

LEGAL PRACTICE TRIBUNAL

LPT 003

de JERSEY CJ

MS CUSHING-SULLIVAN
MS PACHECO

No 4900 of 2006

LEGAL SERVICES COMMISSIONER

Applicant

and

STEPHEN JOSEPH HOOLIHAN

Respondent

BRISBANE

..DATE 18/04/2007

REASONS

THE CHIEF JUSTICE: The respondent solicitor aged 53 years and admitted in 1979 was declared bankrupt on the petition of the Australian Taxation Office on the 27th of January 2006.

He advised the Queensland Law Society of his bankruptcy by letter dated the 10th of February 2006. On the 11th of April 2006 the Law Society cancelled his practicing certificate under section 64 subsection 1 paragraph (a) of the Legal Profession Act 2004, consequent upon the respondent's failure to comply with section 63 subsection 1.

On the 30th of August 2006 the Tribunal made provision for a form of substituted service of the discipline application. The applicant complied with that order on the 4th of October 2006. Section 477 of the Legal Profession Act permits the Tribunal to proceed in the absence of the respondent if it reasonably believes the respondent has been given sufficient notice of the hearing.

The respondent was notified by letter of the 22nd of March 2007 of today's hearing date and the applicant's affidavit material was forwarded on the 10th of April 2007. The letters were sent to his last known postal address, being the address specified in the order for substituted service. The Tribunal is therefore satisfied that the respondent has been given sufficient notice for hearing.

The respondent was, under the original discipline application, subject to as many as 27 separate charges. Charges 4, 5 and 6 have, however, been discontinued.

I proceed to deal now with the remaining charges. They are many and varied. The first is of neglect and delay, failure to maintain reasonable standards of competence and diligence and knowingly misleading clients. It relates to personal injury claims on behalf of a Mrs Walton, and her son, Clinton, and the respondent's dealings with the New South Wales solicitors who engaged the respondent on behalf of those primary clients.

The respondent was so engaged in June 1997 in order to pursue claims for damages for personal injuries arising from a dog attack at Maroochydore in January 1996. In acting for his clients, the respondent failed to communicate advice, as requested by the New South Wales solicitor, failed to refer the matter to counsel for advice in accordance with the principal solicitor's instructions, failed to take any action in an attempt to negotiate a settlement on behalf of his clients and failed to institute court proceedings within the requisite periods.

Further, between mid-1997 and late 2001 the respondent acted dishonestly in relation to his clients. On a number of occasions he falsely advised Mrs Walton that her claim and Clinton's claim were proceeding satisfactorily, that he had taken action against various people, that a settlement offer had been made albeit of insufficient magnitude, and so on. Because of the respondent's inaction, the claims became statute barred. When Mrs Walton retained another New South Wales solicitor to ascertain the current state of the

proceedings, and that solicitor wrote on four separate occasions making enquiries of the respondent, the respondent failed to reply. The first charge amounts to professional misconduct.

The second charge arises from the enquiries made by the Queensland Law Society into the respondent's apparent neglect of Mrs Walton and her son. He was requested in April 2002 to provide a written explanation. It was not until 11 June 2002 that he provided any response.

The third charge concerns that response. It was misleading. It was misleading in that he denied even having received any instructions to act on behalf of Mrs Walton. He thereby committed professional misconduct.

The seventh charge concerns the respondent's client, Mr Clarke. The respondent was retained in March 2000 to act on Mr Clarke's behalf in a claim for damages for personal injuries arising from a work related injury which had occurred in July 1998. The respondent commenced proceedings in the Supreme Court on the 12th of April 2001 but following service of the Statement of Claim and a Notice to Admit Facts in April 2001, the respondent did not otherwise progress the claim at all.

On various occasions between June 2001 and July 2004 the respondent made false statements to Mr Clarke about the claim, to the effect that it was progressing, that he was waiting to hear back from the other side and that it would be finalised soon. None of those things was true. The respondent was guilty of professional misconduct.

The eighth charge concerns a particular aspect of that misrepresentation concerning a mediation conference. The respondent falsely represented to Mr Clarke and others that a mediation conference had been set up for 2 May 2002. That was untrue. The day before the respondent attended at Mr Clarke's residence and falsely informed Mr Clarke that because of the respondent's own illness that mediation could not proceed the following day. The respondent acted deceitfully, as I have said, in that no mediation conference had ever been organised. It was a case of professional misconduct.

The ninth charge concerns the efforts of Mr Clarke's new solicitors, Travis Schultz, to extract from the respondent a bill of costs covering unpaid work and delivery up of Mr Clarke's client file. The account and the file were requested in late July 2004. It was not until 11 October 2004 that the respondent delivered any of the material to the new solicitors. At no stage did he deliver an itemised bill of costs. It even became necessary for Mr Schultz to file an application in the Court for an order for the delivery up of the files. That occurred in mid-September 2004. This was a case bordering on professional misconduct but in the end to be characterised as unsatisfactory professional conduct.

