

# LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Petschler* [2009] LPT 024

PARTIES: **LEGAL SERVICES COMMISSIONER**  
(applicant)  
v  
**WILLIAM JAMES PETSCHLER**  
(respondent)

FILE NO: BS 5081 of 2009

PROCEEDING: Discipline Application

ORIGINATING COURT: Legal Practice Tribunal

DELIVERED ON: 30 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 27 October 2008

TRIBUNAL MEMBER: White J

PRACTITIONER PANEL MEMBER: Mr P J Mullins

LAY PANEL MEMBER: Dr J Lamont

ORDERS:

1. **The respondent is publicly reprimanded.**
2. **The respondent is to pay a penalty in the amount of \$2,000 within six months.**
3. **The respondent is ordered to accept mentoring from Mr Cameron Turnbull and Mr Don Armit or any other senior solicitor nominated by the Manager, Professional Standards of the Queensland Law Society and to confer regularly with that mentor in relation to his legal practice for a period of 12 months.**
4. **The respondent is to report to the nominated mentor/s any correspondence from the Legal Services Commissioner or the Queensland Law Society in relation to a complaint about the respondent's practice within five (5) working days of receipt and thereafter confer with the mentor in respect of the complaint.**
5. **The respondent is to refund the amount of \$1,820.60 to the complainant, Mr William Johns, care of the Townsville Community Legal Service, within 14 days.**
6. **The respondent is to pay the Commissioner's costs of the application fixed in the amount of \$2,500 within six months.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the respondent practitioner is charged with failure to respond/cooperate with the Legal Services Commission investigation and failure to comply with a written notice – whether the practitioner is guilty of unsatisfactory professional conduct and professional misconduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – NEGLIGENCE AND DELAY – where the respondent practitioner acted for a client in an application for family provision – where after the initial filing of the application in 1999 the practitioner neglected to advance the matter – where a complaint was made against the practitioner in 2008 – where the practitioner is charged with neglect and undue delay in the conduct of the matter – whether the practitioner is guilty of professional misconduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – TRUST MONEY – where the respondent practitioner on two occasions withdrew monies from a trust account and paid the monies into his general account without first obtaining the consent of his client or other authorisation – where the practitioner is charged with two breaches of s 8 of the *Trust Accounts Act 1973 (Qld)* – whether the practitioner is guilty of unprofessional conduct pursuant to the *Queensland Law Society Act 1952 (Qld)*

*Legal Profession Act 2004 (Qld)*

*Legal Profession Act 2007 (Qld)*, s 418, s 419, s 443

*Queensland Law Society Act 1952 (Qld)*, s 3B

*Trust Accounts Act 1973 (Qld)*, s 8

*Adamson v Queensland Law Society Incorporated* [1990]

1 Qd R 498, applied

*Legal Services Commissioner v Baker* [2005] LPT 002, cited

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

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

*Legal Services Commissioner v McClelland* [2006] LPT 013, cited

*Legal Services Commissioner v Podmore* [2006] LPT 005, cited

*Legal Services Commissioner v Twohill* [2005] LPT 001, cited

*Queensland Law Society Incorporated v Carberry* [2000] QCA 450, cited

COUNSEL: B I McMillan for the applicant  
L R Middleton for the respondent

SOLICITORS: Legal Services Commission for the applicant  
Bill Petschler Lawyer for the respondent

