In the matter of an application by Thomas John Saunders
[2011] NTSC 63

PARTIES:	THE LEGAL PROFESSION ACT 2006 AND IN THE MATTER OF AN APPLICATION BY SAUNDERS, Thomas John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LP 10 of 2010 (21019407)
DELIVERED:	25 AUGUST 2011
HEARING DATES:	18 & 19 AUGUST 2011
JUDGMENT OF:	RILEY CJ

CATCHWORDS:

LEGAL PRACTITIONERS (NORTHERN TERRITORY) – application for admission to practise – application opposed by the Law Society – whether the applicant is of good fame and character – whether the applicant is a fit and proper person – prior conviction – partial disclosure – attempt to minimise culpability – application dismissed.

Criminal Code (Cth), s 135(2)(1); *Legal Profession Act*, s 11, s 25(2)(b) and s 32(1),(3); *Legal Profession Admission Rules*, r 10and r 18

Re Hampton [2002] QCA 129; *Re OG (A Lawyer)* (2007) 18 VR 164; *Thomas v Legal Practitioners Admission Board* (2005) 1 Qd R 331, applied.

Incorporated Law Institute of New South Wales v Meagher (1909) 9 CLR 655; *Re Deo* (2005) 16 NTLR 102; *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239 followed.

REPRESENTATION:

Counsel:

Applicant:	M Crawley (appearing amicus curiae)
Respondent:	D McConnel

Solicitors:

Applicant:	Self Represented
Respondent:	Law Society of the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Ril1109
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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IN THE MATTER OF:

THE LEGAL PROFESSION ACT 2006

AND:

IN THE MATTER OF AN APPLICATION BY

THOMAS JOHN SAUNDERS

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 25 August 2011)

[1] The applicant seeks admission to the Supreme Court as a local lawyer pursuant to the provisions of the *Legal Profession Act*. The Admissions Board considered the application and, pursuant to s 32 of the Act, resolved to refer to the Court the question of whether the applicant was a fit and proper person to be admitted.

[2] The Law Society of the Northern Territory opposed the application for admission on three grounds:

> (1) the applicant has been convicted of offences of dishonesty and the circumstances of the offences, the period over which the

offending occurred and their relatively recent occurrence mean that he is not at this time a fit and proper person for admission;

(2) the applicant gave a misleading account of facts and circumstances surrounding the commission of the offences to the Court of Summary Jurisdiction for the purposes of obtaining a reduced penalty and as such, demonstrated a lack of candour which, though not tendered for the purposes of this application, nevertheless indicates that he is not at this time a fit and proper person for admission;

(3) the applicant: (i) swore an affidavit that he had given full disclosure of the circumstances of the commission of the offences to the Admissions Board; and (ii) swore a further affidavit in these proceedings purporting to give further disclosure of the circumstances of the commission of the offences; and in both cases failed to provide a candid account of the circumstances of the commission of the offences and as such, is not at this time a fit and proper person for admission.

The Legal Profession Act

[3] The applicant sought admission as a local lawyer pursuant to s 25 of the *Legal Profession Act*. An applicant will only be successful in such an application if the Court is satisfied the person meets the eligibility requirements for admission and the Court is also satisfied the person is a fit and proper person to be admitted to the legal profession.

[4] The expression "fit and proper person" is not defined in the Act. Section 11 makes reference to "suitability matters" in relation to an applicant and, relevant for present purposes, these matters include whether the person is currently of good fame and character and whether the person has been convicted of an offence in Australia. If there is a conviction it is necessary

to consider the nature of the offence, how long ago the offence was committed and the applicant's age when the offence was committed.

The principles

[5] The issue for determination is whether the Court is satisfied that the applicant is a fit and proper person to be admitted to the legal profession.[1] The obligation resting upon the Court is to ensure, so far as possible, the protection of the public from persons who are not suitable for admission.[2] In *Re Deo*[3] Martin CJ quoted with approval the following observations of Isaacs J in *Incorporated Law Institute of New South Wales v Meagher*:[4]

> The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the Court - a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to credit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future.

