

SUPREME COURT OF QUEENSLAND

CITATION: *Legal Services Commissioner v Dempsey (No. 2)* [2009] LPT 23

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)

AND

PAUL ANTHONY DEMPSEY
(respondent)

FILE NO/S: 9435 of 2008

DIVISION: Legal Practice Tribunal

PROCEEDING: Discipline Application

DELIVERED ON: 28 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 28 October 2009

JUDGE: Atkinson J

PRACTITIONER
PANEL MEMBER Ms C Endicott

LAY PANEL
MEMBER Dr M Steinberg

ORDER: **The Tribunal:**

- 1. Recommends that the name of Paul Anthony Dempsey be removed from the roll of legal practitioners in the State of Queensland;**
- 2. Orders that Mr Dempsey pay compensation to Rafaela Oats in the sum of \$17,232.72;**
- 3. Orders that the respondent pay the applicant's costs of and incidental to the application to be assessed.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – GENERALLY – where respondent found guilty of two counts of unsatisfactory professional conduct and four counts of professional misconduct – whether the respondent is a fit and proper person to practice – what is the appropriate penalty in the circumstances.

Legal Profession Act 2007 (Qld), s 456(2), s 462(1)
Queensland Law Society Act 1952, s 481C

Davison v Council of New South Wales Bar Association

[2007] NSWCA 227
Legal Services Commissioner v Dempsey [2009] LPT 20
Queensland Law Society v Bax [1999] 2 Qd R 9
Queensland Law Society v Whitman [2003] QCA 438
Queensland Law Society v Priddle [2002] QCA 297; *New South Wales Bar Association v Maddocks* [1988] NSWCA 158
LSC v Madden (No. 2) [2008] QCA 301

COUNSEL: GP Long, SC with BI McMillan for the applicant
 PJ Davis, SC for the respondent

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

- [1] On 27 August 2009, the Tribunal made findings of two counts of unsatisfactory professional conduct and four counts of professional misconduct: see *Legal Services Commissioner v Dempsey* [2009] LPT 20 at [129]:

“The conduct in charge 1 showed a failure to reach and maintain the reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner and so represented unsatisfactory professional conduct pursuant to s 418(1)(a) of the 2007 Act. In the case of charge 5, that unsatisfactory professional conduct also involved the charging of excessive legal costs contrary to s 420(b) of the 2007 Act. The conduct in charges 2, 3, 4 and 6 involved conduct of an Australian legal practitioner in connection with the practice of law that justifies a finding that he is not a fit and proper person to engage in legal practice, and so represented professional misconduct.”

- [2] Following such a finding, the Tribunal may make any of the orders set out in s 456(2) of the Legal Profession Act (“the 2007 Act”), which provides:

“(2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate –

- (a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
- (b) an order that the practitioner’s local practising certificate be suspended for a stated period or cancelled;
- (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period.
- (d) an order that –
 - (i) imposes stated conditions on the practitioner’s practising certificate granted or to be issued under this Act; and
 - (ii) imposes the conditions for a stated period; and

- (iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;
 - (e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;
 - (f) an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years –
 - (i) employ or continue to employ the practitioner in a law practice in this jurisdiction; or
 - (ii) employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.”
- [3] The Tribunal is of the view that Mr Dempsey was not “a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor.”¹ In the Tribunal’s view he remains unfit.²
- [4] Mr Dempsey gave evidence on re-examination about what he would have done differently with regard to the two matters which were the subject of the complaints before the Tribunal. These were manifestly self-serving accounts of how he would have attempted to ensure that he did not prefer his own interests to those of his clients in the way in which he did which, given his general lack of contrition, carry little weight.
- [5] Mr Dempsey has been a practitioner for many years and suffered ill health in late 2006 which has now been resolved. He has filed many references from respectable members of the community, employees and clients attesting to his competence and honesty. The Tribunal has taken all of those matters into account in reaching its decision on penalty.
- [6] The Tribunal has also taken into account that Mr Dempsey gave untruthful evidence before the Tribunal. It is of course a very serious matter when the view is taken that a legal practitioner has not told the truth on oath. As Ipp JA said in *Davison v Council of New South Wales Bar Association* [2007] NSWCA 227 at [118]:
 “There is ample authority to the effect that untruthfulness in giving evidence in disciplinary proceedings may be taken into account in considering what order should be made: see *Barwick v Council of the Law Society of New South Wales* [2004] NSW CA 32 and the authorities therein referred to at [105].”
- [7] The courts, fellow practitioners and clients cannot have confidence in a legal practitioner who has been untruthful on oath. A person who has been found guilty of the counts of professional misconduct and unsatisfactory professional conduct alleged in this matter and displayed such dishonesty on the disciplinary hearing is

¹ *Queensland Law Society v Bax* [1999] 2 Qd R 9; *Queensland Law Society v Whitman* [2003] QCA 438 at [36]; *Queensland Law Society v Priddle* [2002] QCA 297; *New South Wales Bar Association v Maddocks* [1988] NSWCA 158.

