QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Quinn v Legal Services Commissioner* [2016] QCAT 76
PARTIES:	Michael James Quinn (Applicant) v Legal Services Commissioner (Respondent)
APPLICATION NUMBER:	REO016-15
MATTER TYPE:	Reopening
HEARING DATE:	22 January 2016 and subsequently on the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice DG Thomas, President** Assisted by: **Mr Scott Anderson, Legal panel member** **Ms Julie Cork, Lay panel member**
DELIVERED ON:	8 June 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The application to reopen the proceedings is dismissed.** **2. The parties are allowed 21 days from the date of this order to make submissions as to costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where applicant sought to reopen the proceedings due to substantial injustice and the fact that the applicant did not adduce all evidence to the Tribunal – where the application to reopen was filed out of time – where Tribunal can extend time to file reopening – where definition of "fresh evidence" analysed – where applicant argued double jeopardy under s 16 of the *Criminal Code* 1899 (Qld) as he had his Practising

Certificate taken away and was disciplined under the *Legal Profession Act 2007* (Qld) – whether application to reopen should be dismissed

Criminal Code 1899 (Qld) s 16
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 32, 138(1), sch 3
Queensland Civil and Administrative Rules 2009 (Qld) r 92

Beamish v the Queen [2005] WASCA 62
Legal Services Commissioner v Voll [2008] QCA 239
Legal Services Commissioner v Madden (No 2) [2009] 1 Qd R 149
Pennisi v Wyvill & O'Sullivan (1994) 74 A Crim R 186
Purnell v Medical Board of Queensland [1999] 1 Qd R 362
R v Chardon [2015] QCA 186
R v NG [2007] 1 Qd R 37

APPEARANCES and REPRESENTATION:

APPLICANT:	M. Nicholson of counsel for the Legal Services Commissioner
RESPONDENT:	Michael Quinn appearing on behalf of himself

This matter was heard and determined after and oral hearing and then on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

REASONS FOR DECISION

[1] On 16 September 2015, Mr Quinn applied to reopen the proceedings.

[2] According to the application the reasons were:

a) Mr Quinn did not appear at the hearing of this matter, which was decided pursuant to s 32 of the QCAT Act.

b) Mr Quinn will suffer a substantial injustice if the proceedings are not reopened as the uncontested evidence and decision of the Tribunal are being exploited by another party to prosecute Mr Quinn in an alternative jurisdiction.

c) The evidence relied upon by the Tribunal in reaching its decision was wholly or predominately inadmissible and Mr Quinn was not made aware of this until the proceedings referred to in (2) above were initiated.

d) The applicant in the proceedings the subject of this application, namely the Legal Services Commissioner, was in possession of or at least had sufficient knowledge of the existence of evidence that, if put before the Tribunal would have resulted in a different finding, namely that all or some of the alleged offences would not be made out and deliberately and/or negligently failed to put such evidence before the Tribunal.

[3] Mr Quinn acknowledged that the application for reopening was filed out of time,[1] and sought an order from the Tribunal extending the time to file the application for reopening.[2]

Background

[4] On 19 August 2009, the Queensland Law Society ('QLS') commenced an investigation into the operation of Mr Quinn's trust account. A show cause notice was issued following this investigation.[3] However, the QLS did not take further steps.

[5] A further investigation was commenced. This involved Mr Quinn reconstructing his trust account, which was reviewed by AAT Accountants (Mr Mark Wright).[4]

[6] The QLS issued a show cause notice on 14 February 2012 totalling some 307 pages.[5]

[7] Mr Quinn did not respond to the notice.[6] This failure occurred because of the impact that the investigations were having upon Mr Quinn, both in his professional life and his personal life.[7]

[8] At that stage, Mr Quinn did not have the fortitude to again face each of the numerous allegations and was advised to close the practice in an attempt to satisfy QLS' concerns, given that he had not responded in detail to the allegations.[8]

[9] Mr Quinn advised QLS of the cessation of practice on 16 April 2012.[9]

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1 Submissions on behalf of the applicant, filed 21 October 2015, Paragraph 2.
2 Ibid, paragraph 3.
3 Affidavit of Michael James Quinn sworn 15 January 2016, paragraphs 3-16.
4 Ibid, paragraphs 17-38.
5 Ibid.
6 Ibid, paragraph 40.
7 Ibid, paragraph 41.
8 Ibid, paragraph 41(i) and (j).
9 Ibid, paragraph 41(k).

