SUPREME COURT OF QUEENSLAND

CITATION:	*Quinn v Legal Services Commissioner* [2016] QCA 354
PARTIES:	**MICHAEL JAMES QUINN** (applicant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO/S:	Appeal No 6984 of 2016 QCAT No 182 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time Appeal *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2015] QCAT 85
DELIVERED ON:	23 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2016
JUDGES:	Fraser and Philip McMurdo JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the applicant the necessary extension of time within which to appeal.** **2. Allow the appeal.** **3. Set aside the orders made in the Queensland Civil and Administrative Tribunal on 24 March 2015.** **4. Order that there be a new trial of the discipline application in the Queensland Civil and Administrative Tribunal.** **5. Direct that the Registrar or other proper officer of the Supreme Court cause the name of the applicant to be reinstated in the Roll of Legal Practitioners from which that name was removed pursuant to the order made in the Queensland Civil and Administrative Tribunal on 24 March 2015.** **6. Order the respondent to pay the applicant's costs of the appeal (not including the costs of the applicant's application to extend time for appealing).** **7. Pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) grant the respondent an indemnity certificate in respect of the appeal.**

CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – UNQUALIFIED PERSONS AND DISQUALIFIED PRACTITIONERS – OTHER MATTERS – where the respondent filed a disciplinary application against the applicant, alleging guilt of 64 separate charges of professional misconduct and or unsatisfactory professional conduct for trust accounting offences – where the applicant was found guilty of each charge of professional misconduct by the Tribunal, his name removed from the roll of legal practitioners and ordered to pay $2,500 in costs – where the applicant, over a year out of time, applied for an extension of time within which to appeal against the Tribunal's orders, submitting that the Tribunal failed to hear and decide the discipline application in accordance with the requirements of the *Legal Profession Act* – where the Tribunal proceeded on the basis that the assertions made in the disciplinary application were correct because they were not denied by the applicant – whether that mode of proceeding is reconcilable with the *Legal Profession Act* *Justices Act* 1886 (Qld), s 142A *Legal Profession Act* 2007 (Qld), s 6, s 13, s 453, s 456, s 656C *Uniform Civil Procedure Rules* 1999 (Qld), r 745, r 770 *Attorney-General for the State of Queensland v Barnes* [2014] QCA 152, cited
COUNSEL:	The applicant appeared on his own behalf M D Nicolson for the respondent
SOLICITORS:	The applicant appeared on his own behalf Legal Services Commissioner for the respondent

[1] **FRASER JA:** On 15 July 2013 the respondent filed in the Queensland Civil and Administrative Tribunal a discipline application under s 452 of the *Legal Profession Act* 2007 (Qld)[1] alleging that the applicant, a solicitor, was guilty of professional misconduct and/or unsatisfactory professional conduct. The accompanying particulars occupy 41 pages and make 64 separate charges against the applicant in relation to alleged conduct between 2008 and 2010. The charges allege deficiencies in trust ledger accounts contrary to s 259(1) of the *Legal Profession Act*, unlawful drawing of trust monies contrary to s 249 of the *Legal Profession Act* and s 58 of the *Legal Profession Regulation* 2007, retention of trust monies in a general account contrary to s 248 of the *Legal Profession Act*, and failure to keep trust records which recorded the true position in relation to trust monies received contrary to s 261 of the *Legal Profession Act*.

[2] The respondent's application was supported by affidavit evidence. The applicant did not file any affidavit and indicated to the tribunal that he did not intend to make any submission in opposition to the application.

[3] The tribunal decided to hear the application on the papers, pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). On 24 March 2015

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[1] References in this judgment to the *Legal Profession Act* 2007 are to the reprint current as at 1 December 2014.

the tribunal published reasons in which it concluded that the applicant was guilty of the 64 charges of professional misconduct. The tribunal ordered that the name of the applicant be removed from the local roll of legal practitioners and that he pay the respondent's costs fixed at the sum of $2,500 within 30 days of the date of that order.

[4] On 8 July 2016 the applicant applied for an extension of time within which to appeal to this Court against the orders made by the tribunal. In a draft notice of appeal the applicant contends that the tribunal erred in law in finding him guilty of 64 charges of professional misconduct, that the tribunal took irrelevant matters into account and failed to consider relevant matters in so finding, and that the penalty imposed was excessive. The notice of appeal did not identify the particular errors alleged by the applicant as it should have done, but at the hearing of the application the applicant relied upon a proposition that the tribunal failed to hear and decide the discipline application in accordance with the requirements of the *Legal Profession Act*. He sought orders that the orders made by the tribunal be set aside and that his name be reinstated on the roll of legal practitioners maintained pursuant to s 37 of the *Legal Profession Act*.

