

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Robert Kenneth Cochrane*
[2008] LPT 18

PARTIES: **LEGAL SERVICES COMMISSIONER**
(Applicant)
v
ROBERT KENNETH COCHRANE
(Respondent)

FILE NO/S: 1238/08

PROCEEDING: Discipline Application

ORIGINATING COURT: Legal Practice Tribunal

DELIVERED ON: 19 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 20 November 2008

PRACTITIONER PANEL MEMBER: Byrne SJA assisted by
Ms C C Endicott

LAY PERSON PANEL MEMBER: Dr J Lamont

ORDER: **That:**

- 1. The respondent is publicly reprimanded for professional misconduct;**
- 2. The respondent is penalized with a fine of \$7,500, which is to be paid within one year;**
- 3. By consent, the respondent is to pay the Commissioner's costs of the proceedings fixed at \$2,500 within sixty days;**
- 4. The respondent is to be subject to a restricted practising certificate for three years requiring him to practice under supervision;**
- 5. There should also be orders for mentoring, as to which the parties will be heard.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – DUTIES AND LIABILITIES TO CLIENT – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT- - where the respondent failed to respond to eleven notices issued by the QLS and LSC – where the respondent failed to return trust account moneys to a client

within 14 days- where the respondent engaged in legal practice without a practising certificate – where the respondent misled the Federal Magistrates Court – where the respondent was convicted for contempt of court – whether these acts and omissions constitute unsatisfactory professional conduct or professional misconduct

Hearne v Street (2008) 82 ALJR 1259

Legal Services Commissioner v Madden (No 2) [2008] QCA 301

Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320

COUNSEL: Mr B McMillan for the applicant
Mr P J Davis SC for the respondent

SOLICITORS: Legal Services Commission for the applicant
Reeves Lawyers for the respondent

Discipline Application

- [1] By this discipline application, Mr Cochrane, a solicitor, faces 15 charges arising out of his conduct between 5 August 2005 and 13 December 2007. Eleven concern non-compliance with notices from the Legal Services Commissioner or Queensland Law Society. Put shortly, the others are: misleading the Federal Magistrates Court; contempt of the Family Court of Australia; failure to return trust account moneys within 14 days of being required to do so; and engaging in legal practice without a practising certificate.

Default in Compliance with Notices

- [2] Most of the eleven notices required information. Some required production of documents. All called for a response within a fortnight. The first notice issued in December 2005; the last in March 2007. By the time the hearing concluded, a notice had been complied with: one given in mid-February 2007, which received a response eight months later. Responses have now been given to all notices.
- [3] Mr Cochrane acknowledges that, without reasonable excuse, he did not comply with the notices within the prescribed time. As he admits, he is, therefore, guilty of professional misconduct¹ in respect of each such default.

¹ See s. 269 (3) *Legal Profession Act 2004*; s.443 (3) *Legal Profession Act 2007*.

Misleading a Court

- [4] The charge is that, on 30 May 2006, Mr Cochrane “committed professional misconduct ... by misleading the Federal Magistrates Court.”
- [5] Importantly, the charge does not impute any neglect or default. It is not alleged, for example, that Mr Cochrane misled the court carelessly or neglectfully, let alone recklessly or, worse still, knowingly. The charge concerns a result: that the court was misled. It ignores the cause.
- [6] The particulars are also curious. Relevantly, they allege only that: Mr Cochrane acted as solicitor for a Mr Wright in proceedings before the Federal Magistrates Court; the case was to be heard on 30 May 2006; on that day, Mr Cochrane retained Mr Dowling, a barrister, to apply for an adjournment “on the basis that there had been a difficulty with Mr Wright placing [Mr Cochrane] in funds”; the adjournment was granted; and on 22 November 2006, a Federal Magistrate, handing down his decision “in the matter”, said:

“The client paid funds to the solicitor, received tax invoices, but the funds paid far outstripped the tax invoices rendered by the solicitor to the client. To that extent it might be said, therefore, that there was a surplus of funds paid to the solicitor so that ultimately an assertion made on 13 [sic] May 2006 by counsel instructed by the solicitor to seek an adjournment ... is demonstrably false ... [T]he assertion by Mr Dowling ... that:

“The indication that has been given to me by my instructing solicitors ... is that they were unable until last Friday afternoon ... to progress the matter beyond where they had reached at that stage because of lack of funds. That has now changed ... [I]f they were his instructions, and I am satisfied that they were, the instructions, on the evidence of Mr Wright, were patently false ... It is not the case, as the solicitor asserted in Court via Mr Dowling, that there was a difficulty with funds. That cannot be so on the evidence because there are only two tax invoices that were rendered for amounts which totalled far less than the amounts that had been placed into the solicitor’s trust account... No money was due and owing to the solicitor until such time as an invoice was rendered for work. There is no evidence that there were any such invoices that remained unpaid.”