[10] The QLS determined to cancel Mr Quinn's Practising Certificate on 26 April 2012.[10]

[11] The second show cause notice did not make any reference to the report prepared by AAT Accountants.[11]

[12] Mr Quinn commenced proceedings in the Tribunal against the QLS for a review of its decision to cancel the Practising Certificate (proceedings OCR150-12).[12]

[13] Mr Quinn abandoned those proceedings in about mid 2013 when he became aware of the intention of the Legal Services Commissioner to institute a discipline application against him.[13]

[14] After the current proceedings were commenced, Mr Quinn sought advice in relation to the proceedings and, owing to the fact that he did not intend to practice as a solicitor in the future, accepted advice to not participate in the proceedings.

[15] By this time he had been served with the discipline application.[14] Mr Quinn believes he was never served with the affidavits of William Hourigan and Robert Brittan.[15]

[16] Mr Quinn did not receive anything further until 25 March 2015, when Detective Senior Constable Caulfield telephoned him requesting an interview as to a charge of fraud upon a complaint by the QLS.[16]

[17] Mr Quinn declined to attend the interview and was issued with a notice to appear as to one charge of fraud.[17]

[18] On 30 March 2015, Mr Quinn's solicitor referred him to the Commissioner's website, which listed that he had been struck off on 24 March 2015.[18]

[19] Mr Quinn had disclosed the circumstances of his former business and the investigations and actions of the QLS and the Commissioner to his employer at the commencement of his employment. When he later disclosed the details of the police charge and the QCAT decision his employment was terminated.[19]

[20] In about August 2015 Mr Quinn received the brief of evidence in relation to the fraud charge which revealed that it consisted only of:

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10 Ibid, paragraph 43.
11 Ibid, paragraph 50.
12 Ibid, paragraph 51.
13 Ibid, paragraph 52.
14 Ibid, paragraph 54.
15 Ibid, paragraph 55.
16 Ibid, paragraph 57
17 Ibid, paragraph 58.
18 Ibid, paragraph 59.
19 Affidavit of Michael James Quinn sworn 15 January 2016, paragraph 60.

a) The statement of the officer who issued the charge.

b) The affidavit of Mr Hourigan filed in the QCAT proceedings.

c) The affidavit of Mr Brittan filed in the QCAT proceedings.

d) A copy of the QCAT judgment.

[21] Mr Quinn swears that this was the first occasion on which he had seen the affidavit material relied upon by the Commissioner in the proceedings before the Tribunal.[20]

[22] It took until about mid-September 2015, for Mr Quinn to confirm that there was no other material that he had not seen and, upon confirming that position, he commenced the application to reopen the proceedings as soon as was possible.[21]

Extension of time to make the application to reopen

[1] Mr Quinn concedes that he was required to make the application to reopen within 28 days of the date upon which the decision was handed down.[22]

[2] Mr Quinn also refers to the Tribunal's power to extend time contained in s 61 of the QCAT Act.[23]

[3] Mr Quinn refers to three factors relevant to the question of whether an extension of time should be granted, namely:

a) The explanation of any delay.

b) The merits – prospects.

c) Any prejudice to the respondent.

[4] Mr Quinn explains the delay by reference to his lack of knowledge concerning the date upon which the decision was handed down and, in evidence, points to the fact that the application was made shortly after 9 September when the Queensland Police Prosecutions confirmed the evidence, which would be relied upon in the police proceedings.

[5] In the circumstances, the Tribunal finds that the delay has been reasonably explained.

[6] In relation to the question of prejudice, Mr Quinn submits that the respondent can point to no prejudice apart, perhaps, from costs.

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20 Ibid, paragraph 63.
21 Ibid, paragraph 64.
22 *Queensland Civil and Administrative Rules* 2009 (Qld) r 92, Submissions on behalf of the applicant, filed 21 October 2015, paragraph 2.
23 Submissions on behalf of the applicant, filed 21 October 2015, paragraph 3.

