

SUPREME COURT OF QUEENSLAND

CITATION: *Council of the Queensland Law Society Inc v Tunn* [2004] QCA 412

PARTIES: **COUNCIL OF THE QUEENSLAND LAW SOCIETY INCORPORATED**
(applicant/respondent)
v
JOHN THOMAS TUNN
(respondent/appellant)

FILE NO/S: Appeal No 6474 of 2004
SCT Charge 124

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Solicitors Complaints Tribunal at Brisbane

DELIVERED ON: 5 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 28 October 2004

JUDGES: de Jersey CJ, McMurdo P and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs to be assessed**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY ORDERS – STRIKING OFF AND ANCILLARY ORDERS – appellant found guilty of two counts of professional misconduct and two counts of unprofessional conduct before Solicitors Complaints Tribunal – concerned complaints arising out of conveyancing matters and failure to give an explanation or deliver up files, failure to comply with eight s 5H(2) notices, failure to honour written undertaking to solicitors' firm – charged with serious neglect or delay and, or alternatively, failing to maintain reasonable standards of practice – where appellant alleged complaints due to mistakes of conveyancing clerk – where appellant had been before the Solicitors Complaints Tribunal on three previous occasions – where Tribunal ordered striking off – whether Tribunal erred in striking off appellant

Queensland Law Society Act 1952 (Qld), s 5F, s 5G, s 5H

COUNSEL: L D Bowden for the appellant
M J Burns for the respondent

SOLICITORS: AP Hodgson & Associates for the appellant
Queensland Law Society Inc for the respondent

- [1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of McMurdo P. For the reasons given by Her Honour, I agree that the appeal should be dismissed, with costs.
- [2] **McMURDO P:** The appellant, Mr Tunn, was charged before the Solicitors Complaints Tribunal ("the Tribunal") with two counts of professional misconduct (charges 1 and 2) and two counts of unprofessional conduct or practice (charges 3 and 4).
- [3] It is unnecessary to fully set out the charges which cover some 15 type-written pages, but they may be summarised as follows.
- [4] Charges 1 and 2 concerned the investigation by the Queensland Law Society Inc ("the Society") of the complaints constituting charges 3 and 4 and the general investigation then initiated by the Society. Charge 1 alleged a breach of s 5H(1) *Queensland Law Society Act 1952* (Qld) ("the Act") in failing to give an explanation or to deliver up files in respect of ten complaints to the Society as particularised. Charge 2 alleged Mr Tunn's failure to comply with eight notices under s 5H(2) of the Act as particularised. These matters were also included in the ten particulars in respect of charge 1.
- [5] The third charge alleged that Mr Tunn was guilty of unprofessional conduct constituted by serious neglect or delay and, or alternatively, in failing to maintain reasonable standards. The particulars of charge 3 concerned ten complainants who were Mr Tunn's clients in conveyancing matters. He failed to supervise his staff in ten transactions during a period from February 2002 to May 2003. All but two complaints concerned his employee, Ms Howard. As a result, clients were made liable for default interest because of late settlements; were given wrong advice; the vendor was not advised that the finance of Mr Tunn's purchaser-client had been approved so that the contract was rescinded and the client was obliged to purchase the property at a higher price; registration of the transfer of properties was delayed so that clients' rights were unprotected for some months; mathematical errors were made in calculating settlement figures resulting in a client making an overpayment; the proceeds of a sale were banked late so that a client lost five days interest; a purchaser was allowed an extension of the settlement date by two days without instructions, depriving the client of her right to rescind.
- [6] The fourth charge alleged that Mr Tunn was guilty of professional misconduct or unprofessional conduct in failing to honour his written undertaking to Phillips Fox Lawyers:
- "to deposit the entire sale proceeds of the sale of the property at 14 Glenview Ct, Underwood into the trust account of Tunns Lawyers immediately after settlement of the sale; and not to dispose of or otherwise deal with those settlement proceeds without an order of the court authorising that dealing."

