

Legal Profession Board of Tasmania

Medium Neutral Citation: **A Complainant v A Magistrate**
[2018] LPBT 48

Considered / Heard: **25 June 2018**

Determination date: **26 June 2018**

Jurisdiction: Legal Profession Board, Tasmania

Before: Mr K Pitt QC (Chairman)
Mr G Jones (Legal Member)
Mr D Lewis (Legal Member)
Ms J Paxton (Lay Member)
Mr P Dane (Lay Member)

Determination: The complaint is dismissed pursuant to section 433(1)(e) of the *Legal Profession Act 2007* as the Board does not have the power to otherwise deal with it.

Catchwords: **PROFESSIONS AND TRADES- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- allegations against a judicial officer exercising vested discretionary power- delay of more than three years in bringing complaint- no power to deal with complaint.**

Legislation: *Legal Profession Act (Tas) 2007* s 428, s 433(1)(e)
Magistrates Court Act 1987 s 9

Category: Determination

Parties: (Complainant)
A Magistrate (Magistrate)

File Number: 2018/48

REASONS FOR DETERMINATION

Background

1. This matter comes to the Board by way of a complaint received on 2 March 2018.
2. The Board has considered submissions from the Complainant and the relevant supporting documentation.

Relevant legislation and the law

3. The Magistrate is an Australian lawyer within the meaning of s 5 of the *Legal Profession Act* 2007 ('the Act'). The Magistrate is now, and was at the relevant time, a Magistrate in Tasmania.

4. The Complaint alleges conduct that occurred prior to March 2013. The complaint was received by the Board in March 2018, and accordingly the entirety of the complaint is more than five years old. Section 428(2) of the Act provides that:

... a complaint cannot be dealt with (otherwise than to dismiss it) if the complaint is made more than 3 years after the conduct is alleged to have occurred, unless the Board determines that –

- (a) *it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; and*
- (b) *the complaint is capable of amounting to an allegation of professional misconduct and it is in the public interest to deal with the complaint.*

5. A determination by the Board in accordance with s 428(2) is final and cannot be challenged in any proceedings by the Complainant or the Australian legal practitioner or lawyer concerned.

6. Section 421 of the Act relevantly defines professional misconduct:

professional misconduct includes –

- (a) *unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*
- (b) *conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*

7. The legislative definitions are inclusive of the common law conduct definitions. The common law conduct definitions were stated in *Law Society of Tasmania v Turner & Kench* [2001] TASSC 129 by Crawford J:

[44] ... professional misconduct consists in behaviour on the part of a legal practitioner which would reasonably be regarded as disgraceful or dishonourable by legal practitioners of good repute and competency.

[49] ... in this State, unprofessional conduct extends to conduct which might reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession who are of good repute and competency (the so called common law test)

8. The distinction between professional misconduct and unsatisfactory professional conduct is important and has significant consequences. It is clear, having regard to the legislative framework which sets out the sanctions available for each type of conduct, that professional misconduct requires conduct which is substantially more grave than unsatisfactory professional conduct.
9. Before the Board could deal with those matters of complaint which occurred more than three (3) years prior to the complaint being made, it would by reason of s 482 of the Act need to determine:
- a. That it is just and fair to deal with the complaint having regard to the delay and reasons for the delay; and
 - b. That the complaint involved an allegation of professional misconduct, and
 - c. That it is in the public interest to deal with the complaint.
10. If the Board is not satisfied of all three (3) preconditions, it has no power to deal with the complaint in respect of conduct which occurred more than three (3) years prior to the date of the complaint, otherwise than to dismiss it.
11. In this matter, the complaint is concerned with the conduct of a Magistrate in their capacity as a judicial officer exercising vested discretionary power.
12. The complaint as made to the Board is an attempt to re-agitate matters which have already been considered by courts of competent jurisdiction. Notwithstanding that the complaint has attempted to characterise the Practitioner's conduct as 'professional misconduct', it was conduct for which specific immunity from action is afforded to Magistrates in respect of the manner in which they perform their functions: s 10A of the *Magistrates Court Act 1987*. Similarly, s 6 of the *Supreme Court Act 1887* provides that judges hold all of the powers, privileges and immunities conferred by the Charter of Justice.

13. Pursuant to section 9 of the *Magistrates Court Act 1987* a Magistrate may not be suspended or removed from office except by the Governor in specified circumstances. The Board has no power to affect these outcomes.
14. The Board has accordingly formed the view that it is not in the public interest to deal with the complaint, and it is also not just and fair to deal with the complaint having regard to the delay and reasons for the delay.
15. The Board therefore does not make a determination pursuant to section 428(2) of the Act so as to enable it to deal with this complaint concerning the Magistrate's conduct, all of which occurred more than three years prior to the date of the complaint, otherwise than to dismiss the complaint.
16. It follows that the complaint must be dismissed.

DETERMINATION

The Complaint concerns conduct alleged to have occurred more than three years prior to the complaint being made, and absent a determination of the Board pursuant to section 428(2), is summarily dismissed pursuant to section 433(1)(e) of the Act as the Board does not have the power to otherwise deal with it.

Legal Profession Board of Tasmania

Per: 

Chairperson

Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.

Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.

Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the Legal Profession (Disciplinary Tribunal) Rules 2010 (see <http://www.lpbt.com.au/policy-and-guidelines/>).

The contact details of the relevant bodies are as follows:

Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860

Supreme Court, General Enquiries: 1300 664 608