[6] In support of an application for admission the applicant must file an affidavit specifying that the applicant is of good fame and character,[5] and must also disclose if the applicant has been convicted of an offence other

[1] *Legal Profession Act*, s 25(2)(b).
[2] *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239 at 251.
[3] *Re Deo* (2005) 16 NTLR 102 at [6].
[4] *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655 at 681.
[5] *Legal Profession Admission Rules*, r 10.

than an excluded offence.[6] In so doing the applicant is obliged to approach the Board, and later 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".[7] The obligation is upon the applicant to make candid and comprehensive disclosure regarding anything which may reflect adversely on the fitness and propriety of the applicant to be admitted to practise. The obligation of candour does not permit deliberate or reckless misrepresentation pretending to be disclosure.[8] The applicant must be frank with the Board and, through it, the Court. Full and accurate information must be provided to the Board by the applicant. It is not sufficient if such information is incomplete, or if the whole of the relevant information only emerges in response to enquiries from the Board.[9]

[7] It is for this Court to examine the evidence placed before both the Board and the Court to determine for itself whether the applicant is a fit and proper person to be admitted to the Supreme Court. In so doing, the Court has the same powers as the Board and the decision of the Court is taken to be a decision of the Board for the purposes of the Act.[10]

[8] In the proceedings before this Court the burden rests upon the applicant to satisfy the Court that he is, at this time, of good fame and character and a

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[6] *Legal Profession Admission Rules*, r 18.
[7] *Re Hampton* [2002] QCA 129 at [26].
[8] *Re OG (A Lawyer)* (2007) 18 VR 164.
[9] *Thomas v Legal Practitioners Admission Board* (2005) 1 Qd R 331.
[10] *Legal Profession Act*, s 32(3).

fit and proper person to be admitted. The Law Society appears to oppose the application and asserts the existence of matters adverse to the application. In relation to those matters the burden rests upon the Law Society.[11]

The present case

[9] In his application for admission the applicant provided the Board with a disclosure statement relating to the offending and also with the sentencing remarks from the Court of Summary Jurisdiction. He disclosed that he had been convicted of five counts of engaging in conduct as a result of which he obtained a financial advantage, knowing or believing that he was not eligible to receive that financial advantage, contrary to the provisions of s 135(2)(1) of the *Criminal Code (Cth)*. On 30 March 2009 he was dealt with in the Court of Summary Jurisdiction when he was convicted on each count and released on a bond in the sum of $2000 in his own recognizance to be of good behaviour for a period of 12 months.

[10] The applicant advised that the offending occurred when, for the period from August 2006 to April 2008, he received Austudy benefits from Centrelink pursuant to an entitlement arising from his course of study at Charles Darwin University. During the relevant period he also worked in casual employment and he failed to declare his earnings from that employment to Centrelink contrary to his obligations. He thereby received

[11] *Re Deo* (2005) 16 NTLR 102 at [4].

more in the way of benefits than would be his entitlement had he disclosed his earnings.

[11] At the end of the period the applicant commenced full-time work. He stated that he was aware he had accumulated a large debt and he approached Centrelink and informed an officer that he had been overpaid. He provided his pay slips to the officer and requested that the amount to be repaid be calculated so that he could make the necessary repayments. The calculation revealed the applicant had been paid $9,236.46 to which he was not entitled. He subsequently repaid the amount in full.

[12] In his affidavit the applicant explained that he had previously been in receipt of benefits and had terminated those benefits whilst he took a break from studies. When he resumed his study in 2006 he suffered delay in having benefits restored. Once the benefits were restored, and when he started to receive income, he said he approached Centrelink and informed an officer that he had commenced working and requested that appropriate declaration forms be provided to him. He was advised by the officer to declare his income on the Centrelink website, but he was unsuccessful in his attempts to do so. Thereafter he said he approached the Centrelink office on two further occasions requesting that the appropriate declaration forms be sent to his address. The forms did not arrive. In his disclosure statement he went on to say:[12]

[12] Affidavit of Applicant affirmed 8 June 2010 Annexure F1 at [18].

> Following the frustration of having to reapply for my benefits, the month long process therein involved, and having attempted three times to declare my income unsuccessfully I felt worn down by Centrelink. Each time I was directed to the correct procedures for declaring income and each time Centrelink had failed to send me the appropriate documentation to comply with these procedures. I waited for a while for the fortnightly form to arrive with fading attentiveness. I felt that I had made a concerted and genuine attempt to do the right thing only to be frustrated by Centrelink. My focus was on my studies, my new job, my new home, and getting by. The frustration and stress was magnified by my financial need. I was struggling to meet costs even receiving the extra money and foresaw difficulties ahead. I was aware that many students failed to declare their income. The usual outcome is that they are caught at some later stage and forced to repay the money. In fact I had never heard of a student not being caught up with eventually. It is extremely common behaviour within the student body and I felt some comfort in this fact. However I had never heard of a student being prosecuted for this type of behaviour. I genuinely believed that by failing to declare my income I would receive a slightly higher sum of money each week that I would be able to pay back with interest at a later stage but with no other penalty. I conceived of the money as a loan which I always intended to declare and repay. Moreover as I had the financial record of an average student I did not believe I could approach a financial lending institution for a loan.
>
> ...
>
> My behaviour was never a sinister attempt to defraud the Australian social security system.

