

CITATION: *Legal Services Commissioner v Clapin*
[2011] QCAT 339

PARTIES: Legal Services Commissioner
(Applicant)
v
Peter Ross Clapin
(Respondent)

APPLICATION NUMBER: OCR256-10

MATTER TYPE: Occupational Regulation Matters

HEARING DATE: On the papers, 15 February 2011; further
written submissions received from the
applicant on 23 May 2011 and the
respondent on 10 June 2011.

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Assisted by
Mr Geoffrey Sinclair
(Practitioner Member)
Dr Margaret Steinberg AM
(Lay Member)

DELIVERED ON: 21 July 2011

DELIVERED AT: Brisbane

ORDERS MADE:

1. That the respondent be publicly reprimanded.
2. That the respondent pay a pecuniary penalty of \$7,500, within six months.
3. That the respondent pay the Commissioner's costs fixed in the amount of \$2,500, also within 6 months.
4. That Mr Stockdale and Ms Fuller's application for compensation be determined on the papers; and that they deliver submissions in writing in support of their claims for compensation to the Tribunal, and to Mr Clapin, within 14 days; and that Mr Clapin deliver submissions in response within 14 days thereafter.

CATCHWORDS:

PROFESSIONS AND TRADES –
 LAWYERS – COMPLAINTS AND
 DISCIPLINE – DISCIPLINARY
 PROCEEDINGS – PROFESSIONAL
 MISCONDUCT OR UNSATISFACTORY
 PROFESSIONAL CONDUCT –
 COMPENSATION – where the respondent
 was charged with four charges of: acting for
 more than one party in connection with a
 loan, certifying that he had witnessed the
 signing of a mortgage document when that
 was not true, paying monies out of his Trust
 Account without authorisation, and certifying
 that he had witnessed the signing of a
 guarantee document when that was not true
 – where the respondent admits guilt in
 respect of all the charges – where the
 respondent admits that the first and third
 counts amount to unsatisfactory professional
 conduct, and the second and fourth amount
 to professional misconduct – appropriate
 penalty

Legal Profession Act 2007, pt 4.10, ss 456,
 465, 466

Legal Profession (Solicitors) Rule 2007, r
 8.5.4

Queensland Law Society Rules 1987, r 85
Trust Accounts Act 1973, s 8

Legal Services Commissioner v Cassidy
 [2009] VCAT 2141, cited

Legal Services Commission v Tung Nguyen
 [2005] LTP 007, cited

APPEARANCES and REPRESENTATION (if any):

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

REASONS FOR DECISION

- [1] Mr Clapin is a solicitor, 56, who was admitted to practice in 1983. He ceased practising law in mid 2009 and has not, since, sought to renew his practising certificate.

- [2] These disciplinary proceedings concern four charges brought under the *Legal Profession Act 2007*. The first is that in the period late 2005/early 2006 Mr Clapin acted for more than one party (namely a financier, a borrower and a guarantor) in connection with a loan. The second is that in December 2005 he signed a mortgage document certifying that the mortgagor had signed the document in his presence, when that was not true.
- [3] The third charge is that, in the same month, he paid monies out of his Trust Account without authorisation, in writing, from the persons on whose behalf the money was held in trust; and the fourth, that on or about 23 December 2005 he signed a guarantee document purporting to witness the signature of a guarantor when, in truth, he was not present when the guarantor signed the document.
- [4] Mr Clapin has frankly admitted his guilt in respect of all of these charges, and all of the facts and circumstances alleged by the Commissioner in connection with them. He has also accepted that, as the Commissioner asserts, the first and third counts amount to what the *Legal Profession Act 2007* categorises as *unsatisfactory professional conduct*; and, that the other two charges, involving the false certification of documents, amount to the more serious offence of *professional misconduct*.
- [5] As to the first charge Mr Clapin acted for both the lender, and the borrower, in a transaction in breach of rule 85 of the *Queensland Law Society Rules 1987*, which applied at the time.¹ This has previously been accepted, in this jurisdiction, as unsatisfactory professional conduct: *Legal Services Commissioner v Cassidy* [2009] VCAT 2141.
- [6] The details of the third charge are that Mr Clapin was engaged by a Mr Stockdale and Ms Fuller in a transaction which involved a loan, from them, to Mr Stockdale's sister Ms Miles for two specified investment projects. The loan monies were withdrawn from Mr Clapin's trust account and disbursed for the two projects without first obtaining approval from Mr Stockdale, and Ms Fuller. According to the submissions from the Commissioner, these disbursements appear to have been made in accordance with their intentions, and the wishes of Ms Miles, but nevertheless involved a technical breach of s 8(2) of the *Trust Accounts Act 1973*.
- [7] As to the second and fourth counts, involving false certification of documents, Mr Clapin does not dispute that on two occasions he signed important legal documents in a way signifying that he had witnessed another person's signature, when that was not true.
- [8] Conduct of that kind has been described by the present Chief Justice as dishonourable, and a serious breach going to the integrity of the legal system: *Legal Services Commission v Tung Nguyen* [2005] LTP 007. In that case, the respondent was publicly reprimanded and ordered to pay a penalty of \$4,000.