- [1] The applicant (“the Commissioner”) filed a discipline application against the respondent solicitor (“the practitioner”) pursuant to s 452 of the *Legal Profession Act 2007* (Qld) on 15 May 2009, charging him with failure to respond/cooperate with the Legal Services Commission (“the Commission”) investigation between 31 October 2008 and 30 January 2009. He was also charged with a breach of s 443(3) of the *Legal Profession Act*, namely, a failure to comply with a written notice issued on 17 February 2009.
- [2] After the Commission had received the practitioner’s file, three further charges were added by leave of the Tribunal. Notice was given of them by the Commissioner to the practitioner on 22 October 2009 and the practitioner agreed that they could be heard and determined together with the original charges. Those further charges concern want of diligence and competence when acting for a client and two charges of breach of s 8 of the *Trust Accounts Act 1973* (Qld). In total there are five charges before the Tribunal. The practitioner admits the allegations of fact in respect of all charges and has cooperated in settling a statement of facts.
- [3] On 14 April 1999 the practitioner received instructions from William Bowden Johns, a man in his late seventies who had recently been widowed. His wife of nine years had left a will leaving her estate to her grandson and appointing her son as executor of the estate. She made no provision for Mr Johns. He instructed the practitioner to make an application for family provision from her estate. He also instructed the practitioner to assist in recovering some personal items from the home that he had shared with his late wife and from which he had been excluded by the executor.
- [4] At the request of the practitioner, Mr Johns paid \$800 on 22 April 1999 and \$5,000 on 15 July 1999 on account of fees and outlays. The practitioner paid those monies into his trust account. On 16 July 1999 the practitioner withdrew \$500 from that account and paid it into his general account before obtaining the consent of Mr Johns. It was not otherwise authorised. On 2 August 1999 the practitioner withdrew \$300 from the trust account and paid it into his general account, again without obtaining the consent of his client or being otherwise authorised to do so. Those withdrawals constitute charges 4 and 5.
- [5] On 1 November 1999 the practitioner wrote to Mr Johns enclosing an assessment of his costs to date in the amount of \$2,136.88. Enclosed with the assessment was an account indicating that that amount had been withdrawn from the funds held in trust on account of those fees and outlays. This figure took into account and included the amounts taken on 16 July and 2 August 1999.
- [6] After receiving instructions from Mr Johns, the practitioner promptly wrote to the solicitor for the executor advising of his client’s intention to make a claim against the estate. The following day he sought counsel’s advice with respect to the claim. Acting on Mr Johns’ instructions, a draft affidavit and application pursuant to the *Succession Act 1981* (Qld) were prepared on 29 June 1999. The proceedings were filed in the District Court in Townsville on 21 December 1999 and served the following day. On 15 March 2000 the solicitor for the executor filed a notice of

address for service. On 7 June 2000 the practitioner discussed with counsel his difficulties in advancing the matter. Between 21 December 1999 and 24 January 2003 the practitioner failed to take any material step to progress the matter. On the latter date the practitioner wrote to the solicitor for the executor suggesting a mediation which was promptly rejected.

- [7] Thereafter between 24 January 2003 and March 2008 the practitioner failed to take any material step to progress Mr Johns' claim.
- [8] In March 2008 Mr Johns consulted the Townsville Community Legal Service which immediately contacted the practitioner. The practitioner did not reply. On 12 May 2008 the Townsville Community Legal Service again wrote to the practitioner noting that it had received no response and requested the respondent's file. It was not until 19 August 2008 that the practitioner transferred his file. On 22 October 2008 the Townsville Community Legal Service made a complaint to the Legal Services Commission on behalf of Mr Johns about the practitioner's conduct of his file.
- [9] On 31 October 2008 the Legal Services Commission wrote to the practitioner pursuant to s 437 of the *Legal Profession Act* requesting his response to the complaint by no later than 21 November 2008. The practitioner did not provide a response before that date.
- [10] By an email dated 1 December 2008 an officer of the Legal Services Commission requested the practitioner to advise when he would provide a response to the complaint but the practitioner did not provide any response to that email.
- [11] On 6 January 2009 the Commissioner wrote to the practitioner pursuant to s 443(1)(a)(i) of the *Legal Profession Act* requiring him to provide a full written explanation of his conduct which was the subject of the complaint and to provide his complete client file by no later than 30 January 2009. The practitioner did not provide any explanation or provide his client file as required. By letter dated 2 February 2009 the Commissioner required the practitioner, pursuant to s 443(1)(a)(i) of the *Legal Profession Act*, to provide a written explanation of the matters being investigated by 16 February 2009. Once again the practitioner did not provide an explanation within the time specified.
- [12] By letter dated 17 February 2009 the Commissioner notified the practitioner pursuant to s 443(3) of the *Legal Profession Act* that if his failure to comply continued for a further 14 days he may be dealt with for professional misconduct. He failed to comply for at least a further 14 days after the notice, that is, beyond 3 March 2009.
- [13] On 15 May 2009 the Commissioner commenced this discipline application against the practitioner in respect of his failure to respond to the investigation.
- [14] It was not until a letter dated 17 August 2009 that the practitioner provided an explanation for his conduct to the Commissioner. The Commissioner sought further information from the practitioner on several occasions and thereafter those requests were complied with.
- [15] The practitioner's explanation for his failure to respond to the requests from the Legal Services Commission and the Commissioner was that he was "sticking [his] head in the sand". In his affidavit filed in response to the first two charges relating to the failure to respond, the practitioner said his shortcomings were due to his

