

CITATION: *Legal Service Commissioner v Biddle* [2017] QCAT

PARTIES: Legal Services Commissioner
(Applicant)
v
Russell William Tracy Biddle
(Respondent)

APPLICATION NUMBER: OCR002-16

MATTER TYPE: Occupational regulation matters

HEARING DATE: 11 April 2017

HEARD AT: Brisbane

DECISION OF: **Justice D.G. Thomas, President**
Assisted by:
Ms Julie Cameron, Legal panel member
Dr Margaret Steinberg AM, Lay panel member

DELIVERED ON: 27 April 2017

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The name of the respondent, Russell William Tracy Biddle is to be removed from the Roll of Practitioners kept by the Supreme Court of Queensland.**
- 2. The respondent is to pay the applicant's costs to be assessed on the standard basis on the Supreme Court Scale under the *Uniform Civil Procedure Rules 1999 (Qld)* in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – TRUST FUNDS – where respondent charged and convicted upon guilty plea of 10 counts of dishonest application of trust property – where respondent admits to

professional misconduct – where respondent not opposed to order removing his name from the roll of practitioners – whether respondent's conduct amounts to professional misconduct – whether respondent a fit and proper person – whether respondent's name should be removed from the roll of practitioners

Legal Profession Act 2007 (Qld) ss 418, 419, 420, 456, 462

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 32, 92

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498

Attorney-General v Bax [1999] 2 Qd R 9

Legal Services Commissioner v Voll [2016] QCAT 096

Queensland Law Society v Carberry [2000] QCA 450

Queensland Law Society v Whitman [2003] QCA 238

APPEARANCES:

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

REASONS FOR DECISION

- [1] The Legal Services Commissioner original alleged that the following charges constitute professional misconduct and/or unsatisfactory professional conduct.

- Charge 1 – Improper dealing with client's trust money for his own benefit Estate of Carol Ann Dawson.
- Charge 2 – Improper dealing with client's trust money for his own benefit Estate of Alice Esther Webster.
- Charge 3 – Improper dealing with client's trust money for his own benefit Estate of Thea Lois Moroney.
- Charge 4 – Improper dealing with client's trust money for his own benefit Estate of Deb Claire Bonner.
- Charge 5 – Improper dealing with client's trust money for his own benefit Estate of Ivy Margaret Benfer.
- Charge 6 – Improper dealing with client's trust money for his own benefit Estate of Jacoba Brouwer.

- [2] The proceedings were put into abeyance pending the conclusion of criminal proceedings against the respondent.
- [3] Following the conclusion of those criminal proceedings on 7 December 2016, the Legal Services Commissioner amended the charges to read as follows:

The commissioner alleges that the following charge constitutes professional misconduct and/or unsatisfactory professional conduct.

1. On divers dates between 28 November 2012 and 20 June 2014 the respondent engaged in conduct for which he was convicted on ten charges in the District Court at Brisbane on 7 December 2016 of a serious offence.

The Hearing

- [4] The principal registrar gave notice of the time and place for the hearing in this matter to each party in the proceedings.¹
- [5] The Legal Services Commissioner served the evidence and submissions on Mr Biddle and also notified Mr Biddle of the date of the hearing. A copy of the directions order made on 16 March 2017 was provided to Mr Biddle and, in addition, the Commissioner informed Mr Biddle that should he wish to make submissions, he was required to do so by 11 April 2017.
- [6] The Tribunal is satisfied that Mr Biddle was given notice of the directions made by the Tribunal in relation to evidence and submissions and of the date and place of the hearing.

Background

- [7] An affidavit of Darielle Glenna Campbell sworn 14 March 2017 was filed on behalf of the Commissioner.
- [8] The affidavit exhibited the sentencing remarks of His Honour Judge Reid DCJ, the statement of facts upon which the respondent pleaded guilty, the verdict, and judgment record.
- [9] Based on the statement of facts and sentencing remarks, the Tribunal finds as follows (paragraphs 10-18).
- [10] The offences to which Mr Biddle entered guilty pleas occurred on ten occasions over a 19-month period between 28 November 2012 and 20 June 2014. The total amount involved was \$1,821,230.59.²

¹ Pursuant to QCAT Act s 92.

² Affidavit of Darielle Glenna Campbell, sworn 14 March 2017, exhibit DGC4.

