

**CITATION:** *Legal Services Commissioner v Kellahan* [2012] QCAT 263

**PARTIES:** Legal Services Commissioner  
(Applicant/Appellant)  
v  
Drew Adrian Kellahan  
(Respondent)

**APPLICATION NUMBER:** LPD001-07

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** Hearing on the papers 4 November 2011;  
subsequent written submissions received  
1 February 2012; further hearing on the papers  
12 March 2012

**HEARD AT:** Brisbane

**DECISION OF:** **Justice Alan Wilson, President**  
Assisted by:  
**Ms Julie Cameron, Practitioner Panel  
Member,**  
**Dr Margaret Steinberg, Lay Panel Member**

**DELIVERED ON:** 25 June 2012

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

1. That the Respondent is publicly reprimanded;
2. That the Respondent may not be issued with a practicing certificate within three years of this order, and may not seek the issue of a certificate in that time;
3. That upon the Respondent's return to practice after the expiration of that period, he may only practice in an employed capacity, under the supervision of a solicitor holding a principal level practicing certificate, for a period of at least two years;
4. That upon the Respondent's return to practice, he must arrange a suitable program of retraining in legal ethics in consultation with his supervising solicitor, the Legal Services

**Commissioner, and the Queensland Law Society;**

- 5. That the Respondent pay Alexander John Newitt the sum of \$75,000 within 18 months of the date of this order, by payments of not less than \$25,000 every six months; and, that he pay those monies into a bank account nominated by Mr Newitt and produce written proof of each payment to the Commissioner; and,**
- 6. That the Respondent pay the Commissioner's costs in the agreed sum of \$5,000 within six months of the date of this order.**

**CATCHWORDS:**

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – APPROPRIATE PENALTY – where the Respondent undertook legal work for a private client whilst holding a non-principal level practicing certificate – where the Applicant and Respondent accept that the conduct constitutes professional misconduct – where the Applicant and Respondent have made a joint submission that the misconduct does not involve dishonesty or deceit – where the Applicant and Respondent have made a joint submission on an appropriate sanction – whether the Tribunal accepts that the sanction is appropriate

*Acts Interpretation Act 1954, s 14A*  
*Queensland Civil and Administrative Tribunal Act 2009, s 32*  
*Queensland Law Society Act 1952, ss 38, 39*  
*Legal Profession Act 2004, ss 265, 269(3)*  
*Legal Profession Act 2007, ss 419, 456, 464*

*Law Society of NSW v Jaywardena (2005)*  
 NSWADT 96  
*Law Society of NSW v Kennedy (2005)*  
 NSWADT 153  
*Law Society of NSW v Smith (2003)* NSWADT 163  
*Legal Services Commissioner v Jiear [2012]*  
 QCAT 221  
*NSW Bar Association v Harrison (2001)*  
 NSWADT 213

**APPEARANCES and REPRESENTATION (if any):**

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* ('QCAT Act'). The panel members met to consider the parties' submissions on 4 November 2011 and 12 March 2012.

**REASONS FOR DECISION**

- [1] Mr Kellahan, a solicitor now aged 41, was admitted to practice in January 1995. He does not presently hold a practicing certificate, having voluntarily surrendered it to the Queensland Law Society in mid-2009.
- [2] From June 2002 he held a non-principal level practicing certificate, which, as he knew because of a letter from the Queensland Law Society ("the QLS") at the time, meant that he was only entitled to carry out legal work for his employer at the time – North Queensland Ventures ("NQV"), a wholly owned subsidiary of Matapos Holdings Pty Ltd, where his position was described as "corporate counsel".
- [3] In October 2003 NQV entered into a business relationship with Mr Alex Newitt, trading as "Gro n' Mow". After that time NQV provided business services to that business which, also, provided gardening services for properties managed by NQV.
- [4] The precise nature of the business transactions between Mr Newitt, NQV and Matapos is not clear but in November 2003 Newitt provided, through Mr Kellahan and it seems by way of an investment, funds in the sum of \$105,000. Of that sum, Mr Newitt has never recovered \$75,000.
- [5] The first charge against Mr Kellahan concerns legal work he did for Mr Newitt, involving the resolution of property and child matters between Mr Newitt and his wife. Under ss 38 and 39 of the *Queensland Law Society Act 1952*, which applied at the time, his limited practicing certificate did not permit Mr Kellahan to undertake legal work for private clients outside his employment with NQV.
- [6] Between October 2003 and late April 2004 he wrote to Mr Newitt's wife's legal representatives on NQV's letterhead, indicating that he acted for Mr Newitt in his matrimonial proceedings; filing a document in the Family Court representing that he was Mr Newitt's lawyer; and, receiving and investing the earlier mentioned amount of \$105,000, which represented the balance of the proceeds derived from the sale of the Newitts' former matrimonial home.
- [7] Mr Kellahan says in an affidavit and his submissions in this matter that he had an honest misapprehension as to the extent of his ability to act for Mr Newitt, with whom he enjoyed a friendly relationship and whom he was trying to assist with a personal legal issue. It is incontrovertible, however, that he was not truly in private practice and, importantly, did not hold a current certificate of professional indemnity insurance in compliance with