Mr Tunn, in breach of this undertaking, deposited \$85,230.30 from the sale of the property in his trust account and without any court order disbursed \$6,656 to real estate agents for the balance of the commission on the sale of the property.

- [7] The Tribunal by majority found charges 1 and 2 proved and Mr Tunn guilty of professional misconduct and charges 3 and 4 proved and Mr Tunn guilty of unprofessional conduct or practice. In respect of charges 1 and 2, the majority noted that these were statutory charges and that Mr Tunn had:

"sought to explain the circumstances surrounding the complaints made by his clients, the subject of these charges, and laid the blame for the events that took place on the actions of his unqualified staff. While [he] accepted ultimate responsibility for the matters, he did so in a somewhat reluctant matter [sic]. ...

Breaches of Section 5H(1) and 5H(2) of the Act are serious matters. The regulation of the profession demands that practitioners must comply with notices issues [sic] by the Queensland Law Society. It is the obligation of the Queensland Law Society to investigate complaints. It is the opinion of this Tribunal that [Mr Tunn's] conduct falls below the reasonable standards of a competent practitioner."

- [8] The majority noted in respect of charge 3 that Mr Tunn:
 "was guilty of serious neglect of his clients' affairs and ... failed to maintain reasonable standards of competency or diligence in relation to the conduct of his clients' files. The public are entitled to expect a better standard of conduct from their solicitor than that exhibited by [Mr Tunn]."
- [9] In respect of charge 4 the majority noted that although the undertaking was badly worded, undertakings are not lightly given and must be strictly met; Mr Tunn could have approached the court or the party in whose favour the undertaking was given to vary it; his reliance on a letter from the agent to pay moneys to a third party without the consent of the party in whose favour the undertaking was given was "reckless and foolish".
- [10] The majority made a number of orders, including that Mr Tunn's name be struck from the Roll of Solicitors of this court and that he pay amounts of compensation totalling \$19,317.64 to six complainants by 1 October 2004. He has paid only the first and smallest of those amounts, apparently because he was declared bankrupt on 20 August 2004.
- [11] The dissenting member agreed with the findings of the majority save as to penalty, concluding that Mr Tunn would be fit to continue practising as a solicitor under his proposed structured order, which included a penalty of \$30,000 and elements of supervision and education.
- [12] Mr Tunn, through his counsel Mr Bowden, contends as to charges 1 and 2 that the complaint which may be the subject of an investigation under s 5F(1) of the Act and which may further be the subject of a requisition under s 5G(a) of the Act relates only to a specific complaint from a specific complainant under s 5E(1) of the Act and not to matters of general complaint. He also contends that a failure to comply

with a requirement of the Council of the Society ("the council") under s 5G of the Act was not a discrete offence but merely formed part of the conduct which, if continued, under s 5H(2) of the Act gave rise to the commission of professional misconduct under s 5H(3). Apart from the statutory effect of the failure to respond to the council within time, this was only otherwise a case of unprofessional conduct as defined by s 3B(1) of the Act.

