QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Legal Services Commissioner v Woodman [2017] QCAT
PARTIES:	Legal Services Commissioner (Applicant) v Gary Robert Woodman (Respondent)
APPLICATION NUMBER:	OCR137-16
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Hon J B Thomas, Judicial Member** Assisted by: **Mr Geoffrey Sinclair** **Dr Margaret Steinberg**
DELIVERED ON:	8 November 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The tribunal is satisfied the respondent Gary Robert Woodman had engaged in professional misconduct.** **2. A local practising certificate must not be granted to the respondent before the expiry of four years from the date of this order.** **3. The respondent must pay the applicant's costs of this proceeding to be assessed on the Supreme Court scale within 30 days of his receipt of such assessment.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – CRIMINAL OFFENCES – where the respondent was convicted on two counts of grooming a child under 16 years and one count of using the internet to procure a child under 16

years – whether the respondent's conduct amounts to professional misconduct – whether the respondent is permanently unfit to practice or is not a fit and proper person to be a legal practitioner of the Supreme Court – whether an order should be made striking the practitioner from the roll - whether the respondent should be suspended from holding a practising certificate

Hilton v Legal Profession Admission Board [2016] NSWSC 1617
Legal Services Commissioner v Biddle [2017] QCAT 119
Legal Services Commissioner CBD [2012] QCA 69
Legal Services Commissioner v CBD (No. 2) [2011] QCAT 446
Legal Practitioners Admissions Board v Doolan [2016] QCA 331
Legal Services Commissioner v King (No. 2) [2013] QCAT 558
Legal Services Commissioner v Madden [2008] QCA 301
Prothonotary of the Supreme Court v P [2003] NSWCA 320
Legal Services Commissioner v Quinn [2012] QCAT 618
Legal Services Commissioner v Shand [2017] QCAT 159
Watts v Legal Services Commissioner [2016] QCA 224

Legal Profession Act 2007, s 452, s 598, s 599, s 456, s 418, s 419, s 462

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

Jurisdiction

[1] This is a discipline application brought by the Legal Services Commissioner ("the Commissioner") against the respondent solicitor Woodman under s 452 of the *Legal Profession Act* 2007 ("the LPA").

[2] The Tribunal with jurisdiction to determine such an application is QCAT.[1] This Tribunal has been constituted in accordance with ss 598 and 599 of the LPA.

[3] The orders that may be made on such an application are in the discretion of the Tribunal, and include the various orders that are mentioned in s 456 of the LPA.

The charges

[4] The respondent was convicted on 15 April 2015 on two counts of grooming a child under 16 years, and one count of using the internet to procure a child under 16.

[5] The discipline charges in the present proceedings allege that Mr Woodman's engaging in the relevant criminal conduct and suffering the ensuing convictions constitute professional misconduct and/or unsatisfactory professional conduct.

[6] A third charge of failure to comply with a requirement of an investigator was not pursued. The Commissioner, having considered the respondent's response to that charge, formed the view that he had a reasonable excuse for not complying with the requirement.

[7] The present charges are in respect of events occurring otherwise than in connection with the respondent's practice of law. Conduct of this kind is capable of supporting a finding of professional misconduct, but particular considerations emerge in the decided cases with respect to that type of misconduct.

Issues of determination

[8] This Tribunal must decide :

a) whether the respondent's conduct should be characterised as "professional misconduct" or "unsatisfactory professional conduct"; and

b) the level of sanction appropriate.

Summary of facts

[9] The respondent was born in 1955, and was admitted as a solicitor in 1981.

[10] He practised law for 33 years, until the events which led to his arrest. During that time, he had an untarnished record both in his profession and in the community.

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1 LPA, ss 452, 456; Schedule 2 definition "Tribunal".

[11] Prior to the offending conduct, his second marriage had failed, and health problems had emerged including a stroke in 1995 and major heart surgery in 2008. Following his second divorce in 2011, his wife and children stayed in the marital home, and the respondent went to a unit.

