

CITATION: *Legal Services Commissioner v Smith* [2014] QCAT 518

PARTIES: Legal Services Commissioner
(Applicant)
v
John Charles Smith
(Respondent)

APPLICATION NUMBER: OCR019-13

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Thomas, President**

Assisted by:

Mrs Joanne Collins
Practitioner Panel Member

Mr Keith Revell
Lay Panel Member

DELIVERED ON: 30 October 2014

DELIVERED AT: Brisbane

ORDERS MADE:

1. The respondent be publicly reprimanded.
2. The respondent pay a penalty of \$6,000 within 90 days of these orders.
3. The respondent is required to engage Dr Peter Lynch to provide advice as to the improvement and implementation of appropriate management systems of his practice, to enable the provision of legal services by the respondent in accordance with the professional obligations of Australian Legal Practitioners under the *Legal Profession Act 2007*.
4. The respondent provide a copy of a report by Dr Peter Lynch to the Legal Services Commissioner within 3 months of these orders.

5. The respondent pay the applicant's costs, fixed at the amount of \$2,500.

CATCHWORDS:

PROFESSIONS AND TRADES – LEGAL PRACTITIONERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – UNSATISFACTORY PROFESSIONAL CONDUCT AND PROFESSIONAL MISCONDUCT – where respondent charged with failure to reach or keep a reasonable standard of competence and diligence, and with misleading his client – where the respondent caused a delay of over 9 years in the course of progressing a personal injuries claim for his client – where the respondent has been the subject of previous disciplinary proceedings of a similar nature – whether his conduct constitutes unsatisfactory professional conduct or professional misconduct – where the respondent has already incurred substantial financial consequences as a result of his conduct – whether the respondent's conduct vitiates the imposition of fine

Legal Profession Act 2007 (Qld), s 418, s 419, s 456
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 32

Legal Services Commission v Bussa (2005)
 LPT 005
Legal Services Commission v Bussa [2011]
 QCAT 388
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 the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act).

REASONS FOR DECISION

- [1] The Commissioner is proceeding with two charges against Mr Smith, who was admitted as a solicitor in Queensland on 21 November 1988.
- [2] The basis of Charge 1 is that the respondent's conduct of a personal injuries claim on behalf of the complainant involved a failure, or a substantial failure, to reach or keep a reasonable standard of competence and diligence.

- [3] Charge 2 is that the respondent misled the complainant to believe that he was taking action to progress her matter by organising a compulsory conference.

Background

- [4] In September 2002, the respondent was engaged to act on behalf of the complainant in a personal injuries claim.
- [5] By letter dated 25 November 2002, the respondent served a copy of the notice of claim on Sunnybank Hospital. TressCox Lawyers, representatives for the hospital, replied on 11 December 2002 and indicated that the notice was not compliant, and requested that some matters be addressed. Between December 2002 and May 2005, TressCox sent a number of letters noting that the respondent had not replied to the letter of December 2002 and repeating that the notice initially delivered in 2002 did not comply.
- [6] In May 2005 the respondent sought advice from Murphy Schmidt Solicitors about preserving the complainant's statutory limitation period which was due to expire on 18 July 2005.
- [7] On 5 July 2005, the respondent lodged an application in the District Court of Queensland seeking leave to proceed with the complainant's matter, despite non-compliance with the pre-Court procedures prescribed by the *Personal Injuries Proceedings Act 2002*. The hospital consented to the application to proceed with the claim on the condition that the matter be stayed until pre-Court procedures had been complied with.
- [8] The respondent took no further action until July 2006, when he provided a copy of the claim and statement of claim to TressCox. TressCox responded, indicating that the notice remained non-compliant. The respondent did not reply to that correspondence, or any other correspondence, from TressCox.
- [9] On 6 April 2011, judgment was handed down in OCR156-10 which was disciplinary proceedings brought by the Legal Services Commissioner against the respondent.¹
- [10] On 28 July 2011 the respondent forwarded a letter to the complainant which included the following:
- In tonight's mail there will be a letter to the other sides solicitors requesting a compulsory conference.
- Also in tonight's mail will be a brief to John Kimmins.
- [11] At that time, no communication had been sent to the hospital's solicitors in relation to scheduling a compulsory conference, and there was no brief sent to Mr Kimmins.

¹ *Legal Services Commissioner v Smith* [2011] QCAT 126.