[7] When referring to the question of prospects, Mr Quinn refers to the prospects in the proceedings rather than the prospects in the application for reopening.

[8] As the extension of time relates to the application for reopening, it is the merits or prospects in that application which must be considered.

Reopening

[9] A party to a proceeding may apply to the Tribunal for the proceeding to be reopened if the party considers a reopening ground exists.[24]

[10] The Tribunal may grant the application only if the Tribunal considers:[25]

a) A reopening ground exists; and

b) The ground could be effectively or conveniently dealt with by reopening the proceeding.

[11] As set out in Schedule 3 of the QCAT Act, a reopening ground for a party means:

a) The party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or

b) The party would suffer a substantial injustice if the proceeding was not reopened because significant new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.[26]

[12] These are the only circumstances under which a matter can be reopened.

[13] Mr Quinn does not assert that paragraph (a) of the definition applies – that is he does not submit that he had a reasonable excuse for not attending the hearing. As appears from his affidavit, owing to the fact that he did not intend to practice as a solicitor in the future, he accepted advice not to participate in the proceedings although he had been served with the discipline application.[27]

[14] He does, however, assert that:

a) There is new evidence.

b) The new evidence is significant.

c) The new evidence was not reasonably available when the proceeding was decided.

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24 QCAT Act, s 138(1).
25 Ibid, s 139(4).
26 Definition “reopening” QCAT Act sch 3.
27 Affidavit of Michael James Quinn sworn 15 January 2016, paragraph 54.

[15] Mr Quinn also asserts that he will suffer substantial injustice including impact upon his career, family and the fact that he remains convicted of certain breaches, which may not have actually occurred.[28]

[16] In relation to the issue of "new" evidence, Mr Quinn refers to the authorities of *Katsidis*[29] and also *Chardo*n.[30]

[17] Those cases concerned reopening in criminal proceedings.

[18] Particularly, the reference made by Mr Quinn discusses the different way in which the approach is taken to fresh evidence or new evidence. Fresh evidence is evidence which either did not exist at the time of the hearing or which could not at that time with reasonable diligence have been discovered. New or further evidence is evidence which was available at the hearing or which could with reasonable diligence then had been discovered.

[19] As was observed in *Katsidis* when quoting from a decision of *Beamish v The Queen,*[31] the distinction between fresh and new evidence is one which was soundly based in principle and which continues to be recognised although greater latitude has been suggested in the case of criminal appeals than in the case of civil appeals.

[20] The difference in approach between fresh evidence and new evidence is based upon considerations such as the public interest in not having a multiplicity of trials rehearing the one charge or dispute, and heard repeatedly until a party seeking to lead more previously available evidence finally achieves a successful outcome.[32]

[21] Even in the context of the decisions referred to by Mr Quinn, it is obvious that Courts are very reluctant to order retrials based upon new or further evidence.

[22] In that context, it was observed that "an accused person, if convicted, generally cannot complain of a miscarriage of justice if he deliberately chooses not to call material evidence, it being actually available to him at the time of the trial, or if he fails to exercise reasonable diligence in seeking out material evidence".[33]

[23] The QCAT Act requirements for reopening are clear – new evidence must have arisen and the evidence must not have been reasonably available when the proceeding was first heard and decided.

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28 Further submissions on behalf of the applicant, filed 28 January 2016, paragraph 3.
29 *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229 (24 June 2005) ('Katsidis').
30 *R v Chardon* [2015] QCA 186 (6 October 2015) ('Chardon').
31 [2005] WASCA 62 at paragraph 4-13.
32 *R v Katsidis ex parte AG (Qld)* [2005] QCA 229 (24 June 2005) paragraph [17].
33 Ibid.

[24] Mr Quinn asserts that the phrase "not reasonably available" should be interpreted to mean not reasonably available in the proceedings that are sought to be reopened, rather than not reasonably available anywhere.[34]

[25] The new evidence to which Mr Quinn refers is:

a) A report of Mark Wright of AAT Accountants dated 8 September 2011 ('the Wright Report'); and

b) The fact that the Commissioner had commissioned the QLS to investigate Mr Quinn's legal practice and despite the fact that the QLS report referred to the Wright Report it was not included in any information supplied by the QLS.

