

# SUPREME COURT OF QUEENSLAND

CITATION: *Goodchild v LSC* [2017] QSC 117

PARTIES: **RICKY WAYNE GOODCHILD**  
(applicant)  
v  
**LEGAL SERVICES COMMISSIONER**  
(respondent)

FILE NO/S: BS10261/16, BS11023/16 & BS11535/16

DIVISION: Trial Division

PROCEEDING: Applications to dismiss

DELIVERED ON: 12 June 2017

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2017

JUDGE: Jackson J

ORDER: **In each of the originating applications the order of the court is that:**

- 1. The originating application is dismissed.**
- 2. The applicant pay the respondent's costs of the proceeding.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – PARTICULAR CASES – where the applicant was convicted on a charge of murder at trial – where the applicant lodged complaints with the respondent in respect of two lawyers and a law practice employee involved in his defence more than five years after the conduct complained of occurred – where the respondent notified the applicant of the respondent's decisions to dismiss two of the complaints and to take no further action in respect of the third complaint – where the applicant applied for judicial review of the three decisions of the respondent under s 20 of the *Judicial Review Act* 1991 (Qld) – where the respondent brought three applications to summarily dismiss the origination applications for judicial review under s 48 of the *Judicial Review Act* 1991 (Qld) – whether the originating applications should be dismissed because the decisions which

the applicant seeks to review are not decisions to which the *Judicial Review Act 1991 (Qld)* applies

*Judicial Review Act 1991 (Qld)*, s 20, s 48

*Legal Profession Act 2007 (Qld)*, s 24, s 25, s 430, s 432, s 446, s 448, s 709

*Griffith University v Tang* (2005) 221 CLR 99

*Leadpoint Pty Ltd v LSC* [2015] QSC 254

*Murphy v LSC* [2016] QSC 174

COUNSEL: The applicant appeared in person  
D Holliday for the respondent

- [1] **Jackson J:** These are three applications to summarily dismiss originating applications for judicial review. Each application for judicial review is for a statutory order of review under s 20 of the *Judicial Review Act 1991 (Qld)* (“JRA”). Each application to dismiss is brought under s 48 of the JRA on the ground that no reasonable basis for the originating application is disclosed or the originating application is frivolous or vexatious.
- [2] The respondent’s point is that a statutory order of review under s 20 of the JRA may only be made in relation to a decision to which the JRA applies. A decision to which the JRA applies is defined relevantly in s 4 of the JRA to mean “a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)”. The respondent submits that each of the decisions challenged by the originating applications was not a decision to which the JRA applies within the meaning of that definition.
- [3] The respondent’s contention is that there are no legal rights or duties that owe their existence, in an immediate sense, to any of the decisions or depend upon the presence of the decision for their enforcement.<sup>1</sup> Accordingly, the respondent submits that each of the originating applications must be dismissed because the decision to which it relates is not a decision that can be made the subject of a statutory order of review under s 20 of the JRA.
- [4] Speaking generally, each of the originating applications stems from a complaint made by the applicant about an Australian legal practitioner or a law practice employee who was involved in the unsuccessful defence by the applicant of a charge of murder.
- [5] At the trial of the charge, the applicant was represented by Stuart Shearer, then a barrister, who was instructed by the firm of Carroll Fairon Solicitors. Frank Carroll was the member of the firm responsible for the applicant’s matter. The applicant disputes that Mr Carroll had any or any real involvement. Guy McEntyre was a law practice employee of Carroll Fairon. Frank Carroll was his supervisor. The applicant disputes that Mr Carroll supervised Mr McEntyre in connection with the applicant’s matter.
- [6] On 9 November 2010, a jury found that the applicant was guilty of murder.

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<sup>1</sup> *Griffith University v Tang* (2005) 221 CLR 99, 128 [80].