- [11] This money came from two estates, namely the Dawson Estate and the Goffin Estate.
- [12] In relation to the Dawson Estate, Mr Biddle stole \$1,145,000 (counts 1 – 3) and did this in his capacity as Executor of the Will. The sum of \$172,114.73 was returned by Mr Biddle on 18 October 2013 and the complainants received a partial payment from the Fidelity Fund (administered by the Queensland Law Society) in the sum of \$451,456.42.
- [13] The deficit to the Dawson Estate amounted to \$521,428.85.
- [14] In relation to the Goffin Estate, Mr Biddle stole a total of \$676,230.59 and did this in his capacity as the holder of an Enduring Power of Attorney for the deceased (counts 4 & 5) and as the Executor of the Will (Counts 6 – 10). Mr Biddle repaid no money and a payment was made from the Fidelity Fund of \$506,792.20. The deficit to the Goffin Estate was \$169,438.39.
- [15] The total amount owed to the Fidelity Fund by Mr Biddle is \$958,248.62.
- [16] In the context of the discussions with the clients in those matters, Mr Biddle was untruthful and dishonest. He failed to return numerous phone calls and when did discuss matters, told the clients that they would be contacted when things began to progress. At one meeting, the beneficiaries for the Dawson Estate were shown a trust ledger which detailed three entries for “investment” which had in fact been paid to Mr Biddle.
- [17] When approached in relation to the Goffin Estate, Mr Biddle said that he had borrowed the money but did not make a note of this on the file; he said he intended to pay the money back, but never did so.
- [18] Mr Biddle was not authorised to make the payments which he made to his personal accounts.
- [19] In the sentencing remarks, His Honour Reid DCJ made the following observations:

“These are very significant crimes by a person in a significant position of trust and responsibility. It’s contrary to all of your professional practice over a significant number of years.”³

“As I said, these are serious offence and they have led to very significant losses both to the Fidelity Fund and to the two estates to which I have referred. I accept the submission of the Crown that the fact you were a solicitor, the fact that you grossly abused the trust placed in you, the amount of the loss, the relatively small repayment made by you personally and the consequent loss to the Fidelity Fund and to the estates, and the fact that you used the money both for

³ Sentencing remarks dated 7 December 2016, p 2, ll 38-40.

payment of the ATO Debt and for personal and business expenses are significant aggravating features.”⁴

“There are, however, important considerations in sentencing solicitors who are officers of the Court in respect of these matters. They’re amplified in some of the cases. I think it’s vitally important that the community understands that offences such as this are taken fully into account.”⁵

- [20] His Honour was not impressed by the evidence of Mr Stoker, a psychologist who diagnosed Mr Biddle with a psychiatric condition. His Honour observed, “I don’t have a great deal of regard for his diagnosis.”⁶ His Honour noted that whilst the theft occurred in circumstances where it was inevitable Mr Biddle would be caught and in that sense Mr Biddle was clearly of a mind not clearly thinking,⁷ he had, when selling his practice to Slater and Gordon, sought that the money be paid directly to him rather than in discharge of a mortgage debt which was an indication of the way he was thinking at the time.⁸
- [21] It was submitted that the head sentence should be five years but His Honour considered that in the circumstances involving a solicitor misusing trust, the solicitor would necessarily deserve a significant sentence in excess of five years, and imposed a head sentence of seven and a half years imprisonment.

Disposition

- [22] Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of 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
- [23] Professional misconduct includes unsatisfactory professional conduct if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence.¹⁰
- [24] Pursuant to section 420 LPA, conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct includes conduct for which there is a conviction for a serious offence or an offence involving dishonesty.

⁴ Sentencing remarks dated 7 December 2016, p 3, ll 26-32.

⁵ Ibid, p 4, ll 22-25.

⁶ Ibid, p 4, L 11.

⁷ Ibid, p 4, ll 13 & 14.

⁸ Ibid, p 4, ll 17-20.

⁹ *Legal Profession Act 2007* (Qld) ('LPA'), s 418.

¹⁰ LPA, s 419(1)(a).

[25] The lists which are set out in section 420 do not limit the application of section 418 or 419.¹¹

[26] In relation to professional misconduct, Justice James Thomas in the case of *Adamson v Queensland Law Society*¹² said:

“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.”

[27] The relationship between a legal practitioner and client is founded on good faith and requires a high level of integrity and honesty on the part of the legal practitioner.

[28] As was mentioned in the case of *Legal Services Commissioner v Voll*,¹³ legal practitioners must act with integrity and honesty. These attributes of conduct are fundamental to the role of a legal practitioner and play a very important and essential part in the proper administration of justice. The client must be confident to be able to rely upon the legal practitioner to protect the client's interests and always act in the best interests of the client. This is a fundamental aspect of the legal practitioner/client relationship.

[29] In relation to these proceedings, Mr Biddle has written to the Legal Services Commissioner.¹⁴ This letter was received on 15 February 2017.

[30] In the letter, Mr Biddle says:

“I wish to confirm that I do not oppose any order that the charges constitute professional misconduct and/or unsatisfactory professional conduct. I also do not oppose an order removing my name from the roll of solicitors/legal practitioners.”

[31] He continues:

“I presume the order will be made in due course. I do not need a copy from you accordingly.”