[5] Section 468 of the *Legal Profession Act* confers upon a party dissatisfied with a tribunal's decision of this kind a right of appeal against that decision. Such an appeal is by way a rehearing on the evidence given in the matter before the tribunal, subject to the Court giving leave to introduce further evidence if the Court considers that evidence may be material to the appeal: s 468(3). The applicant foreshadowed an application to adduce further evidence by affidavit. The applicant submitted that this evidence revealed unreliability and error in the affidavit evidence the respondent had filed in support of the discipline application. The respondent acknowledged that the further evidence, if admitted, would raise issues of fact the resolution of which would require cross-examination.

[6] In accordance with the Court's usual practice in matters of this kind, the Court heard argument upon the merits of the proposed appeal with a view to determining the appeal if the Court decided to grant the necessary extension of time.

[7] The considerations which are generally relevant in an application to extend time for appealing were recently summarised by Atkinson J with reference to authority in *Attorney-General for the State of Queensland v Barnes*:[2]

> "There is an important public policy which underlies the time limits for filing an appeal. These were set out by Keane JA in *Spencer v Hutson*:
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> > "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."
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> 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)*. 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:

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2 [2014] QCA 152 at [14] – [16].

- the length of time that has elapsed since the 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.

The effect of these considerations on the application to extend time was set out by Fraser JA in *Creswick v Creswick*; *Tabtill Pty Ltd v Creswick* as follows:

> "An applicant for such an extension must show that strict compliance with the rules will work an injustice, having regard to the circumstances including the history of the proceedings, the conduct of the parties, the nature of the litigation, the consequences for the parties of the grant or refusal of the application, and the prospects of the applicant succeeding in the appeal"."

[8] The applicant's delay in appealing is longer than a year. Ordinarily an applicant could not expect to be granted an extension of time of that magnitude without a persuasive explanation for the delay. In this case it is not in issue that there is a satisfactory explanation for the delay. Earlier this year the tribunal accepted that the applicant had shown sufficient reasons for his delay in applying for a reopening of the tribunal's original decision, but dismissed that application upon a ground that is not relevant in this application. The respondent concedes that the explanation for the delay accepted by the tribunal adequately explains the applicant's delay in appealing to this Court.

[9] The respondent argues that the extension of time should be refused for the different reason that the applicant's failure to comply with the time limit for appealing has prejudiced the respondent. As support for that argument the respondent referred to general statements in authorities about the desirability of finalising litigation within specified time limits and that failure to do so can be costly and unnecessarily burdensome on the parties.[3] The respondent did not point to any prejudice it would sustain if the extension of time were granted, other than the costs of resisting an appeal, all or much of which the respondent would have incurred if the appeal had been brought in time. I accept that there is a strong public interest in compliance with time limits in matters of this kind and that the respondent may incur some irrecoverable costs as a result of time being extended, but those considerations are overwhelmed by the merit of the proposed appeal.

[10] In order to explain my conclusion that the appeal is meritorious it is necessary to refer to the tribunal's reasons for its decision and to some important provisions of the *Legal Profession Act*.

[11] The tribunal's reasons refer to the applicant being an Australian legal practitioner within the meaning of s 6(1) of the *Legal Profession Act* and to the respondent's discipline application. The reasons refers to provisions of the *Legal Profession Act* and, under the heading "Discussion", state:

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3 The respondent referred to *Fox v Percy* (2003) 214 CLR 118 at 128 (Gleeson CJ, Kirby and Gummow JJ).

> "[8] The respondent has informed the Tribunal that he does not propose to respond to the application or make any submissions or representations to the Tribunal in respect of the discipline application.
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> [9] The following is alleged in the discipline application."

[12] After summarising the allegations in the discipline application and referring to statutory provisions, the tribunal's reasons continue:

> "[18] The allegations made in the disciplinary application are not denied.
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> [19] The tribunal will proceed on the basis that the assertions made in the disciplinary application are correct.
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> [20] The disciplinary application demonstrates that the respondent's administration and management of his law practice trust account was in breach of various sections of the Act and its regulations and that the respondent failed to administer and manage the trust account in accordance with the standards of competence and diligence expected of a reasonable legal practitioner.
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> [21] A practitioner is under a very serious duty to properly maintain trust accounts. In the case of *Twohill*, it was found that six breaches of the *Trust Accounts Act* 1973 (Qld) amounted to professional misconduct.
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> [22] In this case, the conduct of the practitioner is extreme. The circumstances demonstrate serious and persistent breaches over a prolonged period of time.
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> [23] In the circumstances, the conduct involved a substantial failure to reach a reasonable standard of competence and diligence and falls short to a very substantial degree, the standard of professional conduct which would be expected of members of the profession of good repute and competency.
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> [24] In those circumstances, the respondent's conduct amounted to professional misconduct as is contemplated by s 419 of the Act."

