

# LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Wherry* [2009] LPT 22

PARTIES: **LEGAL SERVICES COMMISSIONER**  
(applicant)  
**v**  
**BARRETT ANTHONY WHERRY**  
(respondent)

FILE NO: 981 of 2009

DIVISION Legal Practice Tribunal

PROCEEDING: Discipline Application

DELIVERED ON: 7 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 7 September 2009

JUDGE: Fryberg J

PRACTITIONER PANEL MEMBER: Mr M Woods

LAY PANEL MEMBER: Dr M Steinberg

ORDERS: **1) The Tribunal recommends that the practitioner's name be removed from the local roll.**  
**2) The respondent to pay the applicant's costs of and incidental to the discipline application to be assessed as if such proceedings were an action commenced in the Supreme Court.**

CATCHWORDS: Profession – Lawyers – Complaints and discipline – Disciplinary proceedings – Queensland – Proceedings in tribunals – Costs – Standing of Legal Services Commissioner to apply for costs on complainant's behalf – Order for complainant's costs where no appearance

*Legal Profession Act 2007 (Qld), s 456, s 462(1), s 643*  
*Trust Accounts Act 1973 (Qld), s 8*

COUNSEL: B I McMillan for the applicant  
No appearance for the respondent

SOLICITORS: Legal Services Commission for the applicant

No appearance for the respondent

LEGAL PRACTICE TRIBUNAL

FRYBERG J

[2009] LPT 22

DR M STEINBERG  
MR M WOODS

No 981 of 2009

LEGAL SERVICES COMMISSIONER

Applicant

and

BARRETT ANTHONY WHERRY

Respondent

BRISBANE

..DATE 07/09/2009

ORDER

HIS HONOUR: This is an application by the Legal Services Commissioner for disciplinary orders pursuant to section 456 of the Legal Profession Act 2007 against Barrett Anthony Wherry, a solicitor.

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Mr Wherry was convicted in the Magistrates Court at Charters Towers on the 21st of February 2007 of the offence of forging a document with intent to defraud. The document which Mr Wherry forged was an authority regarding costs purporting to be signed but not in fact signed by his client Ms Joanne Bennett.

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Mr Wherry had been engaged by Ms Bennett in respect of a workers' compensation claim and had entered into a client agreement with her in 1998. He acted in the matter over some four years on a speculative basis. The matter settled in mid-2002 for some \$385,000 and after payment of amounts due to the Health Insurance Commission and Centrelink, \$291,000 approximately was paid into the solicitor's trust account in August of that year.

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The solicitor made two payments to his general account from that trust account. The first was a payment of nearly \$77,000, on the same day the money was received. The second was a payment of nearly \$15,000, made in late November 2002 after payment of \$200,000 to his client. That exhausted the funds. Neither of those payments was supported by an authority from the client. Making them amounted to a breach of section 8 of the Trust Accounts Act which required the

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solicitor not to make any payment out without such an authority.

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In February the following year the solicitor made an attempt to recover fees from the client of over \$108,000, no doubt giving allowance to the amounts already withdrawn. Ms Bennett engaged other solicitors to act on her behalf and a bill was demanded. In July 2003 the solicitor wrote to those solicitors enclosing a number of documents, one of which was a purported trust account authority dated 8th of August 2002 and purportedly signed by Ms Bennett. That document was a forgery made by the solicitor.

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There is no evidence before the Tribunal of precisely why the solicitor brought the forgery into being. It appears to have been used to try to persuade the solicitors and, as was found subsequently when the respondent pleaded guilty in the Magistrates Court, also the Law Society that there was a trust account authority in existence. It has not been shown that the respondent was not entitled to the \$91,000-odd in respect of fees. Indeed, there has been no attempt to identify the amount to which he was entitled and the matter has proceeded on the assumption that he may well have been entitled to at least the amount which he withdrew.

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The charge is specified and limited to the fact that he was convicted of an offence involving dishonesty. It is clear from the transcript of the proceedings in the Magistrates Court and from the reasons for judgment of the then Chief

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Magistrate that the dishonesty in question in the  
Magistrates Court was misleading the new solicitors for  
Ms Bennett and the Law Society. It may also fairly be said, I  
think, that it is dishonest, and this may be another way of  
saying the same thing, to forge a document in an attempt to  
evade a prosecution or criticism for a breach of section 8 of  
the Trust Accounts Act. 10

The solicitor has not appeared in this Tribunal. A short  
while ago the Tribunal made an order for substituted service  
on him on the material, it having proved difficult to effect 20  
service in the ordinary way. The material before the Tribunal  
today demonstrates quite clearly that the solicitor has become  
aware of the proceedings and he has had abundant time to place  
any material before the Tribunal which might relate either to  
the substance of the charge or to the issue of sanction. He 30  
has chosen not to do so.

In the last day or so his wife has sent a letter to the  
Commissioner and requested that the contents of the letter be  
placed before the Tribunal. Mr McMillan on behalf of the 40  
Commissioner has very properly done so. The letter asserts  
that the respondent has suffered ill health and seems to  
suggest that there is no immediate prospect of his recovering.  
It does not in terms seek an adjournment and there is  
certainly nothing in it which, in my judgment, would warrant 50  
the granting of an adjournment in the circumstances of the  
case. I did not receive it into evidence but, rather, have  
had it marked for identification.