[26] He submits that the testimony of Mr Kelly on 22 January 2016 confirms that, although the Wright report existed at the time of the first hearing, the QLS did not provide the Wright report to the respondent.[35]

[27] In the submissions filed on behalf of Mr Quinn on 21 October 2015, Mr Quinn says that, in the proceedings involving the QLS,[36] he relied upon an affidavit of Mark William Wright sworn on 12 November 2012.[37]

[28] Mr Quinn asserts that Mr Wright's report was of significant relevance to the Tribunal and was not put before the Tribunal by the Legal Services Commissioner.

[29] Hence, he submits, the evidence was not reasonably available in terms of the requirements of the definition of "reopening ground".

[30] The Commissioner asserts that the relevant evidence was reasonably available when the proceeding was first heard and decided because the report was in the possession of Mr Quinn.[38]

[31] In that respect, the Commissioner draws attention to the fact that Mr Quinn was sent a copy of the Hourigan report on 22 December 2011, by the QLS and asked to provide submissions. There was a response by email on 2 April 2012, indicating that the materials were voluminous, that Mr Quinn had not had time to respond, but that the report ignored the findings of Mr Wright.[39]

[32] The requirements with respect to the "reopening ground" are clearly set out in schedule 3 to the QCAT Act.

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34 Further submissions on behalf of the applicant, filed 28 January 2016, paragraph 10.
35 Ibid, paragraph 11.
36 Paragraph 12 of these reasons.
37 Submissions on behalf of the applicant filed 21 October 2015, paragraph 44.
38 Further outline of submissions on behalf of the respondent, filed 8 February 2016, paragraph 7.
39 Ibid, paragraph 8.

[33] Relevant to the current application, the requirement includes that significant new evidence has arisen and that the evidence was not reasonably available when the proceeding was first heard and decided.

[34] The requirement is plainly consistent with the public interest in not having a multiplicity of trials reopening one charge or dispute in circumstances where the evidence was available at the time of the original hearing.

[35] The Tribunal finds that the evidence was reasonably available when the proceedings were first heard, and in fact was evidence, which was known to Mr Quinn at the time.

[36] On that basis, the requirements concerning the reopening ground are not satisfied.

[37] Under s 139(4) of the QCAT Act, the Tribunal may grant the application only if the Tribunal considers that a reopening ground exists. As the Tribunal is not of that opinion, the application must be unsuccessful.

Section 16 Criminal Code

[38] There is one other substantial matter which Mr Quinn raises and that concerns the effect of s 16 of the *Criminal Code* 1899 (Qld) which provides:

> "A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission…"

[39] Mr Quinn raises this point in the context of his assertion that he suffers substantial injustice by virtue of the matter not being reopened.[40]

[40] Mr Quinn argues that the principle considerations for the Tribunal were the acts and/or omissions relied upon by the QLS in punishing Mr Quinn namely by cancelling his Practising Certificate.[41]

[41] Mr Quinn refers to the decision in *Pennisi*[42] where it was found that s 16 does not rely upon punishment following a conviction for its operation and that it extends to punishment for an act or omission under the provision of any law.[43]

[42] Mr Quinn submits that de Jersey CJ[44] later confirmed the correctness of the decision in *Pennisi* but distinguished the decision on the basis of factual differences.

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40 Submissions on behalf of the applicant, filed 21 October 2015, paragraph 16-40; Submissions on behalf of the applicant in reply, filed 4 February 2016.
41 Submissions on behalf of the applicant, filed 21 October 2015, paragraph 29.
42 *Pennisi v Wyvill & O'Sullivan* (1994) 74 A Crim R 168 ('Pennisi').
43 Submissions on behalf of the applicant, filed 21 October 2015, paragraph 33.
44 *R v NG* [2007] 1 Qd R 37.

