

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Garrett* [2009] LPT 12

PARTIES: **LEGAL SERVICES COMMISSIONER**
(**applicant**)
v
JEFFREY LESLIE GARRETT
(**respondent**)

FILE NO: BS5981 of 2008

DIVISION: Legal Practice Tribunal

PROCEEDING: Discipline application

DELIVERED ON: 1 May 2009

DELIVERED AT: Brisbane

HEARING DATE: 16 February 2009

JUDGE: Mullins J
Ms C Endicott and Dr J Lamont, assisting

ORDER: **1. The respondent is publicly reprimanded**
2. The respondent must pay a penalty of \$15,000
3. The respondent must pay the applicant's costs of the application to be assessed

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – Statutory proceedings – Queensland – where respondent solicitor acted for a claimant for personal injuries against insurer – where expert reports provided to insurer were based on an assumption that subsequently became false to knowledge of respondent solicitor – where respondent relied on counsel's advice in relation to whether the new facts should be disclosed at the mediation of the claim – where respondent remained silent at the mediation and insurer settled case in belief that reports' assumptions were valid – whether respondent committed an act of professional misconduct by his role in the mediation – whether respondent's reliance on counsel's advice could be favourably taken into account when characterising the respondent's conduct – whether respondent should be publicly reprimanded

Legal Profession Act 2007, s 452, s 456

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

Boland v Yates Property Corporation Pty Ltd (1999) 74 ALJR 209, considered

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

Legal Services Commissioner v Mullins [2006] LPT 12, followed

Legal Services Commissioner v Podmore [2006] LPT 5, considered

Legal Services Commissioner v Scott [2009] LPT 7, considered

COUNSEL: JC Bell QC for the applicant
RJ Douglas SC for the respondent

SOLICITORS: Legal Services Commission for the applicant
McInnes Wilson Lawyers for the respondent

- [1] **MULLINS J:** The respondent was the solicitor who instructed Mr G Mullins of counsel to represent his client, Mr White, at the mediation of the client's personal injuries claim that resulted in the Tribunal finding that barrister guilty of professional misconduct: *Legal Services Commissioner v Mullins* [2006] LPT 12 (*Mullins*). After that matter had been completed, the applicant commenced this discipline application on 25 June 2008 against the respondent for one charge arising out of his role in the same mediation. On 24 October 2008, the respondent filed a response to the particulars of the charge in which most of the particulars were admitted. The parties filed a statement of agreed facts on 20 January 2009. The respondent by his solicitors' letter dated 11 February 2009 (exhibit 2) made further admissions that left very little in issue on the hearing of the application.

Summary of agreed facts

- [2] Mr White who was born in 1953 suffered injuries in a motor vehicle accident in April 2001 which resulted in quadriplegia. The respondent notified a claim to Suncorp-Metway Insurance Limited (Suncorp) as the insurer. The respondent obtained an occupational therapy assessment report dated 16 September 2002 prepared by Evidex Pty Ltd (Evidex) which the respondent provided to Suncorp. That report stated that Mr White's life expectancy had been reduced by 20 per cent from that of a normal male of his age. In October 2002 the respondent provided to Suncorp a work assessment report by an occupational therapist on behalf of Evidex that stated that, but for Mr White's injury, he would have continued to work in his trade as a builder until retirement.
- [3] In November 2002 the respondent provided to Suncorp a copy of a forensic accountant's report prepared by Evidex that assessed Mr White's future earning capacity to age 65 years, but for the injury, at \$934,178. The mediation of Mr White's claim against Suncorp was arranged for 19 September 2003. Suncorp briefed Mr Kent of counsel to represent it at the mediation. At this stage no court proceeding had been commenced, as the claim was progressing under the *Motor Accident Insurance Act 1994 (MAIA)*.
- [4] On or about 16 September 2003 the respondent was advised by Mr White that he had been examined for suspected cancer and that secondary cancers at various places in his body had been located at the earliest on or about 1 September 2003, but there were no medical reports in existence dealing with Mr White's cancer or treatment (the cancer facts).