[13] The sentencing remarks reveal that the Magistrate accepted that the applicant was contrite and had voluntarily made full disclosure to Centrelink followed by repayment of the money due. His Honour concluded that the applicant had used the system as a "lending institution" with the intention of repaying the money. In sentencing his Honour observed that the applicant had fully co-operated with the authorities. His

Honour described the applicant's prospects of rehabilitation as being "extremely high".

[14] The applicant was aware that, whilst he was receiving benefits, he had an obligation to disclose his employment and any income he earned. He had, on an earlier occasion, been in receipt of benefits whilst working and had completed the relevant forms disclosing his earnings. By the time of the offending he was aware that any amount he earned would affect the amount of Austudy benefits to which he was entitled.

[15] The applicant completed his degree and then his practical legal training. He applied for admission to this Court by application filed on 8 June 2010. In so doing he disclosed the fact of his conviction in the disclosure statement and provided a copy of the sentencing remarks of the sentencing Magistrate. He did not provide a transcript of the submissions made on his behalf in the Court of Summary Jurisdiction and he did not reveal the amount of benefit obtained. The transcript of the submissions made to the Court of Summary Jurisdiction was subsequently requested by the Admissions Board and the applicant then obtained and supplied it to the Board.

[16] The Board considered the whole of the material provided by the applicant and was not satisfied that he was a fit and proper person. The Board was not prepared to grant a compliance certificate and referred the matter to the Court pursuant to s 32(1) of the *Legal Profession Act*.

The evidence of the applicant

[17] The applicant was called to give evidence in the proceedings. He adopted and relied upon the information provided in the affidavits filed on his behalf including the disclosure statement.

[18] In his evidence the applicant confirmed that in the years prior to the offending he had been in receipt of benefits at the same time as having occasional employment. He was aware that it was necessary to complete disclosure of earnings forms to ensure the correct entitlement was calculated and received. He had previously done so over a period of some six years.

[19] The applicant claimed he had no idea that a deliberate failure to declare income was a criminal matter. He said he believed that as long as he repaid the money that would be the end of the matter. When pressed in cross-examination regarding his claim that he was not aware that a deliberate failure to declare income would constitute a criminal offence he responded that he was aware that it would do so "in an abstract sense", but that he "believed that as long as the money was repaid then it wasn't a criminal act as such". He said he "didn't even think about it as a criminal act". He then said that he knew that what he was doing "was wrong, but I didn't think of it in terms of the criminal act."

[20] When the issue was revisited later in his evidence, the applicant agreed that it was likely that there was a warning on the forms he completed indicating

that failure to disclose such information would amount to an offence. However he maintained that, although he knew what he was doing was wrong, he did not, at that time, think about whether it constituted a criminal offence. He was obviously aware of the criminal nature of his conduct at the time of his application for admission.

[21] I do not accept the evidence of the applicant that he was not, at the time of the offending, aware that his conduct would amount to a criminal offence.

[22] The applicant was a law student in his mid-20s. He was an intelligent person who had been involved with the Social Security system for a period in excess of six years. He had, in the past, been placed in the situation where he received benefits during a period when he also had some work. As he acknowledged, he was fully aware of the obligation to declare income received and he had complied with this obligation on the earlier occasion over a substantial period of time. During the period of his offending he had been sent several letters reminding him of his obligation to advise Centrelink if he commenced paid work.[13] In cross-examination he acknowledged that he knew his conduct was "wrong" but said that he "never followed beyond that in my head". He knew that Centrelink was not a body from which he could seek a loan. He acknowledged that he was aware that a deliberate failure to declare income was a criminal offence "in an abstract sense", but asserted that his belief was that "as long as the money was repaid it wasn't a criminal act as such". Notwithstanding his

[13] Court Book 89.

belief, he pleaded guilty to the offence. It was submitted that he treated the overpayment as a loan. The highest he put it in his instructions as recorded by his solicitor, which were placed before the Court, was that:

> His past experience was that if he worked for a period and subsequently disclosed this, this would be raised as a debt that he would need to repay, it would not result in a prosecution.[14]

[23] During the course of his cross-examination the evidence of the applicant changed from him saying that he had "no idea" that his conduct would amount to a criminal offence, to saying that he was aware that it would do so in "an abstract sense" and then that he did not turn his mind to the issue. He also said he was not aware of anyone having been prosecuted for similar conduct as if to suggest he had considered the issue. Of course the fact that he was not aware of any prosecution is not to say that such conduct was not, in any event, criminal.