- [13] Although not abandoning his argument, Mr Bowden concedes that this technicality has no relevance to the real and only point of the appeal, whether the Tribunal erred in striking Mr Tunn's name from the Roll of Solicitors of this Court.
- [14] Section 5H(1) of the Act requires a practitioner, within a stated reasonable time, to comply with a council¹ requirement under s 5G(a) and (c) in a council "investigation" to produce to the council an explanation of the matter being investigated or any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce. Section 5F(1) requires the council to investigate a complaint under s 5E of the Act, (a complaint made by a complainant as to the conduct of a practitioner, practitioner's clerk or employee). Section 5F(2) also requires the council to investigate the conduct of a practitioner, practitioner's clerk or employee if it considers the conduct may amount to malpractice, professional misconduct, or unprofessional conduct or practice of the practitioner.² It follows that an investigation under s 5G includes both investigations under s 5F(1) and (2) so that the failure of a practitioner to comply with a council requirement under s 5G as referred to in s 5H(1) concerns both investigations of complaints by specific complainants³ and those initiated by the council.⁴ Under s 5H(2), if the practitioner continues to fail to comply with the council's requirement for 14 days after the council gives notice, the practitioner may be dealt with for professional misconduct. That does not mean non-compliance with s 5(H)(1) cannot also be professional misconduct, that is, conduct falling short to a substantial degree of the standard of professional conduct observed or approved by members of the profession of good repute and competency.⁵ It was for the Tribunal to determine whether the conduct particularised in charge 1, insofar as it did not fall within s 5H(2) of the Act which statutorily empowered the Tribunal to deal with Mr Tunn for professional misconduct, also amounted to professional misconduct or unprofessional conduct or neither of these. As Mr Bowden does not contend the finding of guilt on either counts 1 or 2 should be set aside, it is unnecessary to consider these matters further.
- [15] I turn now to consider the question of penalty. Mr Tunn is 48 years old and was admitted to practise as a solicitor on 30 January 1979. Prior to and until 29 February 1992 he practised as a sole practitioner under the firm name J T Tunn & Co and since 6 March 1996 as a sole practitioner under the firm name Tunns

¹ Defined in s 3 of the Act as council of the Queensland Law Society Inc.

² The term "unprofessional conduct or practice" is defined in s 3B(1) of the Act as:

- (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."

³ See s 5E and s 5F(1).

⁴ Under s 5F(2).

⁵ *Adamson v Queensland Law Society Incorporated* [1990] 1 QdR 498, 507-508.

Lawyers. In a letter to the Society on 20 April 2004 Mr Tunn indicated an intention to plead guilty to the charges and admitted that he had been:

"dilatory in responding to correspondence from the Society. The question of the supervision is a somewhat more complex one but I appreciate that the ultimate responsibility rests with me.

...

All problems arise out of conveyancing matters and it would appear that the primary offender (again accepting personal responsibility) was Ms Tina Howard."

- [16] An affidavit from Ms Howard was filed in the proceedings before the Tribunal. She attested that she was an experienced conveyancing clerk when she came to work for Mr Tunn just before Christmas 2002. She found the work very stressful because she had inadequate support. Mr Tunn, the only legally experienced person in the firm, was often out of the office and unavailable to answer her queries or the complaints of clients. She passed on to him the complaints of clients. His only response was that he would see about getting another employee to assist; he did not. She left her employment with Tunns Lawyers in February 2003. Mr Tunn did not require her for cross-examination so that her evidence was unchallenged.
- [17] Mr Tunn suffers ill-health. He has been clinically depressed since 1990 and since that time has been on an anti-depressant medication. He also takes medication for osteoporosis and has recently been hospitalised and is on medication for an oesophageal stricture. He tendered a number of testimonials from solicitors attesting to his competence as a family lawyer, especially in agency matters.
- [18] Mr Tunn has a previous history of findings of professional misconduct and unprofessional conduct. First, on 28 October 1985 he was found guilty of unprofessional conduct in wrongfully converting trust moneys of \$2,637.19 on 21 July 1983; between 1 March 1982 and 7 February 1983 failing to keep a proper account of trust moneys; failing to advise his client that an appeal had been listed before the Full Court of the Supreme Court of Queensland on 1 February 1983 and that it was the solicitor's intention then to instruct his town agents to seek leave to withdraw as solicitors on the record for the client; not informing the client of his intention to withdraw as solicitor on the record nor obtaining instructions about the matter, nor advising the client of the likelihood that his appeal would be dismissed in the absence of representation before the Full Court of the Supreme Court. He was fined \$3,000 and ordered to pay the Society's taxed costs and the costs of the proceedings. Second, on 4 November 1992 he was found guilty of professional misconduct by the statutory committee of the Society for five breaches of r 83 of the Rules of the Society; one breach of reg 5(b) *Legal Assistance (General) Regulations* 1988; one breach of s 10 *Legal Assistance Act* 1965-1990; two charges of failing to register transfers and disregarding a s 31 report and disregarding verbal advices of the Society's auditor; four breaches of reg 5(c) of the *Trust Account Regulations* and disregarding a s 31 report and verbal advices of the Society's auditor; and four breaches of r 81 of the *Rules of the Queensland Law Society*. Mr Tunn was ordered to be suspended from practice as a solicitor until 31 December 1993. Third, on 28 September 1994 Mr Tunn pleaded guilty before the statutory committee of the Society to charges that in or around April 1989 he failed to reveal to a client-purchaser of land that he was a director and shareholder of the vendor company; in