isolation, lack of a senior practitioner in Charters Towers where he practises, lack of a “bring-up” system, difficulties in finding suitable staff and having “too much on [his] plate”. The practitioner is a man of some 58 years. He was not admitted to practice until 1995 and was offered a position with the firm of Hill & Wadley in Charters Towers in February 1996. In September 1996 he became a partner with John Hill and the firm became Hill & Petschler. That partnership was short-lived and ended in December 1997 when Mr Hill moved to Townsville. The practitioner commenced sole practice in February 1998. There was then only himself, the firm of the solicitor for the executor and a visiting solicitor offering legal services in Charters Towers.

- [16] The practitioner’s explanation for his appalling dilatoriness in managing Mr Johns’ affairs is that after the rebuff about the mediation from the executor’s solicitor he felt some intimidation from that solicitor. He did not seek any guidance either from fellow practitioners or from counsel who had given advice about Mr Johns’ claim and with whom he had earlier discussed his difficulties. It seems that counsel had by then retired.
- [17] The practitioner explains that the breaches of the *Trust Accounts Act* were due to ignorance of what he was entitled to do. There was no element of dishonesty involved. He thought he was entitled to transfer monies under the terms of the costs agreement and the general authority signed by Mr Johns. He is now better informed. As at 23 September 2009, when the practitioner wrote to the Commissioner, he still had the balance of \$1,820.60 in his trust account.
- [18] The practitioner was unaware of the availability of assistance from experienced colleagues within the wider legal community or under the auspices of the Queensland Law Society. He has now instituted a file management system and brought all of his current matters into that system.

### **The legislative scheme**

- [19] The legal profession in Queensland is regulated by the *Legal Profession Act 2007* which came into force on 1 July 2007. The previous legislation, the *Legal Profession Act 2004* (Qld) was thereby repealed. It had come into force on 1 July 2004. Prior to the enactment of that Act the *Queensland Law Society Act 1952* (Qld) regulated the disciplinary regime for Queensland solicitors. The conduct which is the subject of charges 1 and 2 occurred between 31 October 2008 and 3 March 2009 and is thus governed by the *2007 Act*. Charge 3 concerns the failure to maintain reasonable standards of competence or diligence in relation to the conduct of Mr Johns’ matter and occurred between April 1999 and August 2009 but predominantly prior to 2004. Charges 4 and 5, the breaches of s 8 of the *Trust Accounts Act*, occurred in 1999.
- [20] The practitioner’s conduct in respect to charges 3, 4 and 5 is to be assessed by reference to the concept of professional misconduct and unprofessional conduct or practice as understood in the *Queensland Law Society Act*.
- [21] There is no definition of “professional misconduct” in the *Queensland Law Society Act*. In *Adamson v Queensland Law Society Incorporated*<sup>1</sup> Thomas J expressed the

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<sup>1</sup> [1990] 1 Qd R 498.

proper approach to an allegation of professional misconduct against a solicitor in the following terms:<sup>2</sup>

“The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.”