the *Queensland Law Society Act 1952* and was, on any view, acting in breach of ss 38 and 39.

- [8] He also asserted, in his affidavit, that he arranged for Matapos to purchase a \$1 interest in Mr Newitt's business and, thereby, that business became part of the NQV group; and, that he reasonably believed he was thereafter acting for Mr Newitt in his capacity as Corporate Lawyer for NQV. The claim is spurious: Mr Newitt did not, personally, become an entity in or an employee of NQV, and his Family Court proceedings had no relationship with any aspect of NQV's businesses.
- [9] Mr Newitt's wife was represented, in their matrimonial proceedings, by a law firm in Cairns. Under a consent order made on 10 May 2004 Mr Newitt was required to pay \$30,000 to his wife's solicitors trust account. The funds that would have been used to pay that agreed sum had been deposited into a bank account held by NQV. By a letter dated 6 August 2004 Mr Kellahan sent Mr Newitt's wife's solicitors copies of a deposit slip (albeit, completed by someone else), which appeared to show that the funds had been transferred into the wife's solicitors trust account. In truth, they had not, and the payment was not actually made until 13 May 2005.
- [10] Mr Kellahan says he was simply an employee of NQV and had no access to its bank accounts and was not, therefore, in a position to satisfy himself about the balances in company accounts. He says that his representation to Mr Newitt's wife's solicitors was, at worse, inadvertently misleading.
- [11] The consent order of 10 May 2004 specifically required, however, that Mr Kellahan pay the sum of \$30,000 then held in NQV's bank account to the wife's solicitors trust account within 7 days. If, as Mr Kellahan claims, he could not and did not know whether the transfer had actually been made, he should not have made the representation.
- [12] The third charge involves a failure to comply with a notice given by the Queensland Law Society. On 1 July 2004 the Legal Services Commissioner referred a complaint lodged by a solicitor (who subsequently acted for Mr Newitt) to the QLS for investigation under s 265 of the *Legal Profession Act 2004*.
- [13] On 5 July 2004, the QLS by its Manager, Legal Investigations Department requested from Mr Kellahan a written explanation concerning the matters which were the subject of the complaint by 12 July, and also requested that Mr Kellahan send various documents to the QLS by that date.
- [14] Mr Kellahan responded on 14 July advising he was prepared to provide a response by 16 July 2004. When nothing was received by that date, the QLS sent a notice, on 22 July, under s 269(3) of the *Legal Profession Act 2004*.
- [15] In the subsequent absence of any response another, similar notice was sent on 2 December 2004. Under the Act, Mr Kellahan's failure to reply to the last notice within the 14 day period specified is deemed to be

professional misconduct, unless he can provide a reasonable excuse. Mr Kellahan properly acknowledges the delay, and now extends his apology to the Society. He also says that when he did respond, it was in a full and complete manner with over 15 pages of detail.