- [7] Mr Cochrane admits the charge. The particulars, however, do not assert that the pertinent facts were *correctly* found by the Federal Magistrate. More importantly, the particulars neither allege in terms nor do they necessarily imply² that Mr

² cf *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301, [56].

Cochrane was careless in his connection with his instructions, much less that he knew or suspected that what he told Mr Dowling was inaccurate³.

- [8] The Tribunal is to hear and decide “each allegation stated in the discipline application”.⁴ And the jurisdiction is confined by the allegations made in the application.⁵
- [9] Nothing more is alleged or proved than that Mr Cochrane, without neglect or default, happened to cause the court to be misled, which is not misconduct.

Contempt of Court

- [10] This charge is also peculiar. It is that “on 29 August 2007 in the Family Court of Australia the respondent was found guilty of contempt of court” - not that he was guilty of such a contempt. However, no point is taken about that. Mr Cochrane acknowledges that he engaged in conduct that constituted a contempt of the Family Court.⁶
- [11] In 2004, Mr Cochrane and his ex-wife were engaged in litigation. His solicitors caused a subpoena to issue from the Family Court requiring the production of documents held by a Commonwealth department in relation to his ex-wife’s father. Medical records were produced in response to the subpoena.
- [12] In 2005, Mr Cochrane made an application in respect of his ex-wife’s father for a Justices Examination Order pursuant to Division 2 of Part 3 of Chapter 2 of the *Mental Health Act 2000*. He supported his application with information from the medical records.
- [13] In short, his contempt of court consisted of his use of documents knowingly obtained through compulsory process for an ulterior purpose.⁷
- [14] Mr Cochrane testifies, and there is no sufficient reason to doubt, that he did not realize that such a misuse of the subpoenaed documents was unlawful or contemptuous. His ignorance of the law, however, is no excuse.

³ This puzzling state of affairs was not clarified as this hearing progressed. Mr Wright apparently gave evidence before the Federal Magistrate. He did not in this hearing. (His complaint that resulted in a notice from the Law Society was among material included in connection with another charge). Mr Cochrane did not give evidence before the Magistrate. He did here. By affidavit, Mr Cochrane relates instructions he gave to Mr Dowling for a hearing on 15 June but does not say what he told Mr Dowling to convey on 30 May. This oddity was not explored in cross-examination. Mr Cochrane did testify that he did not believe that he told Mr Dowling to say any untrue things to the court.

⁴ S. 453 *Legal Profession Act 2007*. No amendment to charge or particulars was sought.

⁵ cf *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301, [72], [76]-[77].

⁶ Incurring a \$1,000 fine and an order that he pay the costs of the contempt proceedings.

⁷ cf *Hearne v Street* (2008) 82 ALJR 1259.

- [15] It is not charged against him that Mr Cochrane knew that what he did in misusing the information was unlawful. Nonetheless, to act as he did in ignorance of a significant and by no means obscure principle of law involved a departure from the standards to be expected of a solicitor of ordinary competence. This was unsatisfactory professional conduct.⁸