[12] The respondent's offending conduct is described in the Commissioner's submissions as follows:-

> "11. On 27 June 2014, the respondent engaged a 14-year-old female child with a profile name of Abbey18 whilst on a social media site. Her profile said that she was a secondary school student and was not really 18. Abbey was in fact a police officer using a covert identity in her role as a law enforcement participant in an operation run by Taskforce Argos. During the chat, Abbey told the respondent that she was in grade 10 and a student living with her mother. The respondent's conversations with Abbey were sexualised and the respondent encouraged her to undress and asked her if she had masturbated before. The respondent then contacted her via Skype and exposed his penis and masturbated.
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> 12. On 5 July 2014, the respondent again sent messages to Abbey and a sexualised conversation took place and the respondent asked her to undress during the chat and asked if she had masturbated before. The respondent then contacted her via Skype and exposed his penis and masturbated on three occasions. During the Skype video call, the respondent procured her to commit sexual acts on herself by instructing her to masturbate. While the respondent raised the topic of meeting the child during the conversations, there was no serious attempt to meet the child and was not persisted with in any way.
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> 13. In relation to the first two references, the respondent was charged with two counts of grooming a child under 16 years pursuant to s 218B(1)(B) of the *Criminal Code* 1899 (Qld). The respondent was charged with a further offence of using the internet to procure a child under 16 years pursuant to s 218(A)(1) of the *Criminal Code* 1899. The respondent pleaded guilty to all three charges.
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> 14. On 15 April 2015, the respondent was sentenced to imprisonment for a period of 18 months, which was wholly suspended for two years in relation to the first two counts. In relation to count 3, the respondent was sentenced to imprisonment for a period of two years which was wholly suspended for a period of three years."

[13] On 11 July 2014, within a week of being charged, he attempted suicide, and was admitted to Pine Rivers Private Hospital for treatment. He has subsequently undergone very extensive treatment with a forensic psychologist, Mr Nick Smith (21 sessions) and with a psychiatrist.

[14] After initial proceedings in QCAT, he wrote to the Registrar indicating that he no longer wished to resist the application and that he would not attend any future hearing dates, due to ongoing medical problems.

[15] The sentencing judge, Samios DCJ, regarded the psychiatric evidence as significantly in the respondent's favour, and decided against requiring actual time to be served in imprisonment. His Honour noted his cooperation and early pleas of guilty and accepted that there was no serious attempt to meet "the child", that topic having been raised fleetingly and not having been persisted in. The offences were described as "distasteful" and his Honour pointed out that whilst there was no real child, only a police officer, the respondent believed he was dealing with a child, and noted that the respondent accepted that what he did was immoral and illegal. The medical evidence was that the respondent was at low risk of reoffending.

Discussion

[16] The Commissioner seeks the removal of the respondent's name from the role of solicitors, and an order for costs on the Supreme Court scale.

[17] On behalf of the Commissioner, it was submitted that the respondent has not shown any insight or remorse for his conduct in the disciplinary proceedings. However, the evidence of events and conduct since the commission of the offences suggests a great deal of shame, apology and remorse on his part. The sequence of events following his being charged starts with a suicide attempt, followed by an early plea of guilty notified after a full hand up committal, and cooperation with the administration of the proceedings. His life, already vulnerable, was shattered and his shame was obvious. His letter of apology addressed to the presiding judge, a report from his psychiatrist Mr N Smith, and his letter to QCAT dated 22 June 2017 all provide credible evidence of remorse and shame.

[18] He has apparently not worked as a solicitor since the time when he was charged.

[19] This Tribunal has to determine whether the relevant conduct is to be characterised as "professional misconduct" or "unsatisfactory professional conduct". Those terms are defined in s 419 of the LPA.

[20] For conduct happening after 1 July 2004, the scheme of the LPA recognises only two kinds of conduct as capable of justifying disciplinary orders against Australian legal practitioners, namely "unsatisfactory professional conduct" and "professional misconduct".