- [12] By letter dated 11 August 2011, the respondent informed the complainant that:

We have yet to receive a response from the other side. We anticipate a response shortly. We will be in further contact with you then which will hopefully be sometime next week.

- [13] At that time, no communication had been sent to the hospital's solicitors in relation to scheduling a compulsory conference.
- [14] By letter dated 22 August 2011, the respondent communicated with TressCox noting that the complainant wished to proceed to compulsory conference and seeking details of the hospital's availability for a conference. The complainant also provided to TressCox a copy of the complainant's statement of loss and damage and a UCPR offer of \$650,000. The issue of non-compliance remained unaddressed.
- [15] In February 2012, the respondent wrote to TressCox asserting that non-compliance had been rectified and all relevant information had been provided.
- [16] In April 2012 the respondent filed an application in the District Court seeking leave to proceed with the matter. The application was listed for 3 May 2012 however, was adjourned to a date to be fixed.

The Law

- [17] The Commissioner asserts that the respondent's conduct with respect to the charges must be assessed by reference to the statutory definitions of '*unsatisfactory professional conduct*' and '*professional misconduct*' in s 418 and s 419 of the *Legal Profession Act 2007* (Qld).
- [18] A solicitor is required to act with competence and diligence in the service of the client and must only accept instructions when the solicitor reasonably expects to be able to provide service to the client with competence and diligence and to attend to the work with reasonable promptness.
- [19] Neglect and delay by a legal practitioner are capable of falling within the definitions of either professional misconduct or unsatisfactory professional conduct, as defined in s 418 and s 419 of the *Legal Profession Act 2007* (Qld).
- [20] The question of whether or not conduct in a particular case amounts to unsatisfactory professional conduct under s 418, or, professional misconduct under s 419 depends upon the particular factual matrix involved.
- [21] The more serious category is that of professional misconduct, which must involve a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

- [22] In various cases, this has been described as a pattern of failure, so that, if the neglect is part of a pattern of failure, it is likely that the conduct will constitute professional misconduct, rather than unsatisfactory professional conduct.

Findings

- [23] In the present case, there was a delay of in excess of 9 years in the respondent properly prosecuting the action on behalf of his client. This substantial delay is not explained and is unacceptable.
- [24] There is also the matter of the conduct of the practitioner in July and August 2011. At the time, the respondent forwarded the letter of 28th July, indicating that certain action would be taken. However, no such action was taken.
- [25] Moreover, the letter of 11 August to the client indicated that the respondent was awaiting a response from the Hospital lawyers in circumstances where the relevant request (to which a response might be expected) was not sent until 22 August (11 days later). The respondent asserts (through his solicitors in a letter to the Commissioner) that he did not intend to mislead his client, but does not provide any satisfactory explanation. These communications would, in my opinion, have clearly have misled the client. This conduct is not acceptable and falls short of the standard expected of a solicitor.
- [26] In the circumstances, the respondent did not act with competence and diligence in the service of the client. The respondent failed to reach, or keep, a reasonable standard of competence and diligence. In view of the previous proceedings against the respondent, which involved conduct of a similar kind, the relevant category in which to classify his conduct here, is professional misconduct, under s 419 of the Act.
- [27] It is noted the respondent accepts that his conduct is properly categorised as professional misconduct, as it fell substantially short of the standard of competence and diligence to be expected.
- [28] I find that the conduct of the respondent amounts to professional misconduct within the meaning of s 419 of the *Legal Profession Act 2007*.

Penalty

- [29] Section 456 of the *Legal Profession Act* deals with penalties, which are available to the tribunal in the event the tribunal is satisfied that the practitioner has engaged in either unsatisfactory professional conduct or professional misconduct. In those circumstances, the tribunal might make any orders it thinks fit, including those listed in s 456.
- [30] The Commissioner has referred to the case of *Legal Services Commission v Bussa*² that involved similar allegations of professional neglect and

² (2005) LPT 005.

undue delay. The Commissioner points to the fact that the period of delay in *Bussa's* case was from 1997 to 2004 (8 years) whilst the respondent's conduct in the current matter involved a delay of 9 years and also an allegation of misleading the client.