about April 1990 he failed to properly protect the interests of his client in that he acted in preparing a bill of mortgage without confirming those instructions with his client or a director thereof; in about May 1989 he acted for a client purchasing land from a vendor company but failed to reveal that he was a director and shareholder of the vendor company; in about May 1989 he failed to properly protect the interests of his client in that he acted on the instructions of another in paying his client's funds for the benefit of a company in which he had an interest, without confirming the client's instructions; he practised as a solicitor without a practising certificate from July until October 1992; and on 29 April 1994 he was convicted of two counts of permitting sodomy and one count of sodomy.⁶ The committee found Mr Tunn guilty of these charges on his own admission, that these charges collectively constituted professional misconduct and suspended him from practice as a solicitor until 30 September 1995.

- [19] The majority of the Tribunal rightly considered this history as a very relevant factor in determining penalty, even though conscious that his last proven misconduct was about ten years earlier.
- [20] Mr Tunn has, through Mr Bowden, indicated a willingness to this Court, partly foisted on him by his recent bankruptcy, to practise only as an employed solicitor and in the field of family law, specifically undertaking to refrain from practising as a conveyancer. As to his failure to comply with the Society's requests under the Act, he emphasises that in most instances Mr Tunn attempted to comply.⁷ He contends that, apart from the statutory effect of s 5H(2) of the Act making his slow response to the Society professional misconduct, the case was essentially only one of unprofessional conduct. It was not the most serious kind; it did not involve fraud or personal gain and did not warrant striking off, especially in the light of the favourable testimonials and Mr Tunn's undertaking; he is a fit and proper person to practice,⁸ at least in the limited practice that he now proposes to undertake.
- [21] Mr Tunn is an experienced practitioner who has been guilty of three previous episodes of unsatisfactory professional conduct. Despite the penalties imposed for those past indiscretions, he has continued to operate his practice in an unprofessional manner by failing both to adequately supervise his staff and also to investigate and answer the legitimate complaints of his clients. He then failed to meet his requirements under the Act to provide explanations and deliver files to the Society, which in itself was found to constitute professional misconduct. He does not seem to have learned from his past experiences before the Tribunal or from the leniency then shown to him. Whilst paying lip service to the concept of his personal duty to his clients and his responsibility for the work of his unqualified staff, in reality he has attempted to shift the fault of his own professional shortcomings onto Ms Howard. In all these circumstances, the majority of the Tribunal was justified in concluding that, despite the mitigating factors, Mr Tunn is not presently a fit and proper person to practice as a solicitor. It may be that, in time, he can persuade the court he has reformed and is once more a fit and proper person to practise, at least

⁶ These details are taken from the findings and orders of the Statutory Committee contained in the Appeal Record Book but in 1994 sodomy and permitting sodomy were not offences unless involving one male person not an adult: see s 208 *Criminal Code* (repealed).

⁷ In one case he was late only by a day, in other instances his delay was longer and in others he has still not given a satisfactory response.

⁸ *Attorney-General v Bax* [1999] 2 QdR 9.

with a limited practising certificate, but on the present facts, the penalty imposed of striking his name from the Roll of Solicitors of this Court was appropriate.

[22] The appeal should be dismissed with costs to be assessed.

[23] **MULLINS J:** I agree with the reasons for judgment of McMurdo P and the order proposed by her Honour.