

CITATION: *Legal Services Commissioner v Mackie*
[2010] QCAT 570

PARTIES: Legal Services Commissioner
(Applicant)
v
David Christopher Mackie
(Respondent)

APPLICATION NUMBER: OCR093-10

MATTER TYPE: Disciplinary proceedings under the *Legal Profession Act 2007*

HEARING DATE: 3 November 2010

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Assisted by:
Mr M Woods (Solicitor Practitioner Panel Member)
Dr J Lamont (Lay Panel Member)

DELIVERED ON: 15 November 2010

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Mr Mackie is publicly reprimanded;**
- 2. He is ordered to pay a fine in the amount of \$5,000.00 within ninety days to the Legal Practitioners Interest on Trust Accounts Fund; and**
- 3. He is to pay the applicant's costs fixed in the amount of \$2,500.00 within one hundred and twenty days.**

CATCHWORDS : PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – where respondent charged with failure to diligently prosecute client's case and recklessly misleading client about progress of matter – where respondent admits both charges – where respondent's conduct represents professional misconduct – nature of the appropriate penalty

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE –

DISCIPLINARY PROCEEDINGS –
COMPENSATION ORDER – where complainant seeks compensation order – where compensation paid by law practice if complainant suffers pecuniary loss and in the interests of justice – where the respondent’s offending conduct occurred when he was employed in a Brisbane law firm – where that law firm is dissolved and no longer exists – where the complainant had previously received written advice by counsel that her opponent’s position was stronger – where complaint rejected previous offers to settle – where complaint still owes outstanding legal fees to the now dissolved firm – whether complainant has suffered pecuniary loss – whether in the interests of justice to award compensation – whether existence of a “law practice” to pay compensation

Legal Profession Act 2007, ss 418, 419, 456(1), 458(2)(c), 466(3), 464

Legal Services Commissioner v Bussa [2005] LPT 005, cited

Legal Services Commissioner v Chadwick [2009] LTP 16, cited

Legal Services Commissioner v Dwyer [2009] LPT 008, cited

Legal Services Commissioner v Hackett [2006] LPT 015, cited

Legal Services Commissioner v Krebs [2009] LPT 11, cited

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

Legal Services Commissioner v Ramsden [2006] LPT 10, cited

Legal Services Commissioner v Sorban [2009] LPT 5, cited

Legal Services Commissioner v Voll [2008] QCA 293; [2008] LTP 001, followed

APPEARANCES and REPRESENTATION (if any):

By consent, the matter was listed for determination on the papers under s 32 of the *Queensland Civil and Administrative Tribunal Act 2009*

REASONS FOR DECISION

- [1] Mr Mackie is a Solicitor, first admitted in 1996. He is 41. This disciplinary proceeding arises from two charges brought against him by the Commissioner in April 2010.
- [2] The first is that between 5 August 1999 and 1 July 2004 he failed to maintain reasonable standards of competence or diligence in relation to the conduct of a matter in which he had received instructions to act for a client, Ms Susan Mulholland. The second is that on diverse dates between 11 February 2004 and July 2004 he recklessly misled Ms Mulholland.
- [3] He admits both charges and all of the detailed particulars of them set out in a *Joint Submission of Facts, Findings and Orders* signed by the legal representatives for both parties to this proceeding, and filed in this Tribunal on 20 September 2010.
- [4] The proceedings are brought, and are to be considered, under the *Legal Profession Act 2007*. Chapter 4 contains what are called 'Key concepts' to be used in assessing the conduct of a legal practitioner.
- [5] Section 418 introduces the concept of '*unsatisfactory professional conduct*' which is defined in terms that it:
- ...includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [6] Section 419 refers to a more serious level of offending, described as '*professional misconduct*' which includes:
- a) Unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence;
 - b) Conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- [7] The parties agree that both charges against Mr Mackie are sufficiently serious to be categorised as professional misconduct. I accept that submission: the practitioner's misconduct, as it is set out in the particulars of each charge, can only be described in the terms used in s 419 – as a serious departure from reasonable standards of competence and diligence.
- [8] He did not prosecute Ms Mulholland's action as diligently as he should have done in four lengthy periods: 6 August 1999 – 7 February 2001; 28 May 2001 – 19 April 2002; 20 February 2003 – 10 December 2003; and, 10 December 2003 – 22 April 2004. He gave his client false information about the progress of the matter during telephone conversations in February, March, May and June 2004 which would have led her to believe that her action had been transferred from Maroochydore to Brisbane District Court,
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placed on the call over list at the Brisbane District Court, and set down for hearing.

