

CITATION: *Legal Services Commissioner v Bartels* [2015] QCAT 060

PARTIES: Legal Services Commissioner
(Applicant/Appellant)
v
Mr Wakeham Bartels
(Respondent)

APPLICATION NUMBER: OCR077-13

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Thomas, President**

Assisted by:
Mr Ken Horsley
Practitioner Panel Member
Dr Margaret Steinberg AM
Lay Panel Member

DELIVERED ON: 25 February 2015

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The respondent be publicly reprimanded.**
- 2. A penalty of \$5,500.00 be imposed.**
- 3. The respondent pay the applicant's costs fixed in the amount of \$2,500.00.**

CATCHWORDS: PROFESSIONS AND TRADES – LEGAL PRACTITIONERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – UNSATISFACTORY PROFESSIONAL CONDUCT AND PROFESSIONAL MISCONDUCT – where respondent faces two charges of failing to maintain reasonable standards of competence and diligence in acting for his clients in criminal matters – where the Legal Services Commissioner submits that the respondent is guilty of professional misconduct – where the respondent admits to the conduct constituting unsatisfactory professional conduct – where the respondent doesn't contest a

finding of professional misconduct – whether the respondent’s conduct amounts to unsatisfactory professional conduct or professional misconduct

*Legal Profession Act 2007 (Qld), s 418. s 419
Queensland Civil and Administrative Tribunal
Act (Qld), s 32*

*Adamson v Queensland Law Society
Incorporated 1991 QdR 498*

APPEARANCES and REPRESENTATION (if any):

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

REASONS FOR DECISION

The charges

[1] The Legal Services Commissioner has brought 2 charges against the respondent namely:

Charge 1 – when acting for Arnesa Omid on a charge of arson in respect of the criminal law proceedings *R v Omid* the respondent failed to maintain reasonable standards of diligence or competence.

Charge 2 – when acting for Christine Williamson on a charge of torture in respect of the criminal law proceedings *R v Williamson* the respondent failed to maintain reasonable standards of diligence and competence.

[2] As to each charge, the particulars include a failure to maintain proper oversight of the matter, failure to take proper instructions, failure to provide the client with proper advice, failure to properly brief counsel with adequate or detailed instructions and failure to properly instruct counsel at the trial.

Background

[3] The respondent acted in criminal proceedings involving 2 clients, Mr Omid and Ms Williamson.

[4] In each case:

1. The clients were found guilty.
2. The clients appealed with one ground for appeal being that the legal representatives were incompetent.
3. The appeals were successful, with the Court of Appeal accepting the ground relating to the incompetence of the legal representatives.

- [5] It is accepted by the respondent that he failed to properly represent and advise his clients and failed to act as a competent practitioner would.
- [6] Essentially, the practitioner conducted the matters on the basis that counsel had been briefed and, for that reason, he had no ongoing role in the preparation of the matter or providing advice to his client.

Discussion

- [7] The Legal Services Commissioner asserts that the conduct of the practitioner amounted to professional misconduct.
- [8] Under section 418 of the Act, “unsatisfactory professional conduct” includes conduct of an Australian legal practitioner happening in connection with the practice of the law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [9] Section 419 of the Act provides that professional misconduct includes unsatisfactory professional conduct of an Australian legal practitioner if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.¹
- [10] It is accepted by both parties that, in determining whether the respondent is guilty of professional misconduct, reference may also be had to the common law.
- [11] The test for professional misconduct formulated by Thomas J in *Adamson v Queensland Law Society Incorporated*² was:
- The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.
- [12] In relation to the *Omid* matter, the respondent acknowledged that much of the work was done by counsel and the respondent had limited contact with his client. He attended 1 or 2 conferences but only for short periods of time and attended at Court on only 1 occasion (for a short time) but did otherwise not instruct the barrister during the hearing. He did not inform his client in advance of the trial that he would not be attending the hearing.
- [13] In particular, the respondent failed to provide advice to his client concerning the need for a defence expert report. The respondent accepts the applicants’ submission that “the essence of the lack of competence was the failure to obtain an alternative report as to the origins of the fire. Without this the defence was doomed. Mr Bartels was the solicitor on the record. He abrogated his responsibility to provide advice to his client”.³

¹ Section 419(1).