- [7] On 15 December 2015, over five years after his conviction, the applicant lodged a complaint with the respondent concerning the conduct of Mr McEntyre.
- [8] On 19 February 2016, the applicant lodged a separate complaint with the respondent concerning the conduct of Mr Shearer.
- [9] On 20 March 2016, the applicant lodged a separate complaint with the respondent concerning the conduct of Mr Carroll.
- [10] Summarising, all but one of the subject matters of the applicant's complaints was that the relevant barrister, solicitor and law practice employee responsible for the defence of his criminal trial engaged in unprofessional conduct or professional misconduct or misconduct as a law practice employee. The exception is an allegation that the law practice employee, Mr McEntyre, also engaged in legal practice as an illegal operator or represented an entitlement to engage in legal practice, when not entitled to so practise.
- [11] On 12 August 2016, the respondent wrote to the applicant notifying his decision to dismiss the complaint against Mr Shearer as one received more than three years after the conduct happened that was the subject of the complaint. The grounds of the decision were that the respondent was not satisfied under s 430(2)(b) of the *Legal Profession Act 2007 (Qld)* ("LPA") that it was just and fair to deal with the complaint having regard to the extent of and reasons for the delay in making the complaint or that the complaint involved conduct that may be professional misconduct.
- [12] On 14 September 2016, the respondent wrote to the applicant notifying his decision to dismiss the complaint against Mr Carroll as one received more than three years after the conduct happened that was the subject of the complaint. The grounds of the decision were that under s 430(2)(b) of the LPA the respondent was not satisfied that it was just and fair to deal with the complaint having regard to the extent of and reasons for the delay in making the complaint or that the complaint involved conduct that may be professional misconduct.
- [13] On 16 September 2016, the respondent made two decisions, in effect, on the applicant's complaint against Mr McEntyre. First, the respondent decided no longer to deal with the complaint that Mr McEntyre acted as an illegal operator in a way that contravened ss 24 or 25 of the LPA. That decision was made under s 446(2)(d) of the LPA. The respondent's ground for the decision was that a prosecution for an offence under s 24 or s 25 of the LPA would be time-barred by reason of s 709 of the LPA because the time period for commencing any prosecution had expired three years before the applicant's complaint was received. Second, the respondent decided to take no further action against Mr McEntyre in relation to the applicant's complaint of misconduct as an employee of a law practice. That decision was made under s 432(1)(b)(ii) of the LPA.

#### **Unlawful operator complaint**

- [14] The respondent submits that the decision no longer to deal with the applicant's complaint that Mr McEntyre acted as an illegal operator is not a decision to which the

JRA applies. In *Leadpoint Pty Ltd v LSC*,<sup>2</sup> I held that a decision no longer to deal with a matter, and thereby not to start proceedings to prosecute, not to give to the Commissioner of Police the results of the investigation of an applicant's complaint and not to refer the complaint to the Queensland Law Society for further investigation is one that does not itself affect any relevant rights or obligations.<sup>3</sup> My conclusion was that such a decision is not one to which the JRA applies because it does not have an effect upon legal rights or obligations in a relevant way.

- [15] No submission was made in the present case that *Leadpoint* was wrongly decided. Accordingly, to that extent, the respondent's challenge to the originating application against the decision no longer to deal with the complaint against Mr McEntyre must succeed.

### Complaints made over three years after conduct concerned

- [16] Section 430 of the LPA applies if a complaint is received by the respondent more than three years after the conduct happened that is the subject of the complaint. In that event, s 430(2)-(6) provide:

- “(2) The commissioner may –
- (a) refer the complaint to mediation; or
  - (b) dismiss the complaint unless the commissioner decides that—
    - (i) it is just and fair to deal with the complaint having regard to the extent of, and reasons for, the delay; or
    - (ii) the complaint involves conduct of the following type and it is in the public interest to deal with the complaint –
      - (A) conduct of an Australian legal practitioner that the commissioner considers may be professional misconduct;
      - (B) conduct of a law practice employee that the commissioner considers may be misconduct of the employee in relation to the relevant practice.
- (3) If the commissioner dismisses the complaint, the commissioner must give an information notice to the complainant about the decision.
- (4) For working out whether it is more than 3 years since conduct that is the subject of the complaint happened, the commissioner must calculate from the last day that the conduct happened.
- (5) This section does not limit the commissioner's power to dismiss a complaint under section 424.
- (6) In this section— **complaint** does not include a complaint about the conduct of an unlawful operator.”

- [17] The respondent submits that a decision to dismiss under s 430(2)(b) is not a decision to which the JRA applies, relying on *Leadpoint Pty Ltd v LSC*<sup>4</sup> and *Murphy v LSC*.<sup>5</sup>

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<sup>2</sup> [2015] QSC 254.

<sup>3</sup> [2015] QSC 254, [23]-[35].

<sup>4</sup> [2015] QSC 254.

<sup>5</sup> [2016] QSC 174.

[18] In *Murphy*, I held that a decision of the respondent to dismiss a complaint or investigation matter made under s 448(1) of the LPA was not a decision to which the JRA applies.<sup>6</sup>

[19] Relevantly, s 448 of the LPA provides:

- “(1) The commissioner may dismiss the complaint or investigation matter if satisfied that –
- (a) there is no reasonable likelihood of a finding by a disciplinary body of –
    - (i) for an Australian legal practitioner – either unsatisfactory professional conduct or professional misconduct; or
    - (ii) for a law practice employee – misconduct in relation to the relevant practice; or
  - (b) it is in the public interest to do so.
- (2) The commissioner must give the respondent and any complainant written notice about the commissioner’s decision to dismiss the complaint or investigation matter.”

[20] The precise question in the present case is whether a dismissal under s 430(2)(b) is subject to the same reasoning as that applied in *Murphy*.

[21] Section 430 creates a threshold that must be crossed before a complaint that is received more than three years after the conduct that is the subject of the complaint may be dealt with. If the respondent does not refer the complaint to mediation (in the case of a consumer complaint), he may deal with the complaint only if he decides that one of two alternative conditions exists. The first is that having regard to the extent of and the reasons for the delay it is just and fair to deal with the complaint. The second is if it is in the public interest to deal with the complaint and, in the case of an Australian legal practitioner, the conduct is professional misconduct or, in the case of a law practice employee, the conduct is misconduct of the employee in relation to the relevant practice.

