his fiancée. In relation to his past affidavits he said once more that he had not disclosed the military offences because he was afraid that they, in combination with the criminal offences, might prevent his admission. Although he had previously said that the reason for non-disclosure was his confusion by the Board employee's advice that he had provided "more than what was required", he now acknowledged that he had seen that statement as providing an opportunity not to disclose relevant information. Since then he had read cases about admission requirements, discussed matters with Mr O'Dea and Mr Scott and sought their guidance during his period of working at the Service, and sought professional counselling from a psychologist. He believed that he had matured in the last year, partly because of his mother's illness and the time he had had to reflect on his conduct. He believed he could now meet the ethical obligations of a lawyer and recognise when he ought to seek advice from a more experienced practitioner.

[15] The applicant also filed in support of his application an affidavit by Mr Scott saying that he was willing to continue to provide guidance and support to the applicant on legal and ethical issues, particularly if he were admitted as a legal practitioner, and an affidavit from Mr Collins, a very senior and experienced barrister, who, although not personally acquainted with the applicant, said that he would be prepared to be a mentor for him as long as was needed.

The Board's reasons for opposing the admission

[16] The Board made the following points about the applicant's conduct. Firstly, all three sets of offences contained elements of dishonesty. Secondly, although the applicant had disclosed the April 2005 offences in his first affidavit filed on 31 October 2014, he had not provided any detail of them and in his second affidavit filed on the 10 November 2014 he had given only limited information. It was not until his third affidavit, filed 17 November 2014, that he had made proper disclosure. Thirdly, in his affidavit of 17 November 2014 the applicant deposed that he had been a law abiding citizen since the April 2005 offending. That was not so, because the military offences involving cab-charge vouchers occurred in September 2005 and, plainly enough, post-dated the April offences. Fourthly, the applicant had deliberately failed to disclose the military offences because he appreciated the risk that if he did so he would not be admitted.

[17] Fifthly, in his affidavit filed on 20 January 2015, the applicant claimed to have desisted from exhibiting his Australian Defence Force file because he was confused by the Board representative's advice that he had provided "more than what was required", but he had subsequently acknowledged (in his affidavit filed on 14 July 2016) that he had taken advantage of that statement as justifying a failure to disclose the military offences. In any event, the Board's employee could hardly have absolved him of the responsibility to disclose the military offences, of which she knew nothing, and the applicant had already filed two affidavits by the time of that conversation, in which he had not disclosed the offences.

[18] And, finally, it could not be said that the applicant had demonstrated a change of character. The Board pointed to the observation in *Ex parte Tziniolis; Re The Medical Practitioners Act*,[3] approved in *Prothonotary of the Supreme Court of New South Wales v Livanes*,[4] that reformations of character and of behaviour were exceptional rather than usual and that where an individual had demonstrated "serious deficiencies in his standards of conduct and his attitudes", it would require "clear proof" to show that he or she had changed.[5]

Discussion

[19] In the present applicant's case, the relevant suitability matters under s 9 of the Act are, whether he is currently of good fame and character;[6] the significance of his previous convictions,[7] given the nature of the offences, the length of time since they were committed, and his age at the time; and the fact that he has been the subject of a disciplinary action in another occupation involving a finding of guilt.[8] His lack of candour in the affidavits he provided in support of his application for admission is, obviously, also a relevant matter.

[20] The Court's role in determining who should be admitted is not punitive; it is to protect the public interest and the interests of the profession.[9] The question of fitness

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3 (1966) 67 SR (NSW) 448.

4 [2012] NSWCA 325 at [35].

5 *Ex parte Tziniolis* at 461.

6 Section 9(1)(a). "Fame" is concerned with the applicant's reputation in the community, while "character" is a reference to his or her "actual nature"; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320 at [17].

7 Section 9(1)(c).

8 Section 9(1)(g)(ii).

9 *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 251; *Gregory v Queensland Law Society Incorporated* [2002] 2 Qd R 583 at 587.