[21] Those terms are defined, but the definitions are not comprehensive.

[22] The definition of "unsatisfactory professional conduct" is that it 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".

[23] That is a mere example, and it focuses on standards of competence and diligence. Obviously there are many areas of practice in which the conduct of a legal practitioner may be unsatisfactory beyond those stated areas.

[24] In similar vein, s 419 deals with "professional misconduct". It provides two examples of types of conduct that will suffice for a finding of professional misconduct. Other formulations of conduct that may be regarded as professional misconduct are left open.

[25] Consistently with decided cases dealing with the term "professional misconduct" and other terms that have been used to describe unacceptable professional behaviour, the illustrations in ss 418 and 419 themselves demonstrate that the term "professional misconduct" is appropriate to describe conduct at the more serious end of conduct that may lead to disciplinary proceedings against professional persons.

[26] The imposition of a sanction is in the discretion of the Tribunal (s 456), and no legislative limitations are imposed according to whether the finding is of professional misconduct or of unsatisfactory professional conduct.

[27] Accordingly, the Tribunal continues to be guided by past decisions subject to the directions afforded by the LPA.

[28] A difficulty however, arises in the interpretation of s 419(1)(b), from the use of the present tense in reference to a "finding that the practitioner **is** not a fit and proper person to engage in legal practice".

[29] It is not difficult to envisage an example of serious misconduct in the past by a practitioner who had successfully rehabilitated by the time of the disciplinary proceeding, and against whom it would then be inappropriate to find that "the practitioner is not a fit person to engage in legal practice". The question arises whether it would be open to find professional misconduct against such a practitioner with regard to misconduct outside the practice of the law without also making a specific finding "that the practitioner is not a fit and proper person to engage in legal practice".

[30] In Shand's case,[2] I acted on the footing that such a finding was necessary, but on reflection place on record that I seriously doubt the correctness of that particular view. It is open to think that if a practitioner's original misconduct was serious enough it would justify a finding that the practitioner "has engaged in professional misconduct",[3] irrespective of the practitioner's present state of grace. The example given in section 419(1)(b) postulates that whenever a finding is justified that a person is not a fit and proper person to engage in legal practice, a finding of professional misconduct is appropriate, whether or not the conduct happened in connection with the practice of law. It would follow that the non-exclusive definition in s 419(1)(b) does not necessarily preclude a finding of professional

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2 *Legal Services Commissioner v Shand* [2017] QCAT 159, at [36] and [42].

3 That is the essential finding required by s 456(1).

misconduct when a finding of present unfitness is not open. It is unnecessary to express a final view on this point, as a finding is available in the present matter that meets either view of the definition. The point is however, an important one, and it needs to be settled.

[31] The conduct of the respondent in this case was disgraceful, and of the kind that appals both his professional peers and the public alike.

[32] At the present time, he is far from recovered from the aftermath of his offences, and his capacity to function professionally is, to say the least, questionable.

[33] There is a significant distinction between fitness to hold a practising certificate, and fitness to remain on the roll. In the present case, I have concluded that, at the present time, the respondent is not a fit and proper person to engage in legal practice. The question whether his name should be removed from the roll is of course a separate one which will be discussed below under the heading "sanction".

[34] Having regard to his present state and to the gravity of his offences, I find that he is not at present a fit and proper person to engage in legal practice.

[35] It follows that his conduct meets the requirements of the definition contained in s 419(1)(b), and with the advice of the panel, I hold that his conduct amounted to professional misconduct.

Sanction

[36] The main issue remaining in this case is whether the respondent's name should be struck from the roll of practitioners, or whether there should be some other sanction such as a suspension for a stated period.

