

CITATION: Legal Services Commissioner v Bevan [2015] QCAT 290

PARTIES: Legal Services Commissioner
(Applicant)
v
Peter Curtiss Bevan
(Respondent)

APPLICATION NUMBER: OCR026-14

MATTER TYPE: Occupational regulation matters

HEARING DATE: 2 July 2015

HEARD AT: Brisbane

DECISION OF: **Justice Carmody**
Assisted by:
Ms Megan Mahon, Legal Panel Member
Prof Susan Dann, Lay Panel Member

DELIVERED ON: 30 July 2015

DELIVERED AT: Brisbane

ORDERS MADE: **THE TRIBUNAL ORDERS THAT:**

- 1. The respondent be publicly reprimanded.**
- 2. The respondent pay a penalty of \$6,000.00 within 90 days.**
- 3. The respondent pay the applicant's costs of and incidental to the disciplinary proceedings within 30 days, to be agreed, or failing agreement to be assessed on the standard basis.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – FAMILY LAW – MISLEADING THE COURT — where the respondent was a solicitor practising in family law – where the respondent represented a client in the Federal

Magistrates Court in respect of a family law dispute – where the respondent made statements to the Federal Magistrates Court that his client had failed to appear as directed by the Court – where the respondent’s client had previously been present within the Federal Magistrates Court’s precinct – where the respondent advised the client not to appear in Court on the relevant day – where the respondent admits to misleading the Court – whether the respondent committed unsatisfactory professional conduct or professional misconduct.

Legal Profession Act 2007 (Qld) ss 419, 452, 456, 462

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Legal Services Commissioner v Hackett [2006] LPT 015

APPEARANCES and REPRESENTATION:

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

- [1] This is a discipline application by the Legal Services Commissioner under s 452 of the *Legal Profession Act 2007 (Qld)* in relation to the professional conduct of the respondent, Mr Peter Curtiss Bevan.
- [2] The applicant has charged the respondent with unsatisfactory professional conduct or professional misconduct by misleading the Federal Magistrates Court at Townsville, constituted by his Honour Magistrate Coker.
- [3] The respondent has admitted the facts constituting the misleading of the Court, and concedes that his conduct amounts to professional misconduct under s 419 of the *Legal Profession Act 2007 (Qld)*.
- [4] The applicant submits that the appropriate orders are that the respondent should be publicly reprimanded and required to pay a pecuniary penalty in the measure of between \$5,000.00 and \$7,000.00. The respondent resists the proposed penalty, claiming that a public reprimand and pecuniary penalty in the amount of between \$4,000.00 and \$5,000.00 sufficiently satisfies the disciplinary objectives of the Act.

- [5] Before considering the submissions of the parties determining the appropriate penalty, it is convenient to briefly summarise the circumstances giving rise to the professional misconduct.

Factual Matrix

- [6] The respondent was a partner in the practice of Bevan & Griffin Solicitors retained to represent Ms Nicole Ursula Ross in the matter of *Souz v Ross* before the Federal Magistrates Court in Townsville.
- [7] On 29 August 2012, the matter was listed for hearing before Federal Magistrate Coker. The respondent appeared for Ms Ross in the proceedings, and advised the Court that she could not be located on the Court's precinct. The respondent explained Ms Ross' failure to appear through an elaborate account – the veracity of which is not a matter in evidence before the Court – involving the onset of a sudden condition or injury requiring medical treatment. The respondent failed to inform the Court that he had previously spoken with Ms Ross in the precincts of the Court and advised her not to appear at the hearing.
- [8] The opposing solicitor in the relevant proceedings promptly informed the Court that his client had observed Ms Ross in the Court's precincts earlier that morning, and could produce a security officer as a witness who could attest to the same. The Magistrate stood the matter down until later in the morning to enable the respondent to secure the attendance of Ms Ross.
- [9] On resuming with the attendance of Ms Ross, the respondent explained her absence by reference to her having "a very strong sense of the flu". The opposing solicitor responded to this statement by the respondent, informing the Court that he had been advised by his client that he had spoken to Ms Ross prior to the resumption of the Court, and Ms Ross had told his client that she had been advised by the respondent not to appear at the hearing. The Court sought verification of the opposing party's account from Ms Ross, who candidly confirmed that she had been advised not to appear.
- [10] The respondent immediately apologised for his conduct and displayed remorse and embarrassment. The respondent appeared to acknowledge the gravity of his conduct and the matter was adjourned.

