

**CITATION:** *Legal Services Commissioner v Mellick*  
[2012] QCAT 333

**PARTIES:** Legal Services Commissioner  
(Applicant)  
v  
Habib Abraham Mellick  
(Respondent)

**APPLICATION NUMBER:** OCR044-11

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** On the papers

Panel met to consider the matter on 12 March 2012; subsequent written submissions from the Respondent dated 8 May 2012, and from the Applicant dated 31 May 2012

**HEARD AT:** Brisbane

**DECISION OF:** **Justice Alan Wilson, President**  
Assisted by:  
**Ms Bronwyn Cushing-Sullivan**  
Practitioner Panel Member  
**Dr Margaret Steinberg**  
Lay Panel Member

**DELIVERED ON:** 27 July 2012

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The Respondent is publicly reprimanded.**
- 2. The Respondent is ordered to pay a penalty of \$5,000.00 within 90 days of this order.**
- 3. The Respondent is ordered to pay the Commission's costs fixed at \$1,500.00 within 30 days of this order.**

**CATCHWORDS:** PROFESSIONS AND TRADES – LAWYERS  
– COMPLAINTS AND DISCIPLINE –  
DISCIPLINARY PROCEEDINGS –  
UNSATISFACTORY PROFESSIONAL  
CONDUCT – PROFESSIONAL

MISCONDUCT – PENALTY – where the respondent failed to progress his client’s claim – where the respondent made dishonest verbal representations to his client and witnesses to the effect that the matter was progressing and listed for trial – where the respondent admitted responsibility – where the respondent undertook to pay costs and compensation – whether a public reprimand is appropriate – whether a pecuniary penalty is appropriate – whether orders requiring the respondent to undergo supervision or retraining are necessary

*Legal Profession Act 2007*, ss 6, 418, 456, Part 4.10

*Queensland Civil and Administrative Tribunal Act 2009*, s 32

*Uniform Civil Procedure Rules 1999*, r 389(2)

*Law Society of New South Wales v Pearson* [2005] NSWDT 206

*Legal Services Commissioner v Bevan* [2009] LPT 25

*Legal Services Commissioner v Bussa* [2005] LPT 005

*Legal Services Commissioner v Houlihan* [2006] LPT 003

*Legal Services Commissioner v Smith* [2011] QCAT 126

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

This matter was heard and determined on the papers pursuant to s 32 of *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”), with the consent of the parties.

### **REASONS FOR DECISION**

- [1] Mr Mellick is a solicitor admitted in 1987, and he is now aged 48. He is an “Australian legal practitioner” under s 6 of the *Legal Profession Act 2007* (“LPA”). In the years 2004-2007, the period referred to in the charges brought against him by the Commissioner, he practiced as a solicitor in Cairns under the name “Mellick Smith & Associates”.
- [2] In February 2004, he was retained by a client, Ms Probert, to bring a civil claim on her behalf against property developers who, she alleged, had over-excavated onto her adjoining land. In September 2004, acting on those instructions, Mr Mellick filed a claim in Cairns District Court. Later that year the defendant sought further and better particulars of the claim but they were not provided.

- [3] In April 2005, the defendant's solicitors filed an application in the court for an order requiring Mr Mellick's client to disclose documents. He did not tell his client about that application, and he consented to an order being made in the court. A list of documents was then filed.
- [4] However, between that step in May 2005 and October 2007, the solicitor failed to do anything to progress Ms Probert's claim. She retained new solicitors who lodged an application for leave to proceed<sup>1</sup>, which was granted. Her action was, however, futile because the defendant companies ultimately went into liquidation or were deregistered.
- [5] It is those circumstances which lie behind the first charge against Mr Mellick: that his conduct of the matter involved a failure or substantial failure to reach or keep a reasonable standard of competence or diligence.
- [6] There is a second charge: that between September 2004 and October 2007 Mr Mellick made dishonest verbal representations to his client and relevant witnesses to the effect that the matter was progressing and was listed for trial. In that period, the client remained in close contact with two expert witnesses and obtained their monthly schedules, in case they were needed for trial. In September 2007, one of them changed his travel and business arrangements to fit in with court dates which had allegedly been set – when, in truth, the matter was not listed for trial.
- [7] The LPA contains two key concepts with respect to the conduct of legal professionals. The first, *unsatisfactory professional conduct*, is defined in s 418 to mean conduct occurring in connection with the practice of law which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian lawyer.
- [8] The second, *professional misconduct*, is defined to include unsatisfactory professional conduct if it involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence or conduct that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- [9] The Commissioner submits that the first charge, involving a failure to advance the client's action, should probably be categorised as unsatisfactory professional conduct; but the second, because it involved actual dishonesty, should be categorised under the more serious head of professional misconduct.
- [10] The Tribunal agrees. The Commissioner's written submissions helpfully traverse other cases in which the Tribunal has considered similar circumstances.<sup>2</sup>
- [11] Mr Mellick's conduct around the first charge is less serious than *Bussa*<sup>3</sup>, which involved great delay and a consistent failure by the practitioner to

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<sup>1</sup> As required under rule 389(2) of the *Uniform Civil Procedure Rules 1999*.

<sup>2</sup> *Legal Services Commissioner v Bevan* [2009] LPT 25; *Legal Services Commissioner v Smith* [2011] QCAT 126; *Legal Services Commissioner v Bussa* [2005] LPT 005; *Law Society of New South Wales v Pearson* [2005] NSWDT 206.