- [16] These proceedings began when a discipline application was filed in the former Legal Practice Tribunal on 21 February 2007. An amended application was filed later, on 27 April 2009. The matter was transferred to QCAT from and after 1 December 2009. On 2 September 2011, both parties filed an agreed statement of facts, accompanied by a further amended application withdrawing one of the four previous, original charges.
- [17] In its submissions on penalty the Commissioner now accepts, in respect of the first charge, that Mr Kellahan engaged in legal practice under the mistaken but genuine belief that his business relationship with Mr Newitt entitled him to do so. As to the second count the Commissioner also accepts that, at the time Mr Kellahan represented that funds had been paid into Mr Newitt's wife's solicitors trust account, he was unaware that the deposit had not been made, and did not confirm for himself that it had occurred – in effect, that Mr Kellahan made a careless representation, albeit not a deliberately false one. As to the third count, the Commissioner's submissions go no further than to point out that Mr Kellahan did not respond to the original correspondence from the Society, or the Notices, until 7 months after the original letter was sent.
- [18] Both the Commissioner and Mr Kellahan accept that the conduct apparent in each of the three charges constitutes professional misconduct, as defined under s 419 of the *Legal Profession Act 2007*, in that it involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence.
- [19] That consensual submission accords with the outcome in several interstate cases involving practitioners acting outside the limitations of their practicing certificates, or without a certificate at all.
- [20] The orders this Tribunal may make, following a finding of professional misconduct, are set out in s 456 of the current Act. The primary considerations are the need to protect the public, and to maintain the reputation of the legal profession. Penalties in disciplinary proceedings against lawyers are not imposed as punishment but, rather, in the interest of protecting the community from unsuitable practitioners.<sup>1</sup>
- [21] The parties have made a joint submission on penalty: in particular, it is submitted that the misconduct does not involve dishonesty or deceit and, for that reason, falls short of requiring a sanction involving the removal of Mr Kellahan's name from the roll; and that, rather, his conduct shows a

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<sup>1</sup> *Law Society of NSW v Jaywardena* (2005) NSWADT 96; *Law Society of NSW v Kennedy* (2005) NSWADT 153; *Law Society of NSW v Smith* (2003) NSWADT 163; and, *NSW Bar Association v Harrison* (2001) NSWADT 213.

lack of understanding about his role and responsibilities as a solicitor, carelessness, and disregard and disrespect for legal governing bodies. The Tribunal accepts that as a fair characterisation of the nature of his offending, and the limits of the penalties it needs to consider.

- [22] It is also material that he has not practiced law since May 2009, has no current practicing certificate, and has no previous disciplinary findings.
- [23] The parties' submissions on an appropriate sanction are also the subject of agreement between them – that Mr Kellahan should be publicly reprimanded; that he not be issued with a practicing certificate within 3 years of the date of any order; that, upon any return to practice and the issue of a practicing certificate to him after that time, his initial right to practice be limited to work in an employed capacity, under the supervision of a solicitor holding a principal level practicing certificate for a period of at least two years; that he pay the sum of \$75,000 to Mr Newitt, over a period of time; and, that he pay the Commissioner's agreed costs of \$5,000, within 6 months of the date of this order.
- [24] The Tribunal accepted that these orders are appropriate, save in two respects. First, concerned that the offending conduct involved both ethical and organisational oversights the Tribunal sought further submissions from both parties on the question whether the professional misconduct warranted a further order that Mr Kellahan, upon returning to practice, undergo a program of specific training in legal ethics.
- [25] In response, the Commissioner and Mr Kellahan's representatives filed joint submissions on 1 February 2012 to the effect that an order of that kind was not warranted because Mr Kellahan's ultimate return to practice would be under the supervision of a solicitor holding a Principal Level Practicing Certificate. The Tribunal has concluded, however, that the offending is of a sufficiently serious kind, and of a particular nature, to warrant the imposition of an additional order that, upon Mr Kellahan's return to legal practice, he must arrange a suitable program of retraining in legal ethics in consultation with his supervising solicitor, the Legal Services Commissioner, and the Queensland Law Society.
- [26] Secondly, both the Commissioner and Mr Kellahan also sought an order that Mr Kellahan pay the sum of \$75,000 to Mr Newitt within 18 months of the date the order, with the sum of \$25,000 to be paid within each 6 months period in that 18 months, those payments to be made into a bank account to be nominated by Mr Newitt, and with the condition that Mr Kellahan provide the Commissioner with written evidence of that payment before the end of each 6 months period.
- [27] According to the Commissioner's submissions Mr Newitt seeks compensation from Mr Kellahan for his investment of \$75,000 in Matapos, which he has never recovered. He also claims interest. Mr Kellahan has indicated that he is prepared to repay that sum, in the terms set out above and the Commissioner's submissions acknowledge that the offer is made in circumstances where it is unlikely Mr Kellahan could have been ordered

to make a payment of that kind by this Tribunal. The Commissioner seeks an order confirming Mr Kellahan's obligation to make the payments, in the manner set out above, "...to ensure that the payments are continued by the respondent".