Findings of the Tribunal

- [11] As the respondent has admitted to misleading the Court, and that such conduct amounts to professional misconduct, the findings of the Tribunal may be disposed of summarily.
- [12] Although the respondent admits to misleading the Court, he claims that it was not his intention to mislead the Court. The respondent claims in his affidavit that he never intended to mislead the Court, and that he was

deprived of the opportunity to advise the Court of the meeting by the interruption of the client of the opposing solicitor.

- [13] As a preliminary matter, I reject the respondent's claim that he was deprived of the opportunity to advise the Court of the relevant meeting with Ms Ross by the intercession of the opposing solicitor's client. The transcript establishes that the respondent had ample opportunity to correct the omission. Indeed, the omission to inform the Court of the respondent's advice to his client not to attend the proceedings – which is the more serious omission under consideration – only came to light after the fact of the meeting was disclosed *and* an adjournment was ordered. The respondent, on any reasonable view, had ample opportunity to advise the Court of the improper advice he had supplied to Ms Ross.
- [14] Examining the transcript, the respondent has clearly made statements which are likely to induce a false impression regarding the appearance of Ms Ross within the mind of the Federal Magistrate. The respondent appears to have omitted to inform the Court, given adequate opportunity, of his prior instructions to Ms Ross not to attend the hearing. Any reasonable person in the position of the respondent would have known that the Court would have obtained the false impression that Ms Ross had not attended by reason of her medical condition as a result of the respondent's omission. Therefore, I find that the respondent knowingly created a false impression within the mind of the Federal Magistrate by omitting to inform the Court of his prior advice to Ms Ross.
- [15] The respondent would have known that his advice to Ms Ross constituted unsatisfactory professional conduct. The respondent could also be expected to have appreciated that, if his advice came to the attention of the Court, it may have prejudiced Ms Ross' case. Furthermore, as the respondent wilfully and knowingly misled the Court, one might expect that it was for the purpose of securing some benefit or advantage, or avoiding some disbenefit or disadvantage. Potential advantages perspicuous from the transcript include: (a) avoidance of personal risks due to his poor immune system following recent transplantation procedures; or (b) securing an unidentified strategic advantage, such as more time to prepare for proceedings, by procuring an adjournment. Although it is not possible to identify the precise objective of the respondent in misleading the Federal Magistrates Court, I am satisfied that it was intentional. This does not mean, however, that the respondent *desired* or *wished* to mislead the Court.
- [16] As the respondent has intentionally misled the Federal Magistrates Court, I am satisfied that the conduct of the respondent is such that it would justify a finding that the respondent has substantially fallen short of the standard of reasonable competence and diligence required from a legal practitioner. Accordingly, the respondent has committed professional misconduct.¹

¹ *Legal Profession Act 2007 (Qld) s 419(1)(a).*

Penalty

- [17] The applicant submits that an appropriate penalty is for the respondent to be publicly reprimanded and required to pay a pecuniary penalty of between \$5,000.00 and \$7,000.00. The respondent submits that the appropriate penalty is for the respondent to be publicly reprimanded and required to pay a pecuniary penalty of between \$4,000.00 and \$5,000.00.
- [18] Professional misconduct is the most serious category of professional transgression prescribed under the *Legal Profession Act 2007* (Qld). In this case, it has required a finding that the conduct of the respondent substantially fell short of the reasonable standard of competence and diligence expected from an Australian legal practitioner. This, however, does not require a finding that the respondent should be struck off or suspended from legal practice. The mitigating circumstances militate against the imposition of such severe penalties.
- [19] If it were established, however, that the account advanced by the respondent relating to the medical condition of Ms Ross was contrived to mislead the Court, more severe penalties would be required. Although misleading the Court by omission may be equally serious as doing the same by commission, the construction of an elaborate subterfuge to subvert the administration of justice would often justify a finding that the errant solicitor is unfit for legal practice. Despite this, I reject the respondent's claim that he was deprived of the opportunity to convey a full account to the Magistrate by the intercession of the opposing party for the reasons outline above.
- [20] I find that the conduct of the respondent cannot be described as mere "gross carelessness or sloppiness", as held in the decision of *Legal Services Commissioner v Hackett*, rather it involves an intentional misleading of the Court.² Nevertheless, the seriousness of the misconduct, although unquestionably grave, is on the lower end of the applicable scale, as it is characterised by a gross error of judgment, as opposed to a deliberate attempt to subvert the administration of justice, acquire a benefit for himself or his client, or otherwise prejudice the legal rights of the opposing party.
- [21] The respondent also appears to appreciate the gravity of his misconduct. The respondent, at the time of the relevant misconduct and throughout the course of the disciplinary proceedings, has consistently acknowledged the seriousness of misleading the Court. Similarly, the respondent admitted the facts surrounding the misleading of the Court and conceded that the defalcation constituted professional misconduct at the earliest possible stage in the disciplinary proceedings.
- [22] Although the applicant and respondent both assert that the respondent's admission of misleading the Court to the Federal Magistrate when challenged mitigates the gravity of the misconduct, the weight of this