[24] In all the circumstances I find that the applicant knew at the time of the offending that he was committing a criminal offence. His subsequent assertions to the contrary are fanciful and reflect an effort on his part to minimise his culpability. They demonstrate that, at the time of giving evidence, he was not fully accepting of responsibility for the course of criminal conduct he had undertaken. At the time he gave evidence in support of his application for admission as a local lawyer, he did not acknowledge his true state of mind as it existed at the time of the

[14] Court Book 81.

offending. This finding impacts upon my assessment of whether or not he is now a fit and proper person to be admitted as a local lawyer.

[25] There are further matters to be taken into consideration.

[26] The Law Society observed that the initial disclosure of the applicant was limited to the information contained in the "disclosure statement" and the transcript of the sentencing submissions. It was not until the Board made a specific request that the applicant provided further information from Centrelink, together with a file note of the applicant's instructions provided to his solicitor at the time of entering the guilty plea and, importantly, a copy of the transcript of the submissions made to the Court of Summary Jurisdiction.

[27] The Law Society submitted, and a reading of the disclosure statement confirms, that the unmistakable impression to be derived from the statement was that the offending was entirely passive. The applicant placed emphasis on the failure of Centrelink to follow the proper administrative processes. He said he decided not to make disclosure only after initial "concerted and genuine" attempts to do so were frustrated. The applicant was unable to satisfactorily explain why, on each of the two identified occasions, he did not obtain and complete the necessary disclosure forms while he was at the Centrelink office. Instead he asked that the forms be posted to him and when they did not arrive, in an

atmosphere of frustration, he embarked upon his criminal conduct and then continued with that criminal conduct for many months.

[28] In my opinion to attempt to explain the offending by reference to a failure on the part of Centrelink is to fail to accept and acknowledge the level of criminality involved in the deliberate and calculated withholding of information by the applicant over a period of months. To describe his efforts at disclosure as "concerted and genuine" is far from apposite. It fails to acknowledge the fact that he did not simply pick up the forms at the Centrelink office whilst he was present in the office and complete them.

[29] Further, the applicant represented that the payment of Austudy benefits simply ran its course and the payments then ceased in March 2008. The Law Society submitted that he represented to the Court of Summary Jurisdiction and to the Board that he had initiated the process of repayment when he found himself with sufficient funds in May 2008 and, at that time, he made immediate and full disclosure to Centrelink.

[30] It was further submitted by the Law Society that, in the proceedings in the Court of Summary Jurisdiction, the applicant allowed an impression to form that his co-operation with Centrelink was complete and unqualified. Indeed such would seem to be the conclusion drawn by the sentencing Magistrate who stated:

> I take into account the fact that you went into Centrelink and you made full disclosure and, to my mind, that speaks volumes of your co-operation with the authorities.

[31] The Law Society submitted that the impressions conveyed were false.

[32] The Society submitted that information subsequently obtained from Centrelink revealed that the applicant was notified on 16 April 2008 that an overpayment had occurred and would be investigated. Shortly thereafter he received a letter confirming that to be the case. His co-operation by volunteering information came about in circumstances where he was aware that an investigation into an aspect of his entitlement had been commenced. Of the prospect that the investigation would reveal the overpayments made to him the applicant said in evidence, "it was certainly something I considered at that time but I dismissed it". He said he made a conscious decision not to reveal the payments immediately because he still had financial difficulties. The applicant did not reveal to the Court of Summary Jurisdiction or to the Board that any enquiry was under way, that it had caused him initial concern or that, because of his financial position, he had made a conscious decision to continue to receive payments to which he was not entitled for a further period.

[33] In any event, the applicant did not supply payslips until 16 May 2008 and then, on 16 June 2008, indicated to Centrelink that he had another employer in the relevant period. He refused to disclose the name of the employer when asked to do so in September 2008. This was far from full and unqualified co-operation with Centrelink.