<sup>3</sup> *Legal Services Commissioner v Bussa* [2011] QCAT 388.

reach or maintain a reasonable standard of competence and diligence; and *Pearson*<sup>4</sup>, in which the practitioner's inaction led to the client's claim becoming statute-barred. When compared, however, with *Bevan*<sup>5</sup> and *Smith*<sup>6</sup>, an aggravating factor present here is Mr Mellick's actual deceit of his client through representations that her action was being progressed appropriately.

[12] In all of the circumstances the Tribunal accepts that, in respect of this charge, Mr Mellick's conduct, while capable of being categorised as professional misconduct, more properly satisfies the definition of unsatisfactory professional conduct.

[13] The second count involves, however, actual dishonesty and should be placed in the more serious category. The practitioner lied to his client but, also, as a consequence of his false representation caused inconvenience to expert witnesses. As the Commission submits, this misconduct is not unlike that considered by the Tribunal in *Houlihan*<sup>7</sup>, where the practitioner failed to institute a personal injuries claim on behalf of a client within the requisite period and, for four years, falsely advised his clients that the claims were proceeding satisfactorily, that action had been taken, and that a settlement offer had been made.

[14] In his favour, Mr Mellick promptly admitted responsibility and has cooperated in the disciplinary proceedings. Ms Probert also claimed compensation from him.<sup>8</sup> The amount claimed was \$7,623.58. The claim was transmitted to him by the Commission in September 2011, and in November Mr Mellick filed an Affidavit consenting to payment which he then made promptly.

[15] As to penalty, the Tribunal may make any order it thinks fit, including those set out in s 456 of the LPA. In determining the appropriate order, the Tribunal will have regard, primarily, to the protection of the public and the maintenance of proper professional standards. Penalties are imposed upon practitioners with a view to those ends.

[16] In its written submissions, the Commission did not seek a finding that Mr Mellick's conduct demonstrates that he is unfit to practice. The submissions say, however:

"The respondent ought to satisfy the Tribunal however that he is now able to cope with the stresses of legal practice and those stemming from his personal life that he's had difficulty with in the past".

[17] Subject to that proviso, the Commission sought orders that Mr Mellick be publically reprimanded, and that he pay a penalty of between \$2,000.00 and \$6,000.00 (and the Commission's cost fixed at \$1,500.00).

[18] When the Commission first gave notice to Mr Mellick he responded, in a letter dated 25 June 2010, properly admitting his misconduct and undertaking to pay any associated cost or compensation. He also said,

<sup>4</sup> *Law Society of New South Wales v Pearson* [2005] NSW ADT 2006.

<sup>5</sup> *Legal Services Commissioner v Bevan* [2009] LPT 25.

<sup>6</sup> *Legal Services Commissioner v Smith* [2011] QCAT 126.

<sup>7</sup> *Legal Services Commissioner v Houlihan* [2006] LPT 003.

<sup>8</sup> Under Part 4.10 of the *Legal Profession Act 2007*.

however, that his misconduct was caused by his constant work commitments and overwhelming workload; the fact that in the relevant period both his parents were suffering “various significant illnesses”; and that, when he attempted to progress Ms Probert’s matter “...something urgent would come up”.

- [19] The panel met to consider the matter on 12 March 2012 and, subsequently, wrote to both parties requesting from Mr Mellick submissions about steps he might have taken to ensure similar or other circumstances would not adversely affect his practice, and whether it might not be appropriate for the Tribunal to consider orders requiring some ongoing supervision or training. The Tribunal also sought submissions from the Commissioner.
- [20] Mr Mellick’s reply was terse: he said that his practice consisted substantially of court work but he “...would of course undertake any programs or training and/or education as deemed appropriate”.
- [21] After considering his response, the Commissioner elected not to make any further submissions but, also, advised it did not wish to seek any further orders in the matter including, in particular, orders requiring supervision or training.
- [22] Orders of that kind may arise for consideration when a practitioner’s conduct shows a consistent or troubling level of misunderstanding of proper conduct, or failure to meet it.
- [23] At the time these charges arose, Mr Mellick had been in practice for almost two decades, during which time he had never been dealt with by any disciplinary body. The same can be said, apparently, of the period of almost five years which has now passed since 2007.
- [24] In those circumstances, the Tribunal accepts that orders requiring the practitioner to undergo supervision or retraining are unnecessary and would be excessive. While the events giving rise to the charges show some organisational and ethical problems, in the context of practitioner’s long period of practice they appear to be aberrational.
- [25] His conduct since the Commissioner first contacted him has been appropriate and responsive (towards both the Commission and his former client), and shows that he understands and has insight into his misconduct. It is improbable that training or supervision would alter or improve that.
- [26] In those circumstances, the Tribunal accepts that an appropriate order involves a public reprimand of the applicant and payment of a pecuniary penalty which should, in light of the seriousness of the offending, be toward the higher end of the range suggested by the previous decisions discussed earlier. The orders will be:
1. The respondent is publically reprimanded.
  2. The respondent is ordered to pay a penalty of \$5,000.00 within 90 days of this order.
  3. The respondent is ordered to pay the Commission’s cost fixed at \$1,500.00 within 30 days of this order.