² *Legal Services Commissioner v Hackett* [2006] LPT 015.

submission is reduced by the fact that the respondent could not have reasonably contended to the contrary in light of his client's admissions. Appropriate consideration has also been given to the medical condition of the respondent, which appears to have at least partly motivated the misconduct, and the fact that dishonest behaviour appears out of character. With that being said, the respondent has not lived an otherwise blameless life, and has been subject to three prior disciplinary appearances.

- [23] Solicitors, entrusted with the special privilege to appear before the Court, are subject to onerous professional and ethical responsibilities demanding unimpeachable independence and candour. As Officers of the Court, these duties are of singular significance and central to the institutional function of a legal professional. Therefore, misleading the Court is a serious defalcation in professional responsibilities reflecting poorly on the suitability of the errant solicitor for practice.
- [24] The efficiency and efficacy of the administration of justice would be gravely prejudiced if Courts were not entitled to rely on the honesty and diligence of admitted legal practitioners. Judges would be required to ascertain the veracity of any submissions or statements of fact or law, as the failure to meticulously verify all material presented before the Court would generate intolerable risks of gross injustice to the parties. Furthermore, the Court would no longer be able to rely on the solemn undertakings of legal practitioners, requiring more costly signals to mitigate the risk of adverse selection and prevent moral hazard.
- [25] As the efficiency and effectiveness of the Courts are fundamental to public confidence in the administration of justice – which is the practical source of legitimacy for judicial power – legal practitioners, as the interface between the Courts and the community, must exhibit the utmost candour. Dishonesty in legal practice, therefore, is a grave breach of duty which risks damaging public confidence in the Courts and the legal profession and undermining the integrity of the administration of justice. Accordingly, it is deserving of condign disciplinary measures commensurate with the gravity of the breach.
- [26] Taking into account the abovementioned factors, I am satisfied that the respondent should be publicly reprimanded,³ and required to pay a \$6,000.00 pecuniary penalty.⁴

Application for Costs

- [27] The applicant seeks an order for costs relating to the disciplinary application. The applicant has been successful in prosecuting the respondent for professional misconduct for misleading the Court.

³ *Legal Profession Act 2007 (Qld) s 456(2)(e).*

⁴ *Legal Profession Act 2007 (Qld) s 456(4)(a).*

- [28] No exceptional circumstances exist which justify this Tribunal refusing to order costs in favour of the applicant.⁵ Therefore, this Tribunal possesses no discretion to refuse an application for costs.⁶
- [29] The Tribunal allows the application for a costs order in an amount to be agreed, or failing agreement to be assessed on the standard basis and paid within 30 days of the date of the order.

Proposed Orders

- [30] The Tribunal orders that:
1. The respondent be publicly reprimanded.
 2. The respondent pay a penalty of \$6,000.00 within 90 days.
 3. The respondent pay the applicant's costs of and incidental to the disciplinary proceedings within 30 days, to be agreed, or failing agreement to be assessed on the standard basis.

⁵ *Legal Profession Act 2007 (Qld) s 462(1).*

⁶ *Ibid.*