[22] Having regard to the location and context of s 430 in Pt 4.4 of the LPA, it follows that when the respondent is not authorised to deal with a complaint by s 430, the respondent is not authorised to refer it to the Queensland Law Society or Queensland Bar Association under s 435 of the LPA, or to investigate it himself under s 436, or to notify an Australian lawyer the subject of the complaint under s 437. Viewed in that context, s 430 operates as a form of time-bar. Unless one of the qualifying conditions is satisfied, the respondent must dismiss the complaint without dealing with it by a full investigation.

[23] When it applies, s 430 thus operates in a way that is anterior to s 432. Section 432 provides generally for the summary dismissal of a complaint as follows:

- “(1) The commissioner may dismiss a complaint for 1 or more of the following reasons—
- (a) the commissioner has given the complainant a notice under section 431 and, within the time stated in the notice or under

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<sup>6</sup> [2016] QSC 174, [73]-[90].

- an extension under that section, the complainant has not complied with the notice;
- (b) the complaint does not disclose conduct that the commissioner considers may be—
    - (i) conduct to which this chapter applies; or
    - (ii) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner or misconduct of a law practice employee in relation to the relevant practice;
  - (c) the commissioner considers the complaint is vexatious, misconceived, frivolous or lacking in substance;
  - (d) the conduct complained about has been the subject of a previous complaint that has been dismissed or dealt with, and the commissioner considers that the complaint discloses no reason to reconsider the matter;
  - (e) it is not in the public interest to deal with the complaint having regard to the fact that the name of the Australian legal practitioner to whom the complaint relates has already been removed from any Australian roll in which he or she was enrolled.
- (2) The commissioner may dismiss a complaint under this section without completing an investigation if, having considered the complaint, the commissioner forms the view that the complaint requires no further investigation.
- (3) If a complaint is dismissed for the reason mentioned in subsection (1)(a), the dismissal does not prevent the complainant from making a fresh complaint under section 429.
- (4) In this section—  
**complaint** does not include a complaint about the conduct of an unlawful operator.  
**previous complaint** includes—
- (a) a complaint under the *Queensland Law Society Act 1952* or the *Legal Profession Act 2004*, if the complaint was made under that Act before the commencement of this section; and
  - (b) a complaint made to the bar association if the complaint was made before 1 July 2004.”

[24] In *Murphy* I distinguished between a decision to dismiss a complaint under s 448 of the LPA and a decision to start a discipline proceeding under s 447. I held that a decision to dismiss under s 448 was one to which the reasoning in *Leadpoint* applied because a decision not to start a discipline application or not to prosecute does not change the position of any party. It does not confer any immunity or right upon the person who is subject to a complaint under the LPA. It takes away no right of the complainant to make a complaint. It does not render the respondent functus officio. The respondent can review the decision or make it again.<sup>7</sup>

[25] In my view, the same reasoning applies to a decision to dismiss under s 430(2)(b) of the LPA. Reverting to the language of *Griffith University v Tang*,<sup>8</sup> a decision to

<sup>7</sup> [2016] QSC 174, [74].

<sup>8</sup> (2005) 221 CLR 99, 128 [79]-[80].

dismiss a complaint under s 430(2)(b) does not affect legal rights and obligations. The applicant is entitled to make a further complaint. Of course, as a practical matter, if the circumstances are no different from those which led to his current complaints being dismissed, the same results might be likely to follow. Nevertheless, a decision to dismiss confers no rights on a person the subject of a complaint. They are not immune from a further complaint over the same subject matter, as s 432(1)(d) of the LPA recognises.

- [26] Accordingly, in my view, the respondent's decisions in the present matters to dismiss the complaints under s 430(2)(b) of the LPA are not decisions to which the JRA applies.

### **A complaint that does not disclose misconduct by a law practice employee**

- [27] The remaining question is whether the decision of the respondent made under s 432(1)(b)(ii) of the JRA to dismiss that part of the complaint made by the applicant against Mr McEntyre of misconduct as a law practice employee is a decision to which the JRA applies. The ground of the decision was that the complaint did not disclose conduct that the respondent considered may be misconduct as a law practice employee.

- [28] As previously stated, s 432 provides a pathway for summary dismissal of a complaint. In my view, a decision to dismiss a complaint under s 432(1)(b)(ii) does not affect legal rights and obligations. The same reasoning that applies to a decision under s 430(2)(b) applies.

- [29] Accordingly, in my view, the respondent's decision in the McEntyre matter to dismiss the complaint under s 432(1)(b)(ii) of the LPA is not a decision to which the JRA applies

### **Conclusion**

- [30] It follows that each of the respondent's applications made under s 48 of the JRA to dismiss the originating application must succeed and each of the originating applications must be dismissed.