¹ Now, see rule 8.5.4 of the *Legal Profession (Solicitors) Rule 2007*

- [9] Mr Clapin has not previously been dealt with by a disciplinary body and had, until now, an unblemished record. He cooperated with the Commissioner and the Queensland Law Society during the investigation of his misconduct. As observed earlier, he has not renewed his practising certificate.
- [10] He represented himself in the proceedings before this Tribunal. His submissions are to the effect that the offending occurred at a time when a number of other factors were operating adversely upon his professional and personal life. These include inadequate management of a rapidly growing legal practice, the serious illness of both a proposed new partner in the firm, and Mr Clapin's wife, and personal health problems. These events culminated, he asserts, in the breakdown of his marriage and, in effect, the collapse of the practice. None of these submissions are disputed.
- [11] The practitioner's submissions, while relating these extraneous factors, nevertheless reveal an appropriate measure of insight – in the sense that he does not purport to place all the blame for the events surrounding these charges upon anyone but himself, or upon these outside influences. That conclusion is reflected in his conduct and, in particular, in his refraining from continuing in practice or seeking a practising certificate.
- [12] The Tribunal has a wide discretion about appropriate penalty or sanction.² Penalties are not imposed, in cases of this kind, as punishment but rather in the interests of the protection of the community from unsuitable practitioners.
- [13] The Tribunal is satisfied that Mr Clapin's conduct falls short of the proper professional standard. The Commissioner does not, however, seek a finding or make a submission that the practitioner's conduct demonstrates unfitness to practice.
- [14] The Tribunal accepts that the circumstances affecting counts 1 and 3 would not warrant disqualification from practice, but counts 2 and 4 (involving the false certification of documents) are, as the decision in *Tung Nguyen* shows, serious matters. Like Mr Clapin the practitioner in that case had an unblemished record, and cooperated with the authorities. In concluding that a fine of \$4,000 was appropriate, the Chief Justice took into account that fact that the solicitor recognised the error of his ways and was remorseful, and had gained no personal benefit. The same comments apply here but the offending, involving two discreet occasions, is worse. In the circumstances a higher fine, of \$7,500, is appropriate.
- [15] Otherwise, again as in *Tung Nguyen*, it is also appropriate to order that Mr Clapin be publicly reprimanded and that he pay the Commission's costs fixed at \$2,500.

² *Legal Profession Act 2007* s 456.

- [16] Mr Clapin is not practising, although he could do so. According to his submissions he is in very poor financial circumstances. The Commissioner does not dispute his assertions about these matters. In the circumstances it is appropriate to allow him six months to pay the pecuniary penalty, and costs.
- [17] Mr Stockdale has indicated, in correspondence to the Commission and QCAT, that he wishes to pursue a compensation claim against Mr Clapin. Under pt 4.10 of the Act an order for compensation can be made against a legal practitioner if this Tribunal is satisfied that the complainant has suffered pecuniary loss, and an order would be in the interests of justice: s 465(1). Unless both parties agree the order cannot exceed \$7,500: s 466.
- [18] Mr Stockdale alleges, in short, that the unauthorised transfer of funds from Mr Clapin's trust account caused pecuniary loss to him and Ms Fuller and he seeks the maximum compensation of \$7,500. Nothing in the material presented to the Tribunal shows, however, an apparent causal connection between the events surrounding any of the four charges (and in particular, counts 1 and 3) and any losses sustained by Mr Stockdale (or Ms Fuller). There is insufficient information for this Tribunal to conclude that the complainant has suffered pecuniary loss because of the conduct concerned.
- [19] It is appropriate to observe that the legislative scheme for compensation set up under pt 4.10 is unsatisfactory. The Tribunal sought further submissions, via the Commissioner, in respect of the complaint and claims. In reply, the representative of the Commission pointed out that it did not represent or act for the complainants and it had, on several occasions, advised them to obtain independent legal advice. That was not, the Tribunal observes, inappropriate: the legislation does not invest the Commission with carriage of these claims.
- [20] Nevertheless, it is unsatisfactory that the Tribunal should be obliged, in effect, to take them up. There seems, however, no alternative but to defer a determination of them, pending further submissions. The Tribunal will communicate with Mr Stockdale and Ms Fuller and direct them to supply written submissions and any material in support of their application, and give copies to Mr Clapin, and to allow Mr Clapin to respond within 14 days thereafter.