Trust Account Breach

- [16] In 2006, Mr Cochrane, then the principal of Hope Lawyers, retained Purcell Taylor, Solicitors, to act as his agent in relation to the acquisition by his client, Ms Voet, of property at Port Douglas. Ms Voet deposited \$60,000 in trust with Purcell Taylor for the express purpose of buying the property. The acquisition, however, did not proceed to completion.
- [17] Mr Cochrane is charged that, between 11 August and 2 November 2006, he breached section 12 (3) of the *Trusts Account Act 1973* by failing to return money held in trust within 14 days of a written request being made for the undisputed portion of the outstanding money to be returned to the client. Mr Cochrane admits his guilt.
- [18] The contravention arose out of a dispute concerning money claimed on account of fees. At first, Mr Cochrane claimed a lien. The client asserted that there was no justification for a lien because the money was paid for a particular purpose, and no bill had been rendered. The claim to a lien was eventually abandoned.
- [19] The circumstances are as follows.
- [20] In early July 2006, Purcell Taylor, at Mr Cochrane's request, paid the \$60,000 into his trust account. About five weeks later, Ms Voet gave Mr Cochrane a written direction to return \$54,500. The \$5,500 balance was to be held in Mr Cochrane's trust account "pending the result of the account".
- [21] That same day, Mr Cochrane told Ms Keogh from the Legal Services Commission that his outstanding fees were between \$5,500 and \$10,000. Ms Keogh advised Mr Cochrane to give the bulk of the money to Ms Voet.
- [22] Ms Voet gave Mr Cochrane a further written direction authorizing retention of \$10,000 pending finalization of his fees. The balance was to be refunded immediately. Mr Cochrane failed to act on the direction.
- [23] On 30 August 2006, Ms Voet's solicitors demanded payment of the outstanding moneys, less the \$10,000 Mr Cochrane was to retain. The next day, Mr Cochrane

⁸ It was not in contest that Mr Cochrane's contempt sustains this finding - despite the absence of an allegation in the Discipline Application concerning his knowledge of the law, state of mind, neglect to research the law and omission to seek advice from another lawyer.

proposed that he also retain \$2,750 for counsel's fees and a further \$10,000 as security for his costs in two other conveyancing matters. Ms Voet's new solicitors did not agree to that.

- [24] By 31 October, Ms Voet's solicitors had not heard further from Mr Cochrane. On that day, immediate repayment of the \$60,000 was demanded.
- [25] On 3 November, Mr Cochrane paid \$37,250 into the trust account of the new solicitors. In July 2007, the remaining \$22,750 was paid out of Mr Cochrane's trust account by the Law Society, which then controlled the account.
- [26] Mr Cochrane has not rendered bills to Ms Voet for any of the three conveyancing matters.
- [27] There is no suggestion that the client suffered loss through the delay in repayment. And it is not charged that Mr Cochrane suspected that he had no lien over all the money he kept. Nonetheless, withholding funds to which Ms Voet was entitled is no trifling matter.⁹

No Practising Certificate

- [28] The final charge is that, between 1 July and 13 December 2007, Mr Cochrane's conduct in connection with the practice of law fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner because he engaged in legal practice without a practising certificate.
- [29] Mr Cochrane admits that he engaged in legal practice without a practising certificate in that period. At the time, he was employed as a solicitor with the Qld Law Group – A New Direction ("Qld Law Group"). He had started there in April 2007. From then until the end of that financial year, he held an unrestricted, employee level practising certificate. However, it lapsed on 30 June 2007. Through stressors, medication and some confusion in administrative arrangements, he overlooked applying for its renewal.
- [30] There is no reason to suppose that an application for a practising certificate would have been unsuccessful. Indeed, a practising certificate has since issued to him.
- [31] The oversight demonstrates poor practice management amounting to unsatisfactory professional conduct.

Professional Misconduct Proved

⁹ Considered alone, it amounts at least to unsatisfactory professional conduct.

- [32] In aggregate, the acts and omissions proved constitute serious professional misconduct. They present as indicative of unfitness to practice. But fitness falls to be decided by reference to present circumstances.¹⁰ And Mr Cochrane's circumstances now are materially different to those that prevailed when the misconduct occurred.