² *LSC v Madden* (No. 2) [2008] QCA 301 at [125].

not a fit and proper person to be entrusted with the duties and responsibilities of a legal practitioner and the Tribunal recommends that his name be removed from the roll under s 456(2) of the 2007 Act.

- [8] The Tribunal was minded to order a stay of this order for 21 days to enable an orderly transition of the practice and to protect the interests of Mr Dempsey's existing clients. However, Mr Dempsey failed to be fully candid with the Tribunal and further information relevant to the Tribunal's determination was disclosed by Mr Dempsey's counsel after the further hearing with regard to penalty. The Tribunal has no confidence in a practitioner who has failed to be fully candid in these circumstances and so will not grant a stay. It would not be in the interests of his clients for a stay of the Tribunal's orders to be granted.

Compensation for Oats

- [9] The respondent has agreed to orders being made for compensation to Mrs Oats. The quantum of that compensation depends on the difference between what Mr Dempsey was entitled to charge and what he did charge. Further evidence was led after the disciplinary hearing as to the quantum of compensation and the findings set out herein reflect the evidence previously led and the further evidence adduced.
- [10] Section 481C of the *Queensland Law Society Act 1952* ("the 1952 Act") set out the maximum that Mr Dempsey was entitled to charge. He was entitled to charge no more than the statutory formula:

$$[E-(R+D)] \times 0.5.$$

"E" is the amount Mrs Oats was entitled to by way of settlement;

"R" is the total amount of money which the client must refund from the settlement under an Act of the law of the Commonwealth or another jurisdiction;

"D" is the total amount of disbursements Mrs Oats must pay, or reimburse, to the practitioner or firm in relation to the speculative personal injury claim.

- [11] The amount Mrs Oats was entitled to by way of settlement was \$50,000. A refund of \$1,396.20 was paid by Mrs Oats to the Health Insurance Commission (HIC). Disbursements were said by Mr Dempsey, in a statement sent by him to Mrs Oats on 19 November 2009, to be \$15,150 plus GST of \$297.88. An analysis of those disbursements shows that \$1,793.40 was for photocopying and for fees, not in fact a disbursement. So the total disbursements was \$13,356.60. It is not clear what the GST of \$297.88 relates to.
- [12] Mr Dempsey was, therefore, entitled to charge legal fees of no more than
- $$[\$50,000 (E) - (\$14,752.80 (\$1,396.20 (R) + \$13,356.60 (D)))] \times .5 = \$17,623.60.$$
- [13] He was entitled to charge fees of \$17,623.60. Refunds were \$1,396.20 (which Mrs Oats paid herself) and disbursements of \$13,356.60. Mr Dempsey was therefore entitled to recover \$30,980.20 (for fees and outlays); HIC was entitled to \$1,396.20; and Mrs Oats was entitled to recover \$17,623.60 from the \$50,000.
- [14] Of the \$50,000 settlement moneys, \$8,116.01 was paid to HIC (from which Mrs Oats was refunded \$6,719.81) and \$41,883.99 was paid to Mr Dempsey's trust

account. Mr Dempsey also received a net payment from Mrs Oats of \$6,328.93 (\$11,960 paid by her less a refund to her of \$5,631.07). Mr Dempsey therefore received \$48,212.92, of which he was entitled to retain \$30,980.20. He therefore received \$17,232.72 in excess of his entitlement.

- [15] He should repay those moneys to Mrs Oats. That would leave her with \$23,952.56, being \$17,623.60 damages and \$6,328.96 repayment of moneys paid by her to Mr Dempsey.
- [16] Mr Dempsey should pay compensation to Mrs Oats of \$17,232.72 (which should include \$7,579 standing to the credit of Mrs Oats in Mr Dempsey's trust account).

Costs

- [17] Section 462(1) of the 2007 Act provides that the Tribunal must make an order requiring a person whom it has found guilty of unsatisfactory professional conduct or professional misconduct to pay the costs of the Commissioner unless satisfied that exceptional circumstances exist. There are no exceptional circumstances in this case. The respondent should pay the applicant's costs on a standard basis to be assessed.