[13] Thereafter the reasons discuss the penalty which should be imposed, followed by these conclusions:

> "[30] In this case, the respondent's conduct was repeated and involved numerous failings including failing to properly administer a trust account, failing to keep proper trust records, producing numerous deficiencies in trust ledgers, transferring funds from trust contrary to legislative requirements, misappropriating trust funds, and retaining trust money in the firm's general account.
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> [31] The seriousness of the misconduct set out in the disciplinary application is obvious and practitioners who are guilty of such misconduct are not fit to practice."

[14] The tribunal's reasons conclude with the orders described in [3] of these reasons.

[15] The respondent argued that it should be implied that the tribunal adverted to the evidence, made findings of fact to the effect of the detailed particulars of the charges stated in the disciplinary application, and, with those findings in mind, decided that the applicant was guilty of professional misconduct as charged. The respondent argued that so much appeared from the quoted reasons, particularly in paragraphs 22 – 24, and that this construction was supported by the suggested fact that the affidavit evidence filed with the application justified the tribunal in making such findings.

[16] The construction of the reasons advocated by the respondent is not open. The tribunal first noted that the allegations in the disciplinary application were not denied (paragraph 18) and then proceeded "on the basis that the assertions made in the disciplinary application are correct" (paragraph 19). This conveys that because the applicant did not deny the respondent's allegations the tribunal proceeded by assuming that those allegations were correct rather than by making a decision whether, upon the evidence relating to each allegation, that allegation was proved. That reading of the tribunal's reasons is also suggested both by the statement in paragraph 20 that "[t]he disciplinary application demonstrates" breaches of sections of the Act and Regulations and by the absence of any reference to evidence or findings of fact such as would be expected if the tribunal had made its decision upon the evidence. The descriptions and characterisations of the applicant's conduct in paragraphs 22 – 24 and 30 – 31 of the reasons were plainly formulated with reference to the conduct alleged against the applicant in the discipline application, rather than with reference to a decision by the tribunal upon the evidence.

[17] That mode of proceeding is not reconcilable with applicable provisions of the *Legal Profession Act*.

[18] Part 4.9 of the *Legal Profession Act* regulates proceedings in a "disciplinary body", the definition of which term comprehends the tribunal. Section 456(1) provides:

> "If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section".

[19] The orders stated in s 456 include orders recommending that the name of an Australian legal practitioner be removed from the local roll, an order publicly reprimanding the practitioner, an order precluding the employment by a law practice in Queensland of the practitioner for a period of not more than five years, an order that the Australian legal practitioner pay a penalty of not more than $100,000, a compensation order, and an order that the practitioner must not apply for a local practising certificate for a stated period. Section 456(1) makes it clear that the disciplinary body's power to make such orders, or any disciplinary order, arises only after it has completed a hearing of a discipline application and is satisfied that the practitioner has engaged in unsatisfactory professional or professional misconduct. The nature of the required hearing is elucidated by s 453, which obliges the disciplinary body to "hear and decide each allegation stated in the disciplinary application". In the context of this legislation, ss 453 and 456(1) required the tribunal to hear the evidence (which, in this case, the tribunal decided it could do by reading the affidavits) and decide whether that evidence proved the allegations made by the respondent against the applicant.

[20] No further confirmation of that conclusion is necessary, but it is found in s 656C:

> "(1) If an allegation of fact is not admitted or is challenged when the tribunal is hearing a discipline application, the tribunal may act on the allegation if the body is satisfied on the balance of probabilities that the allegation is true.
>
> (2) For subsection (1), the degree of satisfaction required varies according to the consequences for the relevant Australian legal practitioner or law practice employee of finding the allegation to be true."

That section precludes the tribunal from acting on an allegation of fact in a discipline action which is not admitted unless the tribunal is satisfied to the required degree that the allegation is true on the balance of the probabilities. The tribunal could not be so satisfied in the absence of evidence of the truth of the allegation. It was not submitted that the applicant admitted any allegation in the discipline application.