- [31] The Commissioner refers to the fact that Mr Bussa was publicly reprimanded and fined \$6,000 and submits that an appropriate fine would fall within a range of \$4,000 to \$6,000.
- [32] The respondent accepts that he should be publicly reprimanded, but submits that no fine should be imposed. This submission is made on the basis of the sums of money which the respondent has already paid (nearly \$40,000.00) in expenses incurred on behalf of the client, and legal costs the client was ordered to pay, and the offer by the respondent to compensate the client for any further costs and expenses incurred as a result of his conduct.
- [33] In light of those circumstances, the respondent submits that general deterrence is well served by reference to the financial consequences already suffered by the respondent, and, any imposition of any further financial penalty would be to punish the respondent, rather than to serve any appropriate purpose of disciplinary proceedings of this nature.
- [34] With regard to the financial consequences to the respondent, the respondent submits that the case is distinguishable from *Bussa*.
- [35] The primary purpose of disciplinary proceedings is to protect the public. This purpose is furthered, and the public interest is served, if the effect of an order made is to deter other practitioners from engaging in professional misconduct. Whilst the primary aim is not to punish the legal practitioner, a significant consideration in relation to penalty is the deterrent element. Practitioners must appreciate that conduct which is unsatisfactory professional conduct or professional misconduct carries with it a serious risk, and so should be deterred from such conduct.
- [36] There was a second case involving Mr Bussa, decided by his Honour, Justice Alan Wilson, then President of QCAT.³ That decision by His Honour related to additional failures beyond those reflected in the earlier decision. As to penalty, this second decision is more relevant than the decision in the first case, as it involves further offending conduct.
- [37] Wilson J observed that, in light of the practitioner's subsequent reoffending, the imposition of a fine of \$10,000 was not inappropriate, and imposed that fine.

³ *Legal Services Commission v Bussa* [2011] QCAT 388.

[38] The Tribunal notes that:

1. The respondent has incurred expenses at the levels suggested. However, many of those expenses were incurred because of the respondent's delay. Some of the expenses would be recoverable by the client in the context of the personal injury proceedings.
2. The respondent has sworn that he largely avoids plaintiff litigation and medical negligence/personal injuries matters.
3. The respondent's firm utilises a bring up system (not previously utilised).
4. In accordance with Lexon Insurance procedures, the respondent has instigated an enhanced management review program within his firm.
5. The respondent intends to obtain and follow the advice of Dr Peter Lynch, to assist him with his workflow and other practices, to implement appropriate strategies to ensure that no further occasions of substantial delay in the prosecution of the matters on behalf of his clients will occur.
6. The respondent has reviewed all current files to identify real issues that might arise with respect to delay.
7. The respondent has expressed remorse, has endeavoured to alleviate his client of the consequences of the conduct by paying the various amounts and has offered to compensate the client for any further costs and expenses incurred as a result of his conduct.
8. The respondent has accepted that his conduct is properly characterised as professional misconduct and has co-operated with the Legal Services Commissioner in relation to these proceedings.

[39] The tribunal is of the view that, in the context of these proceedings, the conduct of the respondent is a factor in his favour. However, the tribunal believes that the practitioner should, in addition to being publicly reprimanded, be fined. Of course, the level of fine depends upon the circumstances of the case that includes those listed in the preceding paragraph.

[40] In the circumstances, having regard to the decision of Wilson J in the later *Bussa* proceedings, the tribunal is of the opinion that a fine of \$6,000 is appropriate.

[41] Further, in accordance with the purpose of proceedings of this nature, (being to protect the public), the respondent should be required, as he has already indicated that he intends to do, to seek the help of Dr Peter Lynch, and provide a report to the Legal Services Commissioner within 3 months of these orders.

Orders

[42] The tribunal orders that the respondent be publicly reprimanded, and pay a fine of \$6,000 within 90 days of these orders.

- [43] If the respondent has not already done so, the respondent is also required to engage Dr Peter Lynch to provide advice as to the improvement and implementation of appropriate management systems of his practice, to enable the provision of legal services by the respondent in accordance with the professional obligations of Australian Legal Practitioners under the *Legal Profession Act 2007*. The respondent should provide a report by Dr Lynch to the Legal Services Commissioner within 3 months of these orders.

Costs

- [44] The tribunal notes that the respondent has agreed to pay the Commissioner's costs and does not resist an order that the costs be fixed in the sum of \$2,500, the amount which the Commissioner seeks.
- [45] Therefore, it is ordered that the respondent pay the Commissioner's costs at \$2,500.