

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Catherine Kincaid* [2008] LPT 15

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
CATHERINE KINCAID
(respondent)

FILE NO/S: 11656/07

ORIGINATING COURT: Legal Practice Tribunal

DELIVERED ON: 19 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 21 November 2008

JUDGE: Byrne SJA assisted by

PRACTITIONER PANEL MEMBER: Ms C C Endicott

LAY PERSON PANEL MEMBER: Dr J Lamont.

ORDER:

1. That the respondent be publicly reprimanded for professional misconduct;
2. That the respondent pay a fine of \$10, 000;
3. That the respondent pay the Commissioner's costs of the proceeding fixed at \$2000; and
4. That if the respondent resumes legal practice or applies for the renewal of her practising certificate she:
 - (i) practise under the supervision of a person nominated by the Queensland Law Society for a period of one year; and
 - (ii) undertake and complete a course of further legal education in a legal ethics course nominated by the Queensland Law Society within one year of resuming practice or at the renewal of her practising certificate.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – DUTIES AND LIABILITIES TO CLIENT – PROFESSIONAL MISCONDUCT– where wrongful advice given regarding the client's misappropriation of funds – where the advice encouraged the client to commit

further criminal offences – where respondent eventually conceded that the conduct constituted professional misconduct

Legal Services Commissioner v Podmore [2006] LPT 005

COUNSEL: Ms S L Lane for the applicant
Mr M D Alexander for the respondent

SOLICITORS: Legal Services Commission for the applicant
Gilshenan & Luton Legal Group for the respondent

- [1] In 2003, Ms Kincaid was a principal in a Gold Coast firm of solicitors. Since her admission ten years earlier, she had practised almost exclusively in family law matters.
- [2] On 7 May 2003, Ms Guillemette telephoned to ask Ms Kincaid to act for her in relation to a dispute over property with her former *de facto* partner, Mr Cass.
- [3] Mr Cass was the sole director of M.V. Circa Pty Ltd, which carried on a cruise/charter boat business. Ms Guillemette was not a shareholder in or director of the company. But she was an employee, working as its bookkeeper. This position of trust gave her access to the company's bank accounts.
- [4] On 9 May 2003, Ms Kincaid met with Ms Guillemette. Ms Guillemette said that, without authority, a couple of days earlier, she had taken \$45,000 from the company's bank account. Her explanation to Ms Kincaid for the misappropriation was, as the agreed statement of facts puts it, that she had withdrawn the funds because of concerns that Mr Cass had "structured his asset holdings in a way that might defeat any claim she had in the *de facto* matter".
- [5] In these disciplinary proceedings, in which the Legal Services Commissioner contends that Ms Kincaid was guilty of misconduct in connection with her advice to Ms Guillemette, Ms Kincaid admits that she ought to have advised her client that: by taking the money, she had committed a criminal offence; it would be in Ms Guillemette's best interests immediately to return the money; and if she were to take more of the company's funds without authority, she would be at risk of prosecution for further criminal offences.
- [6] Unfortunately, the advice Ms Kincaid gave Ms Guillemette was very different.
- [7] According to the agreed statement of facts, Ms Kincaid told Ms Guillemette to "withdraw any further monies available in M.V. Circa's account and to secure such monies until such time as the *de facto* matter" was brought to court.
- [8] Three days later, acting on what Ms Kincaid had counselled her to do, Ms Guillemette withdrew \$10,000 and \$16,500 from the company's bank account.

- [9] The company sued to get its money back. On 23 May 2003, proceedings were commenced in the District Court to recover the misappropriated \$71,500.
- [10] The proceedings prompted Ms Kincaid to seek counsel's opinion. On 29 May, a barrister advised that Ms Guillemette should repay the money. Next day, Ms Kincaid informed the company's lawyers that Ms Guillemette was prepared to return the \$71,500 by way of a cheque payable to the company.
- [11] No part of the money had been repaid by 2 June when the District Court ordered that the \$71,500 be refunded within 48 hours; and that was done.
- [12] On 9 December 2003, an indictment was presented in the District Court charging Ms Guillemette with three counts of fraud – one for each of the withdrawals. She pled guilty to the \$45,000 misappropriation. The remaining charges were discontinued.
- [13] This application was initially defended on the basis that, although Ms Kincaid's advice to Ms Guillemette was incompetent, it was not "conduct violating, or falling short of, to a substantial degree, the standard of professional conduct observed or approved by the members of the profession of good repute and competency".¹ Before the hearing concluded, however, it was accepted for Ms Kincaid that her advice not to repay what had been taken and that Ms Guillemette should use her position of trust as company bookkeeper to withdraw the rest of the cash at bank, constituted professional misconduct. The late concession is warranted.
- [14] Ms Kincaid failed to advert to the legal significance of what her client had done. That oversight constituted a departure from the standard of care reasonably to have been expected of a solicitor of ordinary competence. Worse still, she did not reflect on the criminality involved in encouraging Ms Guillemette to take what remained of the company's funds. Nor did she consult another practitioner – a lawyer whose practice might not have been confined to family law - about the dangers in counselling her client to do what she did - conduct obviously attended with potentially serious consequences for her client² and others.³
- [15] Ms Kincaid's conduct was professional misconduct.
- [16] The main considerations in mitigation are that, after the court proceedings came to her attention, Ms Kincaid took steps to obtain advice for her client. No disciplinary body has previously made adverse findings against her. She has co-operated with the investigation by the Legal Services Commissioner and did not contest matters of primary fact alleged in the discipline application. And it is not suggested that she realized that her advice was an encouragement to crime.

¹ *Legal Services Commissioner v Podmore* [2006] LPT 005, [7].

² The penalty Ms Guillemette suffered has not been disclosed.

³ There is no evidence showing that the withdrawals did impact adversely on the company's operations, staff or creditors.

Disposition

- [17] Ms Kincaid accepts, appropriately enough, that there ought to be a public reprimand, a penalty in the nature of a fine, an order that she pay the Commissioner's costs fixed at \$2,000 and orders that, if she resumes legal practice or applies for the renewal of her practising certificate, she:
- (i) practise under the supervision of a person nominated by the Queensland Law Society for a period of one year; and
 - (ii) undertake and complete a course of further legal education in a legal ethics course nominated by the Queensland Law Society within one year of resuming practice or at the renewal of her practitioner's practising certificate.
- [18] All things considered, the fine should be \$10,000.