The 10th charge concerns the respondent's failure to provide an adequate explanation to the Queensland Law Society in respect of the complaint of the new solicitor, Mr Schultz, concerning the last mentioned matters. An explanation was sought by letter of 6 January 2005 and has not to date been provided.

The 11th charge concerns the respondent's failure to comply with a notice from the Queensland Law Society in that regard under section 269 subsection 3 of the Legal Profession Act 2004.

The 12th charge is that between 1 June 2001 and 29 August 2002 the respondent dishonestly attempted to gain a financial advantage for himself in relation to a proposed sale of land at Caloundra owned by his clients, Mr and Mrs Ezard, or alternatively, knowingly misrepresented to them that the local authority had refused to agree to any subdivision of their land. Mr and Mrs Ezard instructed the respondent in June 2001 to make an application for subdivision of their land on their behalf to the Council, an application for in-principle approval for the subdivision. The respondent engaged a surveyor, Mr Tronc, to lodge such an application. The Council intended to consider that application on 6 November 2001. Contrary to his clients' instructions the respondent instructed the surveyor to withdraw the application. He then falsely represented to Mr and Mrs Ezard that the Council had refused the application. With great deceit he then attended an auction of the land on 29 December 2001 and purchased the

land himself for less than its market value would have been if the in-principle approval had been obtained. This was professional misconduct.

The 13th related charge is that while acting on his own behalf as the buyer of that land and in an attempt to terminate his contract for its purchase the respondent made false and misleading statements to Mr and Mrs Ezard's solicitors in that transaction. The respondent purported to terminate the contract on the basis the land was affected by a particular development control plan. He asserted he did not become aware of the applicability of that plan during the period he had acted himself for Mr and Mrs Ezard. In fact, however, Mr and Mrs Ezard had sent him the relevant material during that period. That was professional misconduct.

The 14th charge concerns the respondent's failure to respond in time to a request from the Queensland Law Society for an explanation in response to the complaint made on behalf of Mr and Mrs Ezard. The response he did provide was by letter dated 30 August 2002, out of time.

The 15th charge concerns that response and its falsity. The false representations included that the Council had refused to support the application for a rezoning, that Mr Ezard instructed the respondent not to proceed with the application, that the respondent bid at the auction only to "help the process along" and was surprised when his bid was accepted and that it was only after the contract was signed that he

ascertained that the property was adversely affected by the town plan. This was professional misconduct.

The 16th charge concerns his clients, Mr and Mrs Waters. On 24 January 2003 the respondent was instructed to act in a proposed action against the Waters' trustees in bankruptcy pursuant to section 178 of the Bankruptcy Act 1966. In early February 2003 Mr and Mrs Waters instructed the respondent to engage counsel. He did not do so. Although he advised Mr Waters that he intended to commence Court action at no time did the respondent do so. The respondent failed to respond to telephone calls from his clients. He falsely advised them in early June 2003 that he had engaged a particular barrister to settle the writ and that counsel was in the process of doing so and that the settled documentation would be available the following day, claims in fact untrue. This was professional misconduct.

The 17th charge concerns the respondent's failure to comply with his obligations as trustee with respect to the audit of his trust account. For the financial period ending 31 March 2003 the respondent failed to have his trust account audited and failed to lodge the audit report and audit certificate by the due date. The report and certificate were not lodged until 3 June 2004. This was unsatisfactory professional conduct.

The 18th charge concerns his client, Ms Foley. The respondent acted for Ms Foley in District Court proceedings. Those proceedings were resolved in December 2003 and the respondent received \$100,000 into his trust account on Ms Foley's behalf.

Although \$65,000 was subsequently paid out to her the balance of \$35,000 was retained. By letter of 9 June 2004 Ms Foley requested an itemised account. Her new solicitor followed this up on 17 December 2004 requesting payment of the \$35,000 balance. The respondent failed to render an itemised bill of costs for all unpaid work to which the requests related or to pay out the balance.

The 19th charge relates to the same matters, alleging a breach of Rule 84 subrule 2 of the Queensland Law Society Rules 1987. The eighteenth and nineteenth charges involved professional misconduct.

The 20th charge related again to Ms Foley's matter and concerns the respondent's failure to give a full explanation in writing under section 269(1)(a)(i) of the Legal Profession Act 2004 and to produce within the specified period particular documents pursuant to section 269(1)(a)(iii). Neither an explanation has been given, nor the documents provided, albeit the request was made on 10 March 2005.

The 21st charge raises the respondent's failure to comply with the Law Society's request for an explanation within a period of fourteen days in the case of a complaint made on behalf of Mr and Mrs Ezard referred to in charge number 14.