That test has been applied to conduct occurring before the *2004 Act* came into operation by the Tribunal established under the *2004 Act*.<sup>3</sup>

[22] The expression “unprofessional conduct or practice” was defined in s 3B of the *Queensland Law Society Act* in the following way:

- “(1) A practitioner commits *unprofessional conduct or practice* if the practitioner, in relation to the practitioner’s practice, is guilty of –
- (a) serious neglect or undue delay; or
  - (b) the charging of excessive fees or costs; or
  - (c) failure to maintain reasonable standards of competence or diligence; or
  - (d) conduct described, under another Act, as unprofessional conduct or practice.
- (2) Subsection (1) does not, by implication, limit the type of conduct or practice that may be regarded as unprofessional for this Act.”

[23] The provisions of the *2007 Act* which are to be applied to the conduct described in charges 1 and 2 provide:

**“418 Meaning of *unsatisfactory professional conduct***

*Unsatisfactory professional conduct* 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.

**419 Meaning of *professional misconduct***

- (1) *Professional misconduct* includes –
- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
  - (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

<sup>2</sup> [1990] 1 Qd R 498 at 507.

<sup>3</sup> *Legal Services Commissioner v Baker* [2005] LPT 002 at [17]; *Legal Services Commissioner v Podmore* [2006] LPT 005 at [7]; *Legal Services Commissioner v Twohill* [2005] LPT 001; *Legal Services Commissioner v McClelland* [2006] LPT 013 at [20].

finding that the practitioner is not a fit and proper person to engage in legal practice.

- (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.”

### **Charge 1**

- [24] In failing to respond to the enquiries or cooperate with an investigation under the *Legal Profession Act*, the practitioner has been guilty of unsatisfactory professional conduct. That conclusion is not contested.

### **Charge 2**

- [25] Section 443(4) provides relevantly:

“If notice under subsection (3)<sup>4</sup> is given and the failure continues for the 14 day period –

- (a) the Australian legal practitioner is taken to have committed professional misconduct, unless the practitioner has a reasonable excuse for not complying with the requirement within that period;...”

The practitioner does not contend that he had any reasonable excuse for not complying and does not, therefore, resist the legislative conclusion that he is guilty of professional misconduct.

### **Charge 3**

- [26] Charge three charges the practitioner with neglect and delay. The neglect of Mr Johns’ application after the initial filing of the application was egregious and constitutes serious neglect of his duty. That conduct falls short, to use the language of *Adamson*, to a substantial degree of the standard of professional conduct observed by members of the profession of good repute and competency. Just what happened to the *Succession Act* application is unexplained, but the estate has been distributed and an elderly man is forced, if he wishes to seek compensation, to bring a civil suit for negligence against the practitioner with all the difficulties entailed in litigating the loss of a chance. The delay brings the profession into serious disrepute. Many privileges are accorded to members of the legal profession. They have correlative duties which this practitioner has singularly failed to discharge so far as his former client, Mr Johns, is concerned.

- [27] In the handling of Mr Johns’ matter the conduct was such as to be characterised as professional misconduct.

### **Charges 4 and 5**

- [28] Charges four and five, the breaches of the *Trust Accounts Act* were examples of unprofessional conduct by the practitioner. In so fundamental a matter as the proper

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<sup>4</sup> Failure to comply with the requirement to give a full explanation of the subject of the investigation.

management of his trust account the practitioner demonstrated a failure to maintain a reasonable standard of competence.<sup>5</sup>