Stressors

- [33] Mr Cochrane was born in 1974. He began employment as a solicitor in 1999, practising family law. He had other work in solicitors' offices before accepting employment with WorkCover as a case manager. He married in January 2003. A few weeks later, he moved with his wife to the Gold Coast. There he got work in a legal firm.
- [34] In December 2003, Mr Cochrane arrived home to discover that his wife had moved out with his six month old daughter, taking most of their possessions. A hostile matrimonial dispute ensued over property and child. The contest took its toll on Mr Cochrane, financially and psychologically.
- [35] Within a week of the separation, Mr Cochrane's wife had successfully applied for a Justices Examination Order against him. Police officers, a psychiatrist and a mental health nurse came to his office. A week later, police, psychiatrists and a nurse arrived at home. These experiences left him humiliated. He began to look for work elsewhere.
- [36] In mid-2004, his elder sister, who had also been admitted as a solicitor in 1999, suggested that the two of them purchase a legal practice. His job prospects seemed poor otherwise. So he agreed to the idea. In August 2005, he and sister bought the practice of Hope Lawyers. After Mr Hope ceased his role as a consultant, a former partner in another firm was brought in as a third equity partner. She and Mr Cochrane's sister clashed. By December 2005, the women had gone, leaving him responsible for the practice.
- [37] Recruiting and training staff proved to be continuing problems. Mr Cochrane tried unsuccessfully to employ an experienced solicitor. Other staffing problems meant that by the end of 2005 he was looking after the bookkeeping and banking himself. Mr Cochrane attended the conveyancing settlements personally: there was no one else.
- [38] Things were not going well, professionally, personally or financially. And over the next two years, those areas of Mr Cochrane's life deteriorated to the point where he could not cope with the several stressors. He experienced anxiety attacks when things got too much: for example, on receiving a notice from the Legal Services Commissioner. Clients lodged complaints. When the regulatory authorities wrote

¹⁰ *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320, [17].

to him about them, the correspondence was ignored. If there was a difficulty with a file, instead of tackling the problem, again he ignored it. The difficulties festered.

- [39] By 2006, the practice was paying Mr Cochrane about \$24,000 a year. He was forced to house-share. He drove a damaged car he could not afford to repair. Debts were piling up.
- [40] In Family Court proceedings, Mr Cochrane defended allegations that he was drug-dependent. And the “constant battle to try to see [his daughter] has been very stressful and upsetting”, he deposes.
- [41] In early 2007, Hope Lawyers was placed into receivership.

New Employment

- [42] When Mr Cochrane started with Qld Law Group, he practised in the commercial and property fields. After a family lawyer left in the middle of this year, he assumed carriage of family law files. He is happy with that work and relieved to be with a mid-sized firm which, he feels, “provides strong support and resources to the solicitors and staff”. He is also glad not to be burdened with management responsibilities any longer and wishes to rebuild his career and reputation.

Contemporary Performance

- [43] Mr Johnson, principal of Qld Law Group, has given evidence of Mr Cochrane’s capacities. At times, Mr Cochrane lets himself down by not managing time well. He has had some difficulty in complying with his employer’s directions to abandon his previous works systems. However, he has Mr Johnson’s support. According to Mr Johnson, most clients are happy with Mr Cochrane’s performance, although there have been a handful of complaints – “nothing out of the ordinary for an employed lawyer”, says Mr Johnson – about not returning phone calls promptly. Mr Johnson deposes:

“Importantly from my perspective, Mr Cochrane does recognize his failings and has largely worked hard to overcome them. Technically, I find Mr Cochrane a very good lawyer and my clients largely report that they enjoy working with him, so that it is hoped that with the finalisation of this investigation, and the obvious effect that it has on Mr Cochrane, that it(sic) can be a very good employed lawyer”.

- [44] There are two recent references from satisfied clients.

Medical and Psychological Assessments

- [45] Dr Kirkup, a psychiatrist, first saw Mr Cochrane in July 2006. For about a year, he treated him for anxiety and depression. The conditions were associated with the significant work-related stresses, including financial concerns. Symptoms included a loss of confidence in the ability to complete work. Sleep was disturbed. Mood was distressed. Concentration was poor. Motivation was reduced. Mr Cochrane was avoiding important work he found stressful: “putting it off indefinitely until he felt better able to deal with it, despite obvious financial and legal consequences”, Dr Kirkup reports. Neglecting to reply to notices from regulators was consistent with this: Mr Cochrane felt too overwhelmed to cope and ignored difficult issues hoping that they would go away.
- [46] The condition responded slowly to medication and cognitive behavioural therapy. Dr Kirkup, in his report dated 13 November 2008,¹¹ commented:
- “While Mr Cochrane’s response to treatment was slow, it was eventually complete. He was reasonably well and able to pursue workplace commitments by ... late 2007. His recovery has continued since then without ongoing medication. He is now perfectly fit to pursue his career in Law”.
- [47] In testifying, Dr Kirkup said that Mr Cochrane retains a predisposition to anxiety but that in his present employment Mr Cochrane was managing his workload “quite well”. “A lot of the stressors” associated with running his own practice had been removed by employment with Qld Legal Group.
- [48] Mr Cochrane has been consulting the psychologist, Mr Dhaliwal, since 1 October 2008. By the time the hearing concluded, Mr Dhaliwal had seen him four times. Mr Dhaliwal is not so sanguine as Dr Kirkup about Mr Cochrane’s mental state.
- [49] Mr Cochrane told Mr Dhaliwal about his matrimonial difficulties and the failure of his legal practice “leaving him with large debts, resulting in ... anxiety and depression”. He reported panic attacks, lethargy, sleep problems, lack of motivation and stress.
- [50] In his 14 November report, Mr Dhaliwal concludes that Mr Cochrane satisfies the criteria for a provisional diagnosis of depression and generalized anxiety disorder/panic.
- [51] Mr Dhaliwal has been helping Mr Cochrane to develop skills in managing the anxiety and panic symptoms. Cognitive behavioural therapy has begun. Mr Cochrane is progressing well. He understands the panic mechanism. He tells Mr Dhaliwal that he can apply skills learned.