- [28] The Commissioner's submissions also record that Mr Kellahan has, in fact, begun the repayments.
- [29] The Tribunal, concerned about its power to make an order for compensation in the circumstances here also sought submissions from both parties as to whether the payment was intended to be "compensation" under the *Legal Profession Act 2007*. The joint response from both parties acknowledges that a compensation order could not be made under Part 4.10 of that Act because Mr Kellahan was not, and is not, a "law practice" as required by s 464. Nevertheless, the parties jointly submit that the Tribunal may make the order under its general power to make "any order it thinks fit" pursuant to s 456(1) of the Act.
- [30] For the reasons identified in the Tribunal's recent decision in *Legal Services Commissioner v Jiear*<sup>2</sup>, the Tribunal is concerned that it has power to make what is, in effect, a *de facto* compensation order under the Act. The question nevertheless arises whether an order, if mutually sought by the parties, may properly be made under s 456(1).
- [31] The legislature has, in Part 4.10 of the *Legal Profession Act 2007*, provided a specific scheme and mechanism for complainants to be awarded compensation arising from the misconduct of a law practice and, under s 456(4), this Tribunal is specifically empowered to make a compensation order. After a consideration of the legislation the Tribunal concluded in *Jiear*<sup>3</sup> that parliament did not intend, in the LPA, to extend the general discretionary power in the Tribunal to make any order it thinks fit under s 456(1) so as to include the particular power to order compensation under later, explicit provisions.
- [32] The decision in *Jiear*<sup>4</sup> involved, however, an application for compensation that was disputed by the respondent lawyer on grounds which, the decision observed, appeared to have some substance. Here the respondent lawyer is not, on any view, liable or exposed to an order for compensation but signifies his willingness to make payments which would have the same practical effect.
- [33] As observed earlier this is protective, rather than punitive, jurisdiction and the legislation is to be construed in a way which will best achieve its purposes.<sup>5</sup> While, for the reasons explored in *Jiear*<sup>6</sup>, it is doubtful whether the legislature intended to empower the Tribunal to make compensation orders in the circumstances arising there (ie, the absence of a 'law practice' against which an order could be imposed), it would be surprising

<sup>2</sup> [2012] QCAT 221.

<sup>3</sup> *Legal Services Commissioner v Jiear* [2012] QCAT 221.

<sup>4</sup> *Legal Services Commissioner v Jiear* [2012] QCAT 221.

<sup>5</sup> *Acts Interpretation Act 1954*, s 14A.

<sup>6</sup> *Legal Services Commissioner v Jiear* [2012] QCAT 221.

if parliament also intended that, in a case where the practitioner has signified a willingness to reimburse a complainant for losses; where there could be no suggestion that, in doing so, the practitioner was attempting to '*buy*' a lesser penalty; and, where a wide discretionary power exists about the kinds of orders the Tribunal can make, it should be prohibited by other provisions from making the order the parties mutually seek.

[34] For that reason the Tribunal is persuaded that it may, and should, accord with the parties' joint submission and, in the unusual circumstances of this case, make an order in the terms sought.

[35] The orders then will be:

1. That Mr Kellahan is publicly reprimanded;
2. That he may not be issued with a practicing certificate within three years of this order, and may not seek the issue of a certificate in that time;
3. That upon his return to practice after the expiration of that period he may only practice in an employed capacity, under the supervision of a solicitor holding a principal level practicing certificate, for a period of at least two years;
4. That upon his return to practice, he must arrange a suitable program of retraining in legal ethics in consultation with his supervising solicitor, the Legal Services Commissioner, and the Queensland Law Society;
5. That he pay Alexander John Newitt the sum of \$75,000 within 18 months of the date of this order, by payments of not less than \$25,000 every six months; and, that he pay those monies into a bank account nominated by Mr Newitt and produce written proof of each payment to the Commissioner; and,
6. That he pay the Commissioner's costs in the agreed sum of \$5,000 within six months of the date of this order.