- [9] He admits that on the occasion of these telephone conversations with his client he did not properly turn his mind to the state of the action or his file, or check the file before providing the incorrect advice.
- [10] All of these events occurred while he was working for a Brisbane law firm. It is said on his behalf that during the first six months of the year 2004 he was working under '*...the enormous pressure of an unrealistic workload*' and was also experiencing personal family problems, of some magnitude.
- [11] A partner of that firm who supervised his work has provided a reference confirming that he was working very long hours. His current employer, who is aware of the present charges, speaks of him as a '*...hard working, intelligent and diligent lawyer*'.
- [12] The two counts against Mr Mackie can be summarised as a substantial failure of diligence in the conduct of a matter on behalf of his client, and a course of recklessly misleading that client about the progress of the matter. Although there is no element of dishonesty involved in the second charge the reckless provision of false information to the client on several occasions over a period of some months is, on any view, a serious matter.
- [13] The parties' legal representatives provided, by arrangement, written submissions about an appropriate penalty. The Tribunal's discretion about the orders it makes is unfettered¹ but may include removal from the local roll, or suspension of a practising certificate. Here, the submissions of both parties are to the effect that Mr Mackie should be the subject of a public reprimand, and pay the Commissioner's costs fixed at \$2,500.00; and, that a pecuniary penalty should be imposed.
- [14] For reasons which appear from a discussion of other decisions in this jurisdiction set out below, I accept that the imposition of a fine is appropriate and that no more serious orders (like removal from the roll of practitioners) are called for. Save for this instance Mr Mackie has an unblemished record. His falling away from proper standards occurred six years ago and his conduct since that time has been, it appears, entirely satisfactory. In light of his personal and professional history the events which gave rise to these proceedings can fairly be described as aberrational, and apparently out of character. No major sanction, like removal or suspension, is necessary to protect the public.
- [15] The tribunal was referred, by both parties, to a number of other decisions in this jurisdiction which they perceived to have some factual similarities to the circumstances arising here, or relevance for other reasons.
- [16] In *Legal Services Commissioner v Voll*² the practitioner was found guilty of misconduct involving a failure of competence and diligence, and of lying to the Queensland Building Tribunal. He was publicly reprimanded and fined

¹ *Legal Profession Act 2007*, s 456(1)

² [2008] QCA 293; [2008] LTP 001

\$20,000.00. In *Legal Services Commissioner v Busa*³ the respondent solicitor was found guilty on professional misconduct and unprofessional conduct in respect of five charges, one involving a substantial delay in progressing a client's matter for a period of eleven years. He was fined \$6,000.00, and a number of restrictive conditions were placed upon his practicing certificate by the Chief Justice.

- [17] In *Legal Services Commissioner v Hackett*⁴ the respondent barrister was found to have engaged in professional misconduct by his swearing of a misleading affidavit for use in a personal business matter. There was, however, no allegation of dishonesty and he was said to have been guilty of gross carelessness. He was reprimanded and fined \$5,000.00. In *Legal Services Commissioner v Dwyer*⁵ the solicitor was found to have engaged in professional misconduct giving rise to five charges. One related to substantial neglect and delay in dealing with a client's matter and the remaining four charges were for trust account infractions. The Tribunal considered a pecuniary penalty in the matter but ultimately decided the public would be better protected if the practitioner was compelled to engage a consultant to assist him in implementing better office systems to ensure the offending conduct did not reoccur. That cost was estimated at \$6,000.00 - \$8,000.00.
- [18] In *Legal Services Commissioner v Madden (No 2)*⁶ the solicitor was charged with a range of matters including failures of competence and diligence, trust account infractions, overcharging, and acting in position of conflict. He had previously been dealt with by a disciplinary body. He was fined \$10,000.00; a range of conditions was imposed upon his continuing right to practice; and, he was ordered to undertake, at his own expense, a further course of study.
- [19] In *Legal Services Commissioner v Sorban*⁷ the practitioner had created and disseminated a false document, and it was held the exercise involved actual dishonest conduct. It was also found to be relevant, however, that the practitioner had been subjected to an exceptionally heavy workload at the time of the offence and may have relied upon information from another employee, which was not correct. No fine was imposed. Similarly, in *Legal Services Commissioner v Chadwick*⁸ the practitioner had made eight representations that were false or misleading in circumstances where he either knew, or ought to have known that to be the case. He was, however, suffering from an untreated medical condition at the time. While the Tribunal held that his behaviour in creating the documents was dishonest countervailing factors including, in particular, an exceptionally heavy workload were, again, sufficient to persuade the Tribunal not to impose a fine.