¹¹ Dr Kirkup last treated Mr Cochrane in August 2007. Mr Cochrane consulted him in October this year and also saw him the day before his report was composed.

- [52] Mr Dhaliwal anticipates that the depressive symptoms will abate over time. He thinks that Mr Cochrane has the potential to make a full recovery and that Mr Cochrane's condition will not necessarily impede his ability to serve his clients in a professional manner.
- [53] Although Mr Dhaliwal's prognosis is more guarded than Dr Kirkup's, based on his observations and what has been reported to him, he considers that Mr Cochrane has "the capacity to ... do ... a competent job ... as a solicitor."
- [54] As a result of treatment from Dr Kirkup and the ongoing consultations with Mr Dhaliwal, Mr Cochrane himself is confident that "he will not allow himself again to slide into episodes of uncontrolled anxiety".

Fitness to Practise Now?

- [55] Despite Dr Kirkup's treatment and the consultations with Mr Dhaliwal and their optimism, Mr Cochrane is not now fit to practise as a principal in a legal firm. But he does not wish to do so. He wants to work as an employed solicitor, under supervision. Is he fit for that kind of restricted practice?
- [56] The failures to comply with notices from the Legal Services Commission and the Law Society constitute serious professional misconduct. But the misconduct does not seem to reflect a character flaw or a persisting unwillingness to discharge professional obligations. Rather it is related to stresses associated with mental illness. That illness has responded to psychiatric and psychological interventions. The contempt of the Family Court resulted from ignorance: that misconduct was not wilfully contemptuous. The trust account offence did not involve defalcation or poor record keeping; and the Commissioner accepts that the delay in repayment is consistent with overlooking mounting difficulties during the Hope Lawyers phase.
- [57] One other concern raised about fitness needs to be addressed.
- [58] Mr McMillan argued that Mr Cochrane's conduct in connection with the contempt reveals a defect of character bearing on fitness to practise. His proposition¹² is, in effect, that the legal principle that rendered the misuse of that information unlawful is infused with such an evident moral component that the omission to appreciate the danger bespeaks a profound lack of moral insight.
- [59] Some laws do reflect deeply entrenched moral imperatives: as clear examples, those proscribing murder and rape. Others - such as those involving the intricacies of revenue law and court procedures - may not.

¹² The contention was not charged. However, as the point fails, it is unnecessary to consider whether it needed to be stated in the Discipline Application.

- [60] It is not obvious that a solicitor of ordinary competence, who possessed the developed sense of right and wrong to be expected of a legal practitioner, would instinctively have realized that what Mr Cochrane was intending to do with the information was unlawful.
- [61] On this view, the contempt does not demonstrate a character defect indicative of unfitness.
- [62] The evidence of Mr Johnson, Dr Kirkup and Mr Dhaliwal shows that Mr Cochrane has the capacity to practise as an employed solicitor. The public interest requires that he be so restricted for three years. Thereafter, any application for an unrestricted practising certificate can be expected to attract the close scrutiny of the Law Society.

Disposition

Mr Cochrane is publicly reprimanded for professional misconduct. He is penalized with a fine of \$7,500,¹³ which is to be paid within one year. By consent, he is to pay the Legal Service Commissioner's costs of these proceedings, fixed at \$2,500, within sixty days. And there should be orders for mentoring, with the parties having an opportunity to agree on their content.

¹³ The fine would have been heavier if Mr Cochrane could pay more.