- [5] The cancer facts were communicated to Mr Mullins in a conference held by the respondent and Mr White with Mr Mullins on or about 16 September 2003. One of the purposes of the conference was to settle a schedule of damages. Mr Mullins prepared that schedule of damages (the schedule) which was based on the Evidex reports. The amount included in the schedule for future economic loss was \$854,787.20, calculated as per the Evidex report, but reduced for contingencies by 20 per cent. Mr Mullins expressed a preliminary view that the cancer facts had to be disclosed to Suncorp prior to the mediation. Mr White instructed the respondent and Mr Mullins that he did not wish to disclose the cancer facts, unless he was legally obliged to do so, and that he wished the mediation to proceed as he wanted the matter resolved. To the respondent's knowledge, Mr Mullins provided the schedule on or about 16 September 2003 to Mr Kent. As the respondent knew and intended, Mr Kent and the representatives of Suncorp read the schedule.
- [6] Mr Mullins provided a written advice to the respondent dated 19 September 2003 on whether the cancer facts should be disclosed to Suncorp prior to the mediation and concluded that:
- (a) Mr White, the respondent and Mr Mullins were not legally obliged to disclose the cancer facts to Suncorp within one month of the discovery of the diagnosis;
 - (b) Mr White, the respondent and Mr Mullins could effectively conduct the mediation provided that they did not positively mislead Suncorp, Mr Kent and his instructing solicitor as to Mr White's life expectancy.
- [7] While the written advice was comprehensive in many respects, it did not address how the obligation of the respondent and Mr Mullins not to positively mislead Suncorp and its advisers reconciled with the information already conveyed to Suncorp by the Evidex reports and the schedule that there was no impediment to Mr White's life expectancy that did not arise from the motor vehicle accident.
- [8] The respondent considered the written advice of Mr Mullins and wrongly accepted it as correct.
- [9] On 19 September 2003, in the presence of the respondent, Mr Mullins orally advised Mr White that he was not legally obliged by the *MAIA* or otherwise to disclose the cancer facts within one month of discovering the diagnosis and that, although there were no cases directly on the point and the law was not certain, Mr Mullins considered that the law did not oblige Mr White to disclose the cancer facts. Mr White confirmed the instructions to the respondent and Mr Mullins that he did not wish to disclose the cancer facts, unless he was legally obliged to do so, and he wished to proceed with the mediation and finalise his claim as soon as possible.
- [10] Mr Mullins advised the respondent and Mr White that it was not appropriate to make positive assertions during the course of the mediation that the facts were different to the facts that they knew to be true and they could not make positive assertions that there were no impediments to Mr White's life expectancy.
- [11] During the course of the mediation, Mr Mullins referred to and relied upon aspects of the schedule to support Mr White's claim for damages and represented that, immediately prior to the injury, Mr White intended to continue working to normal

retirement age. The respondent remained silent during the mediation, notwithstanding that Mr Mullins made those representations.

- [12] At the mediation Suncorp and Mr White agreed to settle his claim for an amount that was substantially greater than would have been the case had the respondent advised Suncorp of the cancer facts. After Mr White died, Suncorp commenced an action to recover the sum paid to Mr White and that action was settled on confidential terms.
- [13] The respondent has admitted that it was his professional duty to reveal the cancer facts to Mr Kent and to Suncorp, before any settlement with Mr White was reached, and that he breached his professional duty by failing to reveal those facts and proceeding to negotiate the settlement of Mr White's claim. (It was relevant that paragraph 4.08 of the *Solicitors Handbook* prescribed that a practitioner shall not attempt to further the client's case by unfair or dishonest means.)

Legislative framework

- [14] Although the application against the respondent was commenced under s 452 of the *Legal Profession Act 2007* (the Act), the complaint had been made pursuant to the *Legal Profession Act 2004* in respect of conduct that was committed prior to the commencement of that Act.
- [15] It was not in issue on this application that the respondent's conduct is to be assessed by reference to the notions of professional misconduct and unprofessional conduct or practice that applied for the purpose of the *Queensland Law Society Act 1952*: see *Legal Services Commissioner v Podmore* [2006] LPT 5 at paragraphs [4]-[9], *Mullins* at paragraph [31], footnote 20, and compare *Legal Services Commissioner v Scott* [2009] LPT 7 at paragraphs [43]-[53].

