

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Gregory* [2009] LPT 6

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
MARK IAN GREGORY
(respondent)

FILE NO: BS2523 of 2007

DIVISION: Legal Practice Tribunal

PROCEEDING: Discipline Application

DELIVERED ON: 4 March 2009

DELIVERED AT: Brisbane

HEARING DATE: 17 February 2009

JUDGE: Mullins J
Ms B Sullivan and Dr J Lamont, assisting

ORDER: **Upon the undertaking of the respondent forthwith to disclose to the mentor engaged in accordance with these orders any correspondence or notices received by him from the Legal Services Commission or the Queensland Law Society (QLS), relating to any complaint or disciplinary action under the *Legal Profession Act 2007*, it is ordered that:**

- 1. The respondent is publicly reprimanded.**
- 2. The respondent must pay a penalty of \$5,000 within six months.**
- 3. The respondent must undertake a practice management course approved by the Director, Professional Standards, of the QLS that commences within the next six months.**
- 4. The respondent must forthwith engage solicitor, Alexandra Phillipa Colman, as mentor for a period of 12 months, but if Ms Colman does not continue as mentor for the period of 12 months, must engage forthwith, on Ms Colman ceasing as mentor, another mentor approved by the Director, Professional Standards, of the QLS for the balance remaining of the period of 12 months.**
- 5. The respondent must engage the services of Peter Lynch, or another such expert as approved by the Director, Professional Standards, of the QLS to provide advice as to the improvement of his legal practice.**

6. **The respondent must provide to the Director, Professional Standards, of the QLS a report by Peter Lynch, or another approved expert, within six months.**
7. **The respondent must commence psychological counselling within three months.**
8. **The respondent must provide to the Director, Professional Standards, of the QLS a report by his psychologist within six months.**
9. **The respondent must pay the applicant's costs of this application fixed in the amount of \$2,500 within six months.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – where the respondent solicitor failed to respond to requirements of the Queensland Law Society to provide explanations in relation to complaints against the respondent and failed to comply with follow up notices issued by the Law Society – where 10 charges relating to those failures amounted to professional misconduct – where the respondent gave an undertaking in his personal capacity to produce to the court a copy of a statement of his financial position in the course of giving evidence as a witness in proceedings where he was the complainant against his former business associate – where the respondent breached the undertaking – whether the respondent's failure to comply with the undertaking should be characterised as professional misconduct or unsatisfactory professional conduct – where the respondent accepted conditions proposed by the applicant for supervision, counselling and mentoring

Legal Profession Act 2007, s 443

Legal Services Commissioner v McColm [2006] LPT 14, considered

Legal Services Commissioner v Zaghini [2005] LPT 4, considered

COUNSEL: SL Lane for the applicant
DH Tait SC for the respondent

SOLICITORS: Legal Services Commission for the applicant
Brian Bartley & Associates for the respondent

[1] **MULLINS J:** Prior to the hearing of this application, the respondent made it known to the applicant that he would not be contesting the eleven charges that were set out in the amended application. A statement of agreed facts was prepared by the applicant and the respondent for the purpose of the hearing.

- [2] I made the orders set out above at the conclusion of the hearing for reasons that I indicated would be published subsequently. These are the reasons for making the orders in respect of the charges against the respondent.

Charges

- [3] Three separate complainants made complaints to the Queensland Law Society (QLS) about the respondent in 2003, 2004 and 2005 respectively. All the charges, other than charge 1, arise either from the failure of the respondent to respond to a requirement of the QLS to provide an explanation in relation to matters the subject of a complaint or the failure of the respondent to comply within the 14 days specified in the notice given by the QLS, as a result of the failure by the respondent to comply with a requirement of the QLS.
- [4] These failures commenced in 2004 and continued in 2005 and 2006 until finally the discipline application was filed in March 2007. Compliance with outstanding requirements of the QLS was made after the respondent engaged his current solicitors in October 2008. Explanations for the respondent's conduct in not responding in a timely way to the requirements of and notices from the QLS were given by the respondent in the letter dated 10 February 2009 that was sent by his solicitors to the QLS.
- [5] Charge 1 arose out of a complaint made by the respondent against a former business associate. The respondent had complained to the police that this business associate had embezzled money from him and sought to induce him to take certain action under promise or threat of reprisal. The business associate was charged in respect of these matters. During the committal hearing against the business associate on 16 November 2001, the respondent was required to give oral evidence. During the course of giving evidence, in order to overcome an objection made by counsel for the business associate, the respondent undertook to the court to produce to the court a copy of a statement of his financial position dated 1 August 1997 which he said had been provided to his bank and, if he did not hold a copy, to obtain a copy from the bank and provide it to the court. The committal was adjourned until 21 February 2002.
- [6] The respondent did, in fact, comply with the first part of the undertaking in that he reviewed his files and did not locate a copy of the relevant statement of financial position. He failed, however, to make inquiry with the bank about obtaining a copy of that document and still had not done so by the time the committal resumed on 21 February 2002. The respondent conceded to the court on that day that he had breached his undertaking. He then had his secretary ascertain from the bank on that same day that he was able to request a copy of the document from the bank, but that there would be a delay in obtaining the copy. It became unnecessary for the respondent to request the copy, however, as the Crown did not proceed with the charges against the business associate. The complaint to the QLS about the respondent's breach of his undertaking to the court was made by that business associate.