### Orders

- [29] As is well known, the jurisdiction of a disciplinary body such as this Tribunal is to protect members of the public.<sup>6</sup> It is not punitive.
- [30] In the practitioner's favour are that he has not previously been dealt with by a disciplinary body; since the commencement of the filing of the discipline application he has cooperated with the Commissioner and facilitated the efficient resolution of the substantive matters of complaint; he has agreed to the late joinder of the three charges relating to Mr Johns' file while holding the hearing date for the original charges; he has accepted the allegations; he has cooperated in an agreed statement of facts; and he does not oppose the orders sought. The practitioner has proposed a scheme for future mentoring and has made some arrangements with senior solicitors who attend at Charters Towers to assist him.
- [31] The Commissioner has proposed that the practitioner be publicly reprimanded. The practitioner does not oppose that order but Mr Middleton, who appeared on behalf of the practitioner, emphasised that for a sole practitioner who occupies a number of community positions in a relatively small country town that will have a very adverse reputational effect on him, both personally and professionally. Although the trust account charges have no element of dishonesty in them, nonetheless members of the community may be inclined to think that something of that kind is involved.
- [32] As part of his community contribution the practitioner is the only Duty Solicitor in Charters Towers. He is a preferred Legal Aid provider. He therefore makes a significant contribution to community life in Charters Towers. As a consequence he has access to the not inconsiderable resources of the Legal Aid office and should avail himself of its online facilities and databases if he does not already do so.
- [33] The proposal that the practitioner accept mentoring from two senior practitioners who visit Charters Towers regularly will formalise his understanding that he may seek assistance when he has any concerns about aspects of his practice. If there is any conflict with files then the Queensland Law Society can nominate some other senior solicitor.
- [34] It is also agreed that the practitioner should refund the amount of \$1,820.60 to Mr Johns. That is the amount remaining in the trust account which Mr Johns had paid on account of fees for acting in his matter. The Tribunal and members had proposed to the parties that interest should be added to that amount. Although the practitioner obtains no interest from having the money in his trust account, nonetheless over nearly 10 years Mr Johns has not been given the services for which the money was held. On reflection, however, interest would be characterised as compensation and as there has been no application for compensation it is not proposed to include an amount for interest on that sum in the order.
- [35] The costs have been fixed and agreed in the amount of \$2,500.

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<sup>5</sup> Section 3B(1)(c) of *Queensland Law Society Act 1952* (Qld).

<sup>6</sup> *Queensland Law Society Incorporated v Carberry* [2000] QCA 450 at [38]; *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301.

- [36] The penalty to which the practitioner has submitted is in the amount of \$2,000 to be paid within six months. This figure is not to underestimate the seriousness of the conduct. It is essential that practitioners understand that they must cooperate in investigations carried out under the *Legal Profession Act*. However, this practitioner is of modest financial means. He engages in a great deal of Legal Aid work in Charters Towers and the purpose of the penalty is not to ruin him financially.
- [37] The ambit of these orders is not dissimilar from those imposed in *Legal Services Commissioner v Bussa*<sup>7</sup> in respect of similar conduct where the Chief Justice constituted the Tribunal, although the monetary penalty is less.
- [38] The orders of the Tribunal are:
1. The respondent is publicly reprimanded.
  2. The respondent is to pay a penalty in the amount of \$2,000 within six months.
  3. The respondent is ordered to accept mentoring from Mr Cameron Turnbull and Mr Don Armit or any other senior solicitor nominated by the Manager, Professional Standards of the Queensland Law Society and to confer regularly with that mentor in relation to his legal practice for a period of 12 months.
  4. The respondent is to report to the nominated mentor/s any correspondence from the Legal Services Commissioner or the Queensland Law Society in relation to a complaint about the respondent's practice within five (5) working days of receipt and thereafter confer with the mentor in respect of the complaint.
  5. The respondent is to refund the amount of \$1,820.60 to the complainant, Mr William Johns, care of the Townsville Community Legal Service, within 14 days.
  6. The respondent is to pay the Commissioner's costs of the application fixed in the amount of \$2,500 within six months.

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<sup>7</sup>

[2005] LPT 005.