Decision in *Mullins*

- [16] It had been argued on behalf of Mr Mullins that his conduct in continuing to rely on the Evidex reports at the mediation, without disclosing the cancer facts, was not tantamount to some representation that he was not aware of facts that could deleteriously impact on longevity. That was rejected. Reference was made at paragraph [29] in *Mullins* that barristers could not approach the mediation on the basis that honesty did not apply and to rules 51 and 52 that had been adopted by the Bar Association of Queensland at the relevant time. Rule 51 provided that a barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise). That was supplemented by rule 52 that required a barrister to correct any false statement unknowingly made by the barrister to the opponent, as soon as possible after the barrister became aware that the statement was false.
- [17] It was found by Byrne J in *Mullins* at paragraphs [30] and [31] that Mr Mullins practised a fraudulent deception:

“[30] By continuing to call the Evidex reports in aid as information supporting Mr White's claim after learning the cancer facts and recognizing their significance for the validity of the life-expectancy assumption, the respondent intentionally deceived Mr Kent and Suncorp representatives

about the accuracy of the assumption. He did so intending that Mr Kent and Suncorp would be influenced by the discredited assumption to compromise the claim: which happened.

[31] The fraudulent deception the respondent practised on Mr Kent and Suncorp involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to constitute professional misconduct.” (footnotes omitted)

[18] Byrne J ordered that Mr Mullins be publicly reprimanded, pay a penalty of \$20,000 and pay the applicant’s costs of that application to be assessed. Byrne J concluded that the misconduct of Mr Mullins warranted a public reprimand to signify disapproval of his misconduct and both the public reprimand and the fine should deter similar misbehaviour: *Mullins* at paragraph [35].

Significance of the respondent’s reliance on counsel’s advice

[19] It was common ground between the applicant and the respondent that the respondent could not rely on Mr Mullins’ advice as a defence to the discipline application. The parties differed, however, on whether the reliance on the advice by the respondent was a circumstance that could be favourably taken into account when characterising the respondent’s conduct.

[20] It was submitted on behalf of the respondent that there were time pressures on the respondent between the disclosure of the cancer facts by Mr White on 16 September 2003 and the mediation scheduled for 19 September 2003. The respondent was an experienced solicitor in personal injuries litigation and had briefed counsel who was also experienced in personal injuries litigation to appear at the mediation and to advise Mr White on whether he had to reveal the cancer facts for the purpose of the mediation. The advice that was prepared by Mr Mullins was 67 paragraphs in length and was not available until the day of the mediation. The respondent therefore had limited time to read and scrutinise the advice before the mediation which Mr White was keen to proceed with.

[21] It was submitted on behalf of the applicant that, notwithstanding the detail of the advice and the time exigency, the advice was obviously deficient in that it did not propose how to deal with the fact that Suncorp had already been provided with the Evidex reports (and the schedule) which were prepared on a factual basis that had become untrue by the time of the mediation. As was pointed out in *Mullins* at paragraph [34], Mr Mullins had posed the wrong questions in his advice. In addition, the very conduct which Mr Mullins advised against – not *positively* misleading Suncorp that there was no impediment to Mr White’s life expectancy in the future – would be committed by not advising Suncorp of the cancer facts and thereby leaving Suncorp to believe that the facts relevant to life expectancy remained those set out in the Evidex reports.

[22] At the time that the respondent considered Mr Mullins’ advice, he was faced with the ethical question of whether he should remain silent at the mediation about the cancer facts, knowing that the information that had been earlier provided to Suncorp had been displaced by the cancer facts. That ethical question directly concerned the honesty of the respondent in dealing with his opponents in the mediation.