The 22nd charge concerns the respondent's borrowing for his personal use on or about 24th April 2002 a sum of \$20,000 from a private company, Tanahe Pty Ltd of which his client Mr Gibbs was director and shareholder. The respondent defaulted in repayment of a loan and in late November 2005 the lender

company obtained judgment against the respondent in the
Magistrates Court in the sum of \$28,105 including accrued
interest. The borrowing involved the respondent preferring
his own interests over those of his client, mixing the affairs
of his client with his own, exhibiting a conflict of interest
and failing to ensure the lender company obtained independent
legal advice, et cetera. This was professional misconduct.

1
10

The 23rd charge concerns the respondent's failure to provide a
full explanation in writing to the Legal Services Commissioner
in respect of the Tanahe borrowing.

20

The 24th charge concerns the respondent's failure to comply
with a written notice in respect of those matters issued under
section 269 subsection (3) of the Legal Profession Act 2004.
That notice was given on the 23rd of August 2005.

30

The 25th charge concerns the respondent's failure in a
reasonable time after a request to provide his client,
Mr Nania, or his solicitors Murphy Schmidt with a bill of
costs covering unpaid work and his client file. Mr Nania had
retained the respondent to pursue a claim for damages in
respect of injuries sustained in a motor vehicle accident in
October 2000.

40

In November 2005 Mr Nania requested Murphy Schmidt to take
over the conduct of his claim. The account was requested of
the respondent on the 7th of November 2005. Nothing was
forthcoming and an application was filed in the Court on the
1st of March 2006. That led to an order of the Court on the

50

14th of March 2006 for the delivery up of the file. That delivery has not yet been made in contempt of the Court's order. This involved professional misconduct.

1

The 26th charge concerns the respondent's failure to provide an explanation about the last-mentioned default at the request of the Legal Services Commissioner under section 269 subsection 1 paragraph (a) subparagraph (i) of the Legal Profession Act 2004. None has been provided.

10

The final, 27th charge, concerns the respondent's failure to give the Queensland Law Society under section 63 subsection (1)(a) of the Legal Profession Act a notice in the approved form of his bankruptcy and to give the society a written statement explaining why nevertheless he continued to be a suitable person to hold a local practising certificate. It was that failure which led to the cancellation of his practising certificate. He had, however, advised the society of his bankruptcy and it seems that maintaining a practising certificate was apparently not a matter of a great concern to him. This was unsatisfactory professional conduct.

20

30

40

The affidavit material filed in the Tribunal establishes all of the charges. No responding material has been filed by the respondent. Each of the charges is established. The charges are of varying gravity. Some are extremely serious, especially those involving active deceit.

50

It remains to characterise the conduct involving failure to
comply with requirements and notices. They should, in this
case, be characterised as involving professional misconduct.
The failure is more substantial than in Williams [2006] LPT 4.
In this case the respondent ignored letters and notices on no
fewer than nine occasions and has provided no reasonable
excuse for non-compliance. They related to six separate
investigations commenced by complaint against the respondent.
Also, there is the circumstance that the respondent had
previously been found guilty on similar complaints.

1

10

20

On the 11th of November 1997 the Solicitors Complaints
Tribunal found three charges established against the
respondent, two of which amounted to professional misconduct
and one unprofessional conduct. One of the counts of
professional misconduct arose out of the respondent's failure
to provide requested information to the Queensland Law Society
during an investigation. The other concerned the respondent's
having advised a client that proceedings had been commenced
when in fact they had not. The count of unprofessional
conduct concerned the respondent's failure to commence an
action, permitting it to become statute-barred. In that case
the respondent was ordered to pay a pecuniary penalty of
\$15,000.

30

40

50

Then on the 20th of February 2001 the Solicitors Complaints
Tribunal found two charges proven against the respondent, each
amounting to professional misconduct. They concerned his
failure to comply with the requirement of the Queensland Law

Society that he provide an explanation, and his failure to
comply with a subsequent section 5H notice. He was then
ordered to pay a penalty of \$3,500.

1

In the result, on this application the respondent has been
found guilty of 21 separate instances of professional
misconduct and three instances of unsatisfactory professional
conduct. The relevant criterion, protection of the public,
requires in this case that the respondent be struck off. He
has a previous history of similar conduct. The conduct
involved in these charges involved serious, repeated and
persistent failure on the respondent's part to adhere to
appropriate professional standards. There are also instances
of dishonesty; many of them.

10

20

His failure to respond in an appropriate way to the discipline
application itself illustrates his abandonment of appropriate
professional standards. No response short of striking off
would be appropriate in this case. The respondent has amply
demonstrated that he is not a person who should be held out as
fit to practise as a legal practitioner.

30

40

There will therefore be an order that the name of the
respondent, Stephen Joseph Hoolihan, be removed from the local
roll and an order that the respondent pay the applicant's
costs of and incidental to this proceeding to be assessed on
the appropriate Supreme Court scale if not agreed.

50

...

1

10

20

30

40

50