There is little that can be said in relation to the proof of the offence. The certificate of conviction is before the Tribunal. The reasons for judgment and the transcript of argument are before the Tribunal. I see no basis upon which any other conclusion could be reached than that the respondent is guilty of professional misconduct. I am advised by those with me that they are of a like view.

As regards the order which the Tribunal should make the requirement for honesty and integrity in a solicitor has been restated many times by many Tribunals throughout Australia and in the Courts. In the present case the solicitor not only forged a document but continued to urge its genuineness even after the matter was challenged. He subsequently demonstrated genuine remorse in pleading guilty in the Magistrates Court but that does not mean that the Tribunal can feel the level of confidence which is necessary in order to ensure that the public is protected against dishonest practitioners. He has not come before the Tribunal or put material before it which would provide a basis for any confidence that, despite his remorse, the public can adequately be protected if he is permitted to continue in practice.

I accept the Commissioner's submission that the appropriate order in the present case is one recommending that the respondent be removed from the local roll.

The applicant also gave notice that there would be an

application for costs on behalf of Ms Bennett. An affidavit  
has been put before the Tribunal exhibiting a letter from  
Kingston & Stanton Solicitors acting for Ms Bennett. It  
appears to relate to events that occurred in 2003 and  
subsequently but it is quite unclear whether it directly  
relates to matters the subject of the charge. It is a tax  
invoice setting out attendances, correspondence and  
professional conduct for which the solicitors have charged  
Ms Bennett.

The Commissioner has not made an application himself for an  
order that costs of Ms Bennett be paid. In that regard it  
seems to me that the Commissioner was probably acting  
correctly as he does not have any express provision in the Act  
which gives him standing to apply for such an order, and it  
seems he does not hold any written authority from Ms Bennett  
to seek such an order on her behalf. I say nothing as to  
whether he could seek such an order if he did hold such an  
authority. That is one difficulty with regard to the  
proposition that an order should be made for Ms Bennett's  
costs.

The Commissioner has very properly and helpfully drawn the  
Tribunal's attention to the provisions of section 462(1) which  
mandates the Tribunal making an order requiring a person whom  
it has found guilty to pay costs, including the costs of the  
Commissioner and the complainant, unless exceptional  
circumstances itself. It almost goes without saying that the  
Commissioner will have costs incurred in any proceedings

before the Tribunal. It does not go without saying that a complainant will incur costs in proceedings before a Tribunal. Indeed, in most cases one would expect that a complainant would not incur legal costs in relation to the matter before the Tribunal.

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It seems to me that one should not construe section 462(1) as requiring the Tribunal to make an order for a person to pay the costs of a complainant when there is no suggestion that any such costs have been incurred.

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There are cases where it will ordinarily be likely that a complainant has incurred costs. Section 643 of the Act deals with parties to proceedings and provides that a complainant is entitled to appear at the hearing in relation to those aspects of the hearing that relate to a request by the complainant for a compensation order and if the Tribunal grants leave other aspects of the hearing.

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In the present case the complainant did not apply for a compensation order and there is no evidence that the complainant has suffered any loss which could be the subject of compensation, nor has she sought leave to become a party to the proceedings. A complainant who is not a party to the proceedings might conceivably incur costs which could be recovered under section 462 but as presently advised, I cannot imagine how. It seems to me that, prima facie, the costs which are referred to in that section are going to be costs which have been incurred of and incidental to the Tribunal

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proceedings.

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The costs in the present case which the complainant has incurred were incurred, it appears, over a period of years prior to the happening of the event which is the subject of the Tribunal proceedings - that is, prior to the conviction of the solicitor for an offence of dishonesty. Indeed, what I was told from the Bar table suggests that the original complaint was one of overcharging. It could hardly have been a complaint indicating the conviction since that was many years in the future at the time that complaint was made. It therefore seems that even if Ms Bennett became a party to the proceedings, it is unlikely that any of the costs which she has incurred could be identified as being costs of and incidental to the proceedings.

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It does not seem to me that costs of making a complaint would necessarily or even ordinarily fall within the notion of costs of and incidental to proceedings. However, they may do so. There can be no doubt that costs of proceedings can include costs of preparation right from the time of taking or giving first instructions. That is a question which depends on the facts of the case and it is unnecessary for me to say more about it at this time. In the present case, it is not shown that such costs have been incurred. I therefore think it not appropriate to make any order for costs of the complainant and in the end, counsel for the Commissioner conceded that this would not be an appropriate case for so doing.

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To make sure that Ms Bennett was not proceeding on a different

basis, or on an assumption that her interests would somehow be  
looked after differently, the Tribunal adjourned and allowed  
the legal representatives for the Commissioner to contact  
Ms Bennett to ensure that she did not wish to make any  
application to be joined, or to argue for costs, and the  
Tribunal has been assured that such contact was made and there  
is no such wish.

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The order of the Tribunal is: that it is recommended that the  
name of Barrett Anthony Wherry be removed from the local roll  
and that Mr Wherry pay the costs of the Commissioner of and  
incidental to the disciplinary proceedings, to be assessed as  
if such proceedings were an action commenced in the Supreme  
Court.

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Does that form of order satisfy?

MR McMILLAN: Yes, that's suitable, your Honour.

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