- [23] Whether it is reasonable for a solicitor in the position of the respondent to rely on counsel's advice will be affected by many factors. In the circumstances of this mediation, the respondent was not a passive recipient of counsel's advice, but brought his own legal knowledge, skill and experience to his consideration of it. The observations made by Kirby J in the context of an allegation of professional negligence in *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209, 240 [142] are apposite.
- [24] Notwithstanding the urgency that applied to the respondent's consideration of Mr Mullins' advice, the advice was patently flawed and that should have been apparent to the respondent. The fact that the respondent acted on the advice is an explanation for why the respondent behaved the way he did at the mediation, but it is not a factor that can favour the respondent in characterising the respondent's conduct at the mediation.

Characterisation of the respondent's conduct

- [25] In the circumstances in which this mediation took place, the respondent by remaining silent at the mediation practised a fraudulent deception (analogous to that committed by Mr Mullins), in that the respondent intentionally deceived Mr Kent and the other representatives of Suncorp to believe that he knew of no facts likely to affect significantly Mr White's life expectancy. It was therefore argued by Mr Bell QC on behalf of the applicant that the respondent had committed an act of professional misconduct by his role in the mediation in the same way that it was found that Mr Mullins' conduct amounted to professional misconduct.
- [26] Mr Douglas SC who appeared for the respondent on this application accepted that the respondent's conduct amounted to dishonesty, but submitted that, in context, the conduct was not of such seriousness as to characterise it as professional misconduct, rather than as unprofessional conduct or practice, and that it should therefore be left for the Tribunal to characterise the conduct in the circumstances.
- [27] As the crux of the allegation against each of Mr Mullins and the respondent was dishonesty, there should be no different characterisation of the respondent's conduct from that of Mr Mullins in the mediation. The conduct of the respondent amounted to professional misconduct, as that concept is explained in *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498, 507-508.

Matters favourable to the respondent

- [28] The respondent was admitted as a solicitor of the Supreme Court of Queensland in 1991 and is the principal of a firm of solicitors. There have been no previous adverse disciplinary findings made against the respondent. Apart from the conduct the subject of this proceeding, the references from fellow practitioners that were tendered on behalf of the respondent indicated that the respondent is perceived by his peers as a competent, diligent and honest practitioner. He is highly regarded in his local community.
- [29] The applicant fairly acknowledged that the conduct the subject of this proceeding was an isolated incident, where the respondent mistakenly relied on counsel's advice, and acted in the course of the mediation as a result of an erroneous understanding of his professional obligations.

- [30] The respondent cooperated with the Legal Services Commission in relation to the complaint against him arising out of the mediation and this discipline application. It was to the respondent's credit that the issues that remained outstanding at the hearing of this application were confined.
- [31] There is no doubt whatsoever that the respondent appreciates now why his conduct at the mediation fell substantially short of the standard expected of a legal practitioner. It is highly unlikely that the respondent will ever repeat such conduct.

Appropriate orders

- [32] The applicant submitted that there should be a public reprimand and a substantial penalty in the order of \$20,000 comparable with the orders made in *Mullins*.
- [33] It was submitted on behalf of the respondent that a public reprimand was inapt, as the publication of the reasons in *Mullins* meant that the profession was well aware of the events that resulted in this charge and the respondent's involvement in it. In addition, as the reasons of the Tribunal in this matter would be published on a publicly accessible website, the public reprimand was unnecessary and would take the matter no further.
- [34] It was also submitted on behalf of the respondent that it was Mr Mullins who was primarily running the mediation. That submission did not make sufficient allowance for the independent responsibility that the respondent had throughout the mediation as the solicitor for Mr White, both in acting for Mr White and dealing with Suncorp and its advisers.
- [35] The disciplinary proceeding itself has been salutary for the respondent. Apart from personal deterrence, however, the disciplinary proceeding is also concerned with general deterrence and the need to protect the public and maintain the reputation of the profession: *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301 at paragraph [122]. That justifies a public reprimand of the respondent under s 456(2) of the Act. It would be an odd result, where there was substantial similarity in the professional misconduct of Mr Mullins and the respondent in the same mediation, for only one to be publicly reprimanded.
- [36] The orders that should be made in respect of the respondent's professional misconduct are:
1. The respondent is publicly reprimanded.
 2. The respondent must pay a penalty of \$15,000.
 3. The respondent must pay the applicant's costs of the application to be assessed.