² 1991 QdR 498.

³ Paragraph 8 of the submissions on behalf of the respondent.

- [14] In the charges before the Tribunal, it is evident that Mr Bartels took no role in advising his clients. For example, in the case of Ms Williamson, the Court of Appeal judgment records Mr Bartels agreement that “at no time did I go through the case with her and at no time did I discuss the charges or what her legal rights were or what the Court process was”.
- [15] The respondent accepted the applicants submissions that:
- on the advice of Mr Williamson, Ms Williamson pleaded guilty to the charge of torture, not having been fully advised of the ramifications of same. She was sentenced to a term of imprisonment and appealed. She, too, was successful on the basis of lack of competence on the part of her legal representatives. Again, Mr Williamson “ran” the case, Mr Bartels failed to act as a competent practitioner would.
- [16] In essence, the respondent played no active role in providing advice to either of the clients to which the charges relate. The respondent failed to maintain proper oversight of each matter, to take proper instructions, to provide the client with proper advice, to properly brief counsel with adequate or detailed instructions and to properly instruct counsel at the trial.
- [17] A solicitor’s professional responsibility is not discharged by briefing competent counsel. The solicitor has a continuing duty to apply the solicitor’s own professional judgment in the case. When counsel is briefed, the client is entitled to the benefit of considered advice and representation by both counsel and the solicitor.
- [18] Conduct which falls short of this standard falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [19] In the circumstances of these charges, where, to the degree outlined, the solicitor played no active role in providing advice to the client, the respondent fell short to a substantial degree of the standard of professional conduct which would be expected by members of the legal profession. In terms of s 419, the conduct involved a substantial failure to reach or maintain a reasonable standard of competence and diligence.
- [20] The conduct constitutes professional misconduct in terms of the definition of that term as it is set out in s 419 of the Act.
- [21] The respondent is not contesting the charge of professional misconduct.⁴

Penalty

- [22] When considering the question of penalty, the primary aim is to protect the public and not to punish the practitioner. However, in that respect, principles of personal and general deterrence are relevant.

⁴ Paragraph 12 of the submissions on behalf of the respondent.

- [23] Proceedings such as these disciplinary proceedings are directed towards maintaining proper standards in the profession and providing a strong indication to the legal profession as to conduct which will not be tolerated. Sanctions which will deter other practitioners from engaging in similar conduct assist with this aim.
- [24] The tribunal notes that, from the outset, the respondent acknowledged his failings and has been fully cooperative with the Legal Services Commissioner, indicating, at an early date, that he would not contest a charge of unsatisfactory professional conduct and later has not contested the charge of professional misconduct.
- [25] It is also noted that the respondent has filed affidavits by Mr Clutterbuck and Mr Jones which indicate that since the time of the decisions of the Court of Appeal the respondent has taken steps to correct the failings identified.
- [26] The applicant has submitted that the respondent should be publicly reprimanded and that a penalty be imposed. The applicant submits that a penalty in the range of \$4,000 to \$6,000 is appropriate.
- [27] Bearing in mind the need to deter other practitioners from engaging in similar conduct, the tribunal makes the following orders:
1. The respondent be publicly reprimanded.
 2. A penalty of \$5,500.00 be imposed.
- [28] The applicant has also sought an order that the respondent pay the applicants costs fixed in the amount of \$2,500.00.⁵ The respondent does not object to that order.⁶ The Tribunal orders that the respondent pay the applicants costs fixed in the amount of \$2,500.00.

⁵ Page 6 of the submissions filed on behalf of the applicant 9 September 2013.

⁶ Paragraph 15 of the submissions on behalf of the respondent.