[43] Mr Quinn submits that the proceedings should be reopened and immediately dismissed or alternatively permanently stayed to avoid his being punished twice for the same act or omission.[45]

[44] The Commissioner submits that there has been no "punishment" of Mr Quinn in having his name removed from the Roll of Practitioners or in fact the cancellation of his Practising Certificate.[46]

[45] The Commissioner submits that the QLS has a separate decision making process as to the operation of Practising Certificates in Queensland and the Commissioner is responsible for protecting the community from unsuitable practitioners.[47]

[46] The Commissioner asserts that Mr Quinn has been dealt with by the QLS with respect to the administrative issue of whether he should have a Practising Certificate, and that the administrative action of the Law Society is not a punishment. Moreover, in the context of the disciplinary proceedings, the order made by the Tribunal does not amount to a punishment.[48]

[47] In the context of proceedings before the Tribunal, it is well accepted that the aim of the orders made concerning sanctions are to protect the public and not to punish the practitioner. The Tribunal has regard to the protection of the public and maintenance of appropriate professional standards.

[48] This position has been reflected in many cases in Queensland.[49] In the case of *Madden,* the Court said at 122:

> "Disciplinary penalties are not imposed as punishment but rather in the interests of protection from the community from unsuitable practitioners. In determining what order the Court should now make, regard should primarily be had to the protection of the public and the maintenance of proper professional standards. That is reflected in the expression of the main purposes of Chapter 4 (Complaints & Discipline) in the 2007 Act, which include "to promote and enforce the professional standards, competence and honesty of the legal profession, (c) To provide a means of redress for complaints about lawyers, (d) To otherwise protect members of the public from unlawful operators."

[49] The decision in *R v NG*,[50] referred to by Mr Quinn, supports this proposition.

[50] In that case, school authorities dealt with certain conduct under the *Education (General Provisions) Act* 1989 (Qld) by expelling the individual

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45 Submissions on behalf of the applicant, filed 21 October 2015, paragraph 40.
46 Submissions on behalf of the respondent, filed 26 January 2016, paragraph 4.
47 Ibid, paragraph 5.
48 Ibid, paragraph 7.
49 *Legal Services Commissioner v Voll* [2008] QCA 293 per Keane JA at [7], Legal *Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 ('Madden').
50 [2007] 1 Qd R 37.

from school. The individual argued that he could not be punished a second time for the same acts or omissions.

[51] As has been observed by Mr Quinn, de Jersey J followed *Pennis*i in relation to the conclusion that s 16 of the *Criminal Code* 1899 (Qld), "does not rely for its operation upon punishment following a conviction".[51]

[52] However, de Jersey J found that the expulsion did not constitute "punishment".

[53] De Jersey J found, at 36 that, when s 16 of the Code speaks of "punishment" for an "act or omission" either under the Code or some other statute, it has in mind the punishment provided for by the Code or another generally applicable statute or by a particular statute. De Jersey J observed, "it may be that the appellant feels he has been punished, but in truth the treatment accorded to him was not punishment: rather it bore the character of a regulatory direction by the education authority directed at least primarily to the maintenance of good government within that particular school."[52]

[54] The decision in *R v NG* reviews a number of authorities and concludes, "this line of authority provides good reason to doubt the correctness of the apparent assumption underlying *Pennisi* that the reduction in rank and deduction in salary amounted to "misconduct" within the meaning of s 16 of the *Criminal Code* 1989 (Qld). My review is that they were not, and that *Pennisi* should not be followed".[53]

[55] The Commissioner also makes reference to the case of *Purnell v Medical Board of Queensland*[54] where, in the context of the disciplinary nature of the orders of the Medical Board, Fitzgerald P observed at 384: "proceedings to determine charges under the Medical Act are not criminal in nature. Nor are they proceedings by way of punishment. The object is protection of the public and of the integrity of the profession".

[56] The Tribunal concludes that the orders made were not by way of punishment of Mr Quinn but rather to protect the public. They did not amount to punishment as that term is used in s 16 of the *Criminal Code* 1899 (Qld).

Conclusion

[57] In the circumstances, the application fails, as the requirements imposed by the QCAT Act had not been made out.

[58] Therefore, the application is dismissed.

Costs

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51 *Pennisi v Wyvill & O'Sullivan* (1994) 74 A Crim R 168 at [33].
52 *Pennisi v Wyvill & O'Sullivan* (1994) 74 A Crim R 168 at [36].
53 *R v NG* [2007] 1 Qd R 37 at [48].
54 [1999] 1 Qd R 362.

[59] The Tribunal will allow the parties 21 days to make submissions as to costs.