3 [2005] LPT 005
 4 [2006] LPT 015
 5 [2009] LPT 008
 6 [2008] QCA 301
 7 [2009] LPT 5
 8 [2009] LTP 16

- [20] In *Legal Services Commissioner v Ramsden*⁹ the practitioner typed and post-dated a document in order to avoid a small sum of stamp duty but promptly and fully acknowledged his error and expressed contrition and remorse. He was reprimanded, and fine \$5,000.00.
- [21] In each of the last mentioned decisions – *Sorban, Chadwick and Ramsden* – there were actual findings of dishonesty. Although that is not the case here, the practitioner’s failure to convey correct information to his client over a period of about five months involves a prolonged course of misconduct which may be contrasted with what was, in those cases, an incident of untruthfulness, but promptly rectified.
- [22] The circumstances in *Hackett* and *Dwyer* bear observable similarities to those arising here. There is no allegation of dishonesty, but the level of carelessness was high. *Madden* involved a greater range of misconduct and represents, for the purposes of deciding a pecuniary penalty here, what might determine the upper limit. In all of the circumstances surrounding Mr Mackie’s offending a fine in the vicinity of that imposed in *Hackett*, of \$5,000.00, properly reflects both the seriousness of the offending, and the mitigating factors in Mr Mackie’s favour.
- [23] The order of the Tribunal is that:
- a) Mr Mackie is publicly reprimanded;
 - b) He is ordered to pay a fine in the amount of \$5,000.00 within ninety days to the Legal Practitioners Interest on Trust Accounts Fund;
 - c) He is to pay the applicant’s costs fixed in the amount of \$2,500.00 within one hundred and twenty days.

Compensation claim

- [24] Mr Mackie’s client, Ms Mulholland, has filed papers seeking a compensation order under Chapter 4, Part 4.10 of the *Legal Profession Act 2007*.
- [25] At the time of Mr Mackie’s offending conduct, he was employed by a Brisbane law firm, Gilshenan and Luton. That firm no longer exists, having been dissolved some years ago.
- [26] The jurisdiction to make a compensation order arises under s 458(2)(c) and the term ‘compensation order’ is defined in s 464 to include, relevantly, an order that a *law practice* pay a complainant an amount of compensation which, unless both parties consent, cannot exceed \$7,500.00¹⁰. The order can only be made if this Tribunal is satisfied that the complainant has suffered pecuniary loss because of the practitioners conduct and is in the interests of justice that a compensation order be made.
- [27] The first problem in the application is that at present there is no ‘law practice’. The term ‘law practice’ is defined in Schedule 2 to include, relevantly, a law firm; an Australian legal practitioner who is a sole

⁹ [2006] LPT 10
¹⁰ S 466(3)

practitioner; or an incorporated legal practice. None of those terms apply to Mr Mackie, or did so at any material time. Rather, he was what is defined in Schedule 2 as a *law practice employee* but does not appear to be, under that description, personally exposed to any compensation order¹¹.

- [28] It may be that the tribunal has power under s 456 to make an order that the respondent pay a sum of money to Ms Mulholland, even if the payment is not in the nature of a 'compensation order'. That section gives the tribunal a general power, upon a finding of professional misconduct or unsatisfactory professional conduct, to make '*... any order it thinks fit*': s 456(1).
- [29] It is unnecessary to decide whether that general power exists because, here, the available evidence is not persuasive that Ms Mulholland is entitled to any form of payment in the way of compensation. The material shows that so long ago as 1992 she received written advice from a barrister (now a Supreme Court Judge) who advised her that her opponent's prospects of defeating her claim were 'far stronger' than hers of enforcing the transaction which gave rise to the action.
- [30] It appears, too, that a number of offers were made in the action by the other party in the action but rejected by Ms Mulholland; and that, ultimately, she was not prepared to pay Gilshenan and Luton's outstanding fees, or put them in funds to take the action to trial. It also appears that she still owes that firm, Mr Mackie's former employer, fees of over \$20,000.00. Ms Mulholland says the other party in the action became a bankrupt in 2005 and she was thereby prevented from any recovery, but that ignores her non-payment of the costs her lawyers sought earlier to advance the matter.
- [31] It is not apparent how it would be in the interests of justice that Mr Mackie be ordered to pay compensation to her, when there is no evidence that his conduct affected her prospects in the action, or prevented her going to trial if she wished. The fact she owes Mr Mackie's former employers quite large outstanding fees also tells against an order. The compensation claim should be refused.

¹¹ See the observations of Margaret Wilson J in *LSC v Krebs* [2009] LPT 11 at para [32]