> "is not one of law to be determined by reference to previous decisions. The duty of the court is to determine in what manner the court should exercise its discretion in the particular circumstances of each case. Generalizations relating to questions of character and moral fitness… should not be treated as if they were propositions of law".[10]

[21] The 2000 and 2005 offences would not, without more, preclude a finding that the applicant was now a fit and proper person for admission. The Board has pointed to a statement in *Re Owen*[11] to the effect that convictions for dishonesty will be viewed as disqualifying because

> "[s]uch criminal conduct will necessarily provide such an indication of human frailty or defect of character as is incompatible with membership of the legal profession".[12]

There are, not surprisingly, some qualifications to that statement; the High Court of New Zealand refers to that being particularly the case in relation to convictions for dishonesty resulting in a sentence of imprisonment and those which have occurred in the course of a person's professional life.

[22] Section 9(1)(c) of the *Legal Profession Act* 2007, in its reference to the age of the individual of the time of the offending and the lapse of time since, recognises the significance of immaturity and the possibility of reform. It acknowledges, in effect, that

> "…the false steps of youth and early manhood are not always final proof of defective character and unfitness. The presumption which, according to circumstances, they may appear to raise may surely be overcome by a subsequent blameless career".[13]

[23] The 2000 offences were, on any view, trivial. Indeed, they do not appear to be recorded on the South Australian police database. The April and September 2005 offences occurred in early adulthood, four years before the applicant commenced the study of law, and entailed nothing premeditated or studied. To the contrary, they were in each case opportunistic and committed under the influence of alcohol. It is now a decade since the last of the conduct in question occurred. There is no suggestion there has been any further event of the kind. It is reasonable to conclude that the behaviour entailed in these offences was the product of immaturity, and is most unlikely to be repeated. They are not necessarily an indicator of the applicant's present character.

[24] Far more serious is the applicant's failure to meet his duty of candour. The way in which the 2000 and April 2005 offences were dealt with in the first two affidavits may not bespeak anything more than a failure to appreciate the level of detail required. The breach which puts the applicant's fitness in question is his failure to disclose the military offences in the three affidavits filed in October and November 2014, relevant to which was his statement that he had been a "law-abiding" citizen since committing the April 2005 offences, and his attempt, when he did in January 2015 provide a copy of his Australia Defence Force file, to justify his previous failure to do so with the argument that he had been "confused" by the advice of the Board's employee.

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10 *Ex parte Lenehan* (1948) 77 CLR 403 at 422.
11 [2005] 2 NZLR 536.
12 At 543.
13 *Ex parte Lenehan* (1948) 77 CLR 403 at 424.

[25] An applicant for admission must approach the Board and, in turn, 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".[14]

Notwithstanding that a person guilty of a serious offence may demonstrate a change in character, a pre-requisite for admission remains

> "a complete realization by the party concerned of his obligation of candour to the court in which he desired to serve as an agent of justice".[15]

Also relevant in this connection is this statement by Mahoney JA in *Dawson v Law Society of New South Wales*,[16] cited with apparent approval in *Livanes*,

> "Repentance is relevant, at least in the ordinary case, because it assists the conclusion that the applicant had left his previous standards or values and adopted more appropriate ones. Without that, his conduct in the future is unlikely to be acceptable".

[26] The applicant knowingly desisted from disclosing the military offences and, having been forced to do so, attempted to justify his behaviour on an entirely specious basis. In his affidavit of 21 August 2015, he acknowledged that his failure to disclose the military offences was not inadvertent, but the product of a deliberate decision. That he made that acknowledgement suggests some appreciation of his obligation of candour; but, significantly, it was not until July this year that the applicant admitted the disingenuousness of his claimed reason for non-disclosure (that the Board's employee had caused confusion).

[27] There are encouraging signs that the applicant may have undergone a change in his attitude and behaviour. He has demonstrated a degree of commitment to the law and its values by working unpaid in a full-time role at the Aboriginal and Torres Strait Islander Legal service for eight months in 2015, until his mother's illness intervened. In doing so, he has received useful mentoring from both Mr O'Dea and Mr Scott, who particularly have made clear to him the importance of the obligation of candour, and he has expressed willingness to continue to seek appropriate guidance from senior practitioners. Notwithstanding, the seriousness of the applicant's past conduct in withholding information about his record of dishonesty and the recency of his recognition of the candour owed to the Court mean that the Court cannot presently be satisfied that he has demonstrated a change of character such that he could properly be found at this time a fit and proper person for admission as a legal practitioner.

Order

[28] The application for admission to the legal profession is refused.

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14 *Re Hampton* [2002] QCA 129 at [26].
15 *In re Davis* (1947) 75 CLR 409 at 426.
16 [1989] NSWCA 58.