[21] Unsurprisingly in light of the seriousness of the sanctions available to the tribunal, the *Legal Profession Act* contains no provision that allows it to treat uncontested allegations in a discipline application as evidence. The respondent frankly acknowledged that in relation to proof of allegations in discipline applications there is no statutory analogue of s 142A of the *Justices Act* 1886 which, in respect of a complaint of a simple offence or breach of duty made by a public officer or a police officer where the defendant does not appear at the time and place fixed for hearing, authorises the Magistrates Court in defined circumstances to "determine the matter of the complaint as fully and effectually to all intents and purposes as if [the facts and particulars alleged in the complaint] had been established by evidence under oath before it…" (s 142A(4)). (The exceptional character of that mode of proceeding is recognised by other provisions of that Act, including the provision in s 142A(6) that it is not available where any licence, registration, certificate, permit or other authority held by the defendant under any Act should become cancelled or suspended, or where the defendant should be disqualified from holding or obtaining any licence, registration, certificate, permit or other authority under any Act.)

[22] The tribunal's approach of proceeding upon the assumption that the allegations made in the disciplinary application were correct was a fundamental departure from the statutory obligation imposed upon the tribunal to hear and decide each allegation stated in the discipline application. It follows that the jurisdiction of the tribunal to make orders against the applicant under s 456(1) did not arise.

[23] The remaining question concerns the orders that should be made consequent upon the conclusion that the tribunal lacked jurisdiction to make the orders it made.

[24] The combination of that conclusion and the existence of a relevant factual dispute that admittedly could not be resolved satisfactorily without cross-examination suggests that an order for a new trial is an appropriate appellate response. Such an order is authorised by r 770(1) of the *Uniform Civil Rules* 1999. That rule is rendered applicable in an appeal from the tribunal by r 745(1), which relevantly provides that Pt 1 of Ch 18 (which includes r 770) applies to an appeal to the Court of Appeal from a decision of the Supreme Court constituted by a single judge, or other named courts, or "(c) another body from which an appeal lies to the Court of Appeal." The tribunal is such a body and the hearing required by the *Legal Profession Act* is appropriately described as a "trial" for the purposes of r 770.

[25] As was pointed out in both parties' submissions, the *Legal Profession Act* does not prescribe any procedure for the reinstatement of the name of a legal practitioner which has been removed from the roll in the event of a successful appeal against the decision pursuant to which the practitioner's name was removed. The respondent informed the Court that the practice, as indicated by members of the Legal Practitioners Admissions Board, is that the Board would reinstate the name of the legal practitioner upon notification of such an order. The applicant contended that the inherent jurisdiction of the Supreme Court, which is expressly preserved by s 13 of the *Legal Profession Act*, empowered the Court to direct that the applicant's name be reinstated on the roll. I accept that the inherent jurisdiction of the Supreme Court in relation to the control and discipline of local legal practitioners and lawyers does extend to an order of that kind. It is appropriate to make such an order.

[26] Because the applicant did not participate in the proceedings in the tribunal it is not appropriate to make any order about the costs in the tribunal. I would not make any order for the costs of the application for an extension of time because, on the one hand it was required only because of the applicant's delay, and, on the other hand, the delay was admittedly explained and the application succeeded. Costs of the appeal in this Court should follow the event. (Since the applicant represented himself in this Court there may be no costs, or no substantial costs, recoverable under that order, but that is a matter to be decided in a costs assessment in the event of any dispute about it.)

[27] The respondent has applied for an indemnity certificate in respect of the appeal under s 15 of the *Appeal Costs Fund Act* 1973 (Qld). The tribunal falls within the definition in that Act of "court", which includes any "body or person from whose decision there is an appeal to a superior court on a question of law…". I would hold that the appeal should succeed on the question of law discussed in these reasons. Upon that footing, this Court is empowered to grant an indemnity certificate in respect of the appeal. In circumstances in which the respondent did not submit to the tribunal that it should proceed in the legally erroneous way in which it did proceed, the discretion to grant an indemnity certificate should be exercised.

Orders

[28] For these reasons the appropriate orders are:

1. Grant the applicant the necessary extension of time within which to appeal.
2. Allow the appeal.
3. Set aside the orders made in the Queensland Civil and Administrative Tribunal on 24 March 2015.
4. Order that there be a new trial of the discipline application in the Queensland Civil and Administrative Tribunal.
5. Direct that the Registrar or other proper officer of the Supreme Court cause the name of the applicant to be reinstated in the Roll of Legal Practitioners from which that name was removed pursuant to the order made in the Queensland Civil and Administrative Tribunal on 24 March 2015.
6. Order the respondent to pay the applicant's costs of the appeal (not including the costs of the applicant's application to extend time for appealing).
7. Pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) grant the respondent an indemnity certificate in respect of the appeal.

[29] **PHILIP McMURDO JA:** I agree with Fraser JA.

[30] **HENRY J:** I agree with the reasons of Fraser JA and the orders he proposes.