[34] The claim of the applicant in his disclosure statement that his Centrelink payments stopped from the time he completed full-time study, whilst partially true, did not reveal that the payments only stopped when Centrelink made the belated discovery that the applicant had moved from full-time to part-time study whilst continuing to be paid Austudy benefits. It seems that the change to his entitlements arose from the information sharing arrangements which existed between the University and Centrelink. The payments were first suspended and then terminated because it was clear that the applicant did not meet the minimum requirements for payments to be maintained.

[35] In the Court of Summary Jurisdiction the applicant, through his counsel, described the offence as one of omission, the omission being a failure to inform Centrelink of his earnings. However the Centrelink records indicated that on two occasions after the offending commenced the applicant attended at the Centrelink office and applied for and obtained an advance payment of $500 against his Austudy benefit. At the time of making those applications, the applicant had full knowledge of the fact that he was receiving payments to which he was not entitled. It seems that in so doing he did not report the fact that he was earning income. As the Law Society submits, he went out of his way to obtain the funds at an accelerated rate. These were acts of commission rather than omission and were not disclosed to the Court of Summary Jurisdiction or in the disclosure statement.

[36] The Law Society challenged the claim made by the applicant that he attended upon Centrelink on a number of occasions in order to obtain the necessary forms to make the declaration of his earnings. The claim is not supported by the Centrelink records. The records of his interaction with Centrelink do not contain any mention of a request for the forms. Nevertheless, after some hesitation, I accept that the applicant did make an initial informal disclosure of his employment. It would seem the disclosure was made in passing to an officer who was moving on to the next client. The applicant was left to formalise the situation by completing appropriate forms online. How clearly he made his subsequent requests for declaration forms is not known. Accepting that he did, on two later occasions, make a request for forms whilst he was in the Centrelink offices, it is plain that he quickly abandoned any intention to make formal disclosure.

[37] I do not accept that the decision of the applicant to not reveal his income was based upon any failure on the part of Centrelink or its officers. As he described the situation he was in need of money. He made a deliberate decision not to make disclosure in order to obtain additional funds. It was a conscious decision to mislead Centrelink by omitting to file the necessary documents in order to obtain funds to which he was not entitled, but which he thought could be paid back when he was financially able. He went further and obtained two accelerated payments of $500 each at a time when he knew he had been overpaid by virtue of his failure to make an earlier declaration. This was the basis upon which he proceeded with his criminal

conduct. Any failure on the part of Centrelink or its officers was entirely incidental. Again, at the time of giving evidence, he maintained an explanation for his conduct which sought to minimise his culpability and deflect blame to others.

[38] The applicant had a duty of comprehensive disclosure and complete candour. Notwithstanding that duty, no effort was made to ensure that the false impressions were corrected. His failure has continued through to the time of the hearing before this Court.

The conviction

[39] There is no dispute that on 30 March 2009 the applicant was convicted of the offences to which reference has been made. The conduct of the applicant which constituted the offending extended over the period from August 2006 to May 2008. The applicant delayed completion of his practical admission requirements until after the criminal proceedings had been resolved. He then completed those requirements and applied for admission on 8 June 2010. A period of approximately 15 months elapsed between the date of the conviction and the application for admission.

[40] It is not disputed that the nature of the offending meant that the applicant was not a fit and proper person to be admitted at the time of the offending. The issue is whether he is a fit and proper person at this time. The applicant has not provided either the Board or the Court with any substantive information regarding his conduct and behaviour during the

intervening period. Nothing of substance has been placed before the Court to demonstrate his rehabilitation. In his evidence before the Court he simply described his employment history during the period. This included work in Sydney, both as a clerk with a firm of solicitors, and work on a voluntary basis with the Aboriginal Legal Service for three months. Other than providing a record of employment, there was no evidence as to how that employment was relevant to his rehabilitation. There was no evidence as to how, or to what extent, the applicant had recognised and sought to address his rehabilitation. Following the recording of the convictions, in the circumstances of this case it is not sufficient for the applicant to rely solely upon the lapse of time. It is necessary for the applicant to demonstrate that whilst he was not a fit and proper person at the time of the offending, he is now a fit and proper person to be admitted as a local lawyer. He has not done so.

Conclusions

[41] In my opinion the applicant has failed to provide the Board and this Court with a candid account of the commission of the offences and, as such, is not at this time a fit and proper person for admission.

[42] In addition he has been convicted of offences of dishonesty which, at the time of commission, demonstrated that he was not a fit and proper person for admission. There has been no evidence placed before the Court to

enable a conclusion to be drawn that he is now a fit and proper person for admission.

[43] I am not satisfied that the applicant is of good fame and character and a fit and proper person to be admitted to practice. The application is dismissed.