Respondent's circumstances

- [7] The respondent is 44 years old. He was admitted to practice in 1990 and after working as an employed solicitor conducted practice as a sole practitioner from 1 September 1997 to 30 June 2008. One of his employed solicitors became his

partner in this practice, as from 1 July 2008. The respondent has practised primarily in the area of family law. Whilst a sole practitioner he had the responsibility of supervising eight or nine staff which included one or two employed solicitors, in addition to carrying a significant workload of his own files.

- [8] The respondent had found it stressful giving evidence as the complainant at the committal hearing against his former business associate, where he was rigorously cross-examined about his financial dealings. He described himself as “shell-shocked” after his experience as a witness on the day on which he gave the undertaking. He then got caught up in handling his family law files in the busy period leading up to Christmas. He described the failure to comply with the undertaking as an oversight, and not a deliberate act, as it was not a document that he had any reason to withhold.
- [9] The respondent was overwhelmed by the complaint by his former business associate that was made to the QLS in 2003. The respondent acknowledges that he developed a mental block about dealing with the complaints made against him by the former business associate and then subsequently by two former clients.
- [10] Throughout the period covering the complaints and the investigations by the QLS the respondent was responsible for the conduct of a number of legal aid family law files that were difficult and time consuming. There was also a personal matter that emerged in 2005 that distracted the respondent from dealing with the complaints being investigated by the QLS.
- [11] According to the respondent, taking on a partner in his practice has made a difference, because he is now sharing the burden and responsibility of supervising and managing the files and staff of the practice.
- [12] Although the respondent has contributed to the delay and the resolution of this disciplinary proceeding, the applicant does not contend that the respondent is not a fit and proper person to practise as a solicitor. Several references were tendered on behalf of the respondent from persons who have dealt with the respondent professionally in recent times that acknowledge the respondent’s commitment to his practice and clients.

Characterisation of the charges

- [13] It was common ground between the applicant and the respondent that the charges, other than charge 1, amounted to professional misconduct. Even apart from the effect of a provision such as s 443 of the *Legal Profession Act 2007*, the failure of a solicitor to comply with requirements of and the statutory notices issued by the QLS amounts to disregard for the discipline process and professional obligations that apply to practice as a solicitor.
- [14] The issue arises as to how the respondent’s failure to comply with his undertaking to the court should be characterised. Even though the undertaking was given by the respondent in his personal capacity, and not in the course of practice as a solicitor, the respondent knew and understood the significance of giving an undertaking to the court. The respondent acknowledges that it was unacceptable that as a solicitor he did not honour his undertaking to the court to produce a document.

- [15] The failure of the respondent to comply with his undertaking has to be considered in the context that it occurred whilst he was a witness and the committal hearing was part-heard. The failure to produce the document did not cause any loss or consequence for any person other than the respondent who was cross-examined on the resumption of the committal hearing to highlight the breach of his undertaking.
- [16] As the breach of the undertaking occurred prior to the commencement of the *Legal Profession Act 2004*, the definitions of professional misconduct and unsatisfactory professional conduct for the purpose of charge 1 are based on the definitions of “professional misconduct or malpractice” and “unprofessional conduct or practice” in the *Queensland Law Society Act 1952*.
- [17] The applicant relied on the decisions of *Legal Services Commissioner v Zaghini* [2005] LPT 4 and *Legal Services Commissioner v McColm* [2006] LPT 14 to submit that the respondent’s conduct was analogous to that in *Zaghini* and should be characterised as professional misconduct.
- [18] In both *Zaghini* and *McColm* the undertakings were given by the respective practitioners in the course of acting for clients and to progress matters for those clients. That can be distinguished from the giving of the undertaking by the respondent for a personal matter, even though the undertaking was given to a court. The applicant also relied on the fact that the failure to honour the undertaking lasted for a period of some three months, but that merely coincided with the period of the adjournment of the committal hearing. In the circumstances, the respondent’s failure to comply with the undertaking given by him to the court in the course of giving evidence as a witness was unsatisfactory professional conduct.

Orders

- [19] It is appropriate that the respondent be publicly reprimanded and pay a penalty, because of the nature of the professional misconduct that was the subject of most of the charges and the need for deterrence, both general and personal, to discourage legal practitioners (including the respondent) from failing to respond to requests for information in relation to the investigation of complaints against them and any notices given by the investigatory body.
- [20] The respondent was willing to undergo supervision and mentoring, in order to ensure that he was never in the position again where he failed to respond to the investigation of a complaint made against him. Solicitor Ms Colman, who works predominantly in the area of family law, was prepared to be the respondent’s mentor for 12 months. The respondent gave the undertaking to the court, in the terms that are recited at the commencement of these published reasons, in order to facilitate mentoring in the circumstances to which the undertaking applies. The respondent was prepared otherwise to accept the conditions proposed by the applicant for his supervision, mentoring and counselling. As those conditions were an appropriate response to the matters disclosed in the material before the Tribunal on this discipline application, they were incorporated in the orders made by the Tribunal.