[32] The letter appears to be signed by Mr Biddle.

[33] The Tribunal has made findings in relation to Mr Biddle's conduct.

[34] As was correctly observed by His Honour Reid DCJ, the conduct of Mr Biddle amounted to very significant crimes, particularly when committed by a person in the position of trust and responsibility of Mr Biddle. Mr Biddle's conduct amounted to a gross abuse of the trust which was placed upon him and involved a very significant amount of money (\$1,821,230.59) of which

¹¹ LPA, s 420(3).

¹² [1990] 1 Qd R 498, 507.

¹³ [2016] QCAT 096.

¹⁴ Affidavit of Darielle Glenna Campbell, sworn 14 March 2017, exhibit DGC6.

a very small sum, namely \$172,114.73, was returned to one of Mr Biddle's clients.

- [35] In each case, even after payments from the Fidelity Fund, the clients suffered a real loss of monies; in the case of the Dawson Estate, the sum of \$521,428.58 and in the case of the Goffin Estate, the sum of \$169,438.39.
- [36] Moreover, the Fidelity Fund, which is maintained by the Queensland Law Society, paid out the sum of \$958,248.62, which is owing by Mr Biddle but will likely never be repaid.
- [37] In the circumstances, Mr Biddle's conduct violated and fell short, to a very substantial degree, of the standard of professional conduct which is observed or approved by members of the profession of good repute and competency.
- [38] Mr Biddle's conduct amounted to professional misconduct as that term is used in section 419 LPA.

Sanction

- [39] Upon a finding of professional misconduct, the Tribunal can make any order that it thinks fit including those orders which are set out in section 456 LPA.
- [40] Section 456 includes orders that the practitioner's local practicing certificate be suspended for a stated period or cancelled,¹⁵ that the practitioner be publicly reprimanded,¹⁶ that a penalty be imposed¹⁷ or that a recommendation be made that the name of the practitioner be removed from the local roll.¹⁸
- [41] The Commissioner has submitted that the Tribunal should make an order recommending that the name of the respondent be removed from the local roll.
- [42] It is well established that the aim of imposing sanctions is to protect the public.¹⁹
- [43] The purpose of disciplinary penalties was set out by the Queensland Court of Appeal (Holmes and Fraser JJA, White J) in *Legal Services Commission v Madden (No 2)* [2008] QCA 301; (2009) 1 Qd R 149 at [122]:

"[122] Disciplinary penalties are not imposed as punishment but rather in the interests of the protection of the community from unsuitable practitioners. In determining what order the Court should now make,

¹⁵ LPA s 456(2)(b).

¹⁶ LPA s 456(2)(c).

¹⁷ LPA s 456(4)(a).

¹⁸ LPA s 456(2)(a).

¹⁹ *Attorney General v Bax* [1999] 2 Qd R 9 at 22, Pincus JA; *Queensland Law Society v Carberry* [2000] QCA 450 at [38].

regard should primarily be had to the protection of the public and the maintenance of proper professional standards. That is reflected in the expression of the main purposes of ch 4 ("complaints and discipline") in the 2007 Act, which include "to promote and enforce the professional standards, competence and honesty of the legal profession", (c) "to provide a means of redress for complaints about lawyers", and (d) "to otherwise protect members of the public from unlawful operators." (Citations omitted)

- [44] The issue is whether the respondent is a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor.²⁰
- [45] The conduct of the respondent involved very significant crimes and breaches of trust. The respondent's conduct demonstrated a total disregard for the very important professional obligations he owed as a legal practitioner.
- [46] The conduct of the practitioner clearly demonstrates that, at the time he committed the offences, he was not a fit and proper person to practice as a legal practitioner.
- [47] In determining the question of fitness to practice, the relevant time at which fitness is considered is the time of the decision. In this case, no evidence has been put before the Tribunal to suggest that the position has changed as between the current time and the time at which the offences were committed.
- [48] In all the circumstances, the Tribunal determines that the respondent is not a fit and proper person to be entrusted with the important duties and responsibilities of a legal practitioner and on that basis recommends that Mr Biddle's name be removed from the local roll.

Costs

- [49] The Commissioner has sought an order for costs in his favour.
- [50] Pursuant to section 462(1) LPA, upon a finding that the practitioner has engaged in professional misconduct, the Tribunal must make an order that the practitioner pay costs unless the Tribunal is satisfied that exceptional circumstances exist.
- [51] The Commissioner has submitted that there are no exceptional circumstances in this case, and no submissions to the contrary have been made. There is no evidence of exceptional circumstances. The Tribunal finds that there are no exceptional circumstances which would preclude an order required by section 462(1) LPA.

²⁰ *Attorney General v Bax* [1999] 2 Qd R 9 at 12; *Queensland Law Society v Whitman* [2003] QCA 238 at [37].