[37] Recent decisions including decisions of the Queensland Court of Appeal emphasise the distinction between removal of a practising certificate and removal from the roll. The development of this distinction is described in *Legal Services Commissioner v Shand* [2017] QCAT 159 at paras [51]-[68]. It is now firmly established throughout Australian jurisdictions that an order for striking off the roll should only be made when the probability is that the solicitor is permanently unfit to practise.[4]

[38] A finding that a respondent at a particular time is not a fit and proper person to engage in legal practice does not necessarily mean that he or she is not fit to remain on the roll. Different purposes and considerations apply to the maintenance of the roll and to the granting or the withdrawing, suspending or imposing of conditions concerning practising certificates.[5]

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4 *Prothonotary of the Supreme Court v P* [2003] NSWCA 320, [17]; *Watts v Legal Services Commissioner* [2016] QCA 224, [46].

5 *Legal Practitioners Admissions Board v Doolan* [2016] QCA 331, [44]-[50]; *Watts* above at paras [46], [47] and [52].

[39] In some cases, the circumstances of the offence are themselves enough to permanently stigmatise the offender as unfit to be a member of an honourable profession, as for example where the circumstances show an ingrained, unacceptable character raising concern that the practitioner ought never to be admitted to practice again.[6]

[40] The Commissioner in this case submits that this respondent's conviction and the nature of the offences itself is sufficient to undermine public confidence in the legal profession if the respondent turned out to be a "fit and proper person". It was submitted further that the very facts of his criminal offences demonstrates that he is an ethically unsuitable practitioner and should not be allowed to carry out the responsibilities and duties of a legal practitioner. In short, it was submitted, the seriousness of the crime is enough in itself to require his removal from the roll.

[41] However, a perusal of a number of relatively recent cases suggests that this respondent's convictions and conduct do not reach the necessary level to justify his removal from the roll at this stage.

[42] There are many cases where this issue has arisen, but six relatively recent cases in particular may be mentioned. Three of these have resulted in striking off and three in some lesser course being taken. Striking off was ordered or upheld in *Quinn*,[7] *Biddle*[8] and *King (No. 2)*.[9] The non-striking off cases which offer some guidance are *Watts*,[10] *Madden*,[11] and *CBD*.[12]

[43] It is not necessary to recite and compare the facts of all of these cases. I am content to say that in cases where striking off has been held to be justified there was sustained misconduct of a kind that marked each respondent as a person who would never be fit to trust with the powers and functions entrusted to a solicitor.

[44] Of all the above cases, perhaps the most instructive and comparable with the type of misconduct with which we are concerned is *CBD*. In that case, the offending solicitor was convicted of possession of child exploitation material, and was sentenced to 12 months imprisonment wholly suspended for a period of two years. The QCAT Tribunal (Wilson J) noted that his practice had been restricted since the time he was charged, and was of the view that there was no persuasive reason to impose any further period of disqualification. His Honour observed that while the offending engendered concern, the actual circumstances did not give rise to an apprehension that

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6 *Hilton v Legal Profession Admission Board* [2016] NSWSC 1617, [6] - bribery of a minister repeatedly over a sustained period, obtaining earlier release for criminals, misconduct over very significant period and perversion of actual legal practice.

7 *Legal Services Commissioner v Quinn* [2012] QCAT 618 (considered in *Watts v Legal Services Commissioner* [2016] QCA 224 at [49]).

8 *Legal Services Commissioner v Biddle* [2017] QCAT 119.

9 *Legal Services Commissioner v King (No. 2)* [2013] QCAT 558 (Fryberg J with panel).

10 *Legal Services Commissioner v Watts* [2016] QCA 224.

11 *Legal Services Commissioner v Madden* [2008] QCA 301.

12 *Legal Services Commissioner CBD* [2012] QCA 69, dismissing an appeal against *Legal Services Commissioner v CBD (No. 2)* [2011] QCAT 446.

the community needed to be protected from him. In affirming that decision, the Court of Appeal (Muir JA, with whom Margaret Wilson AJA and Applegarth J agreed) noted the seriousness of the offence, but also stated:

> "It should not be overlooked that the respondent practised with apparent competence and success without any blemish on his professional record. There is every expectation that he will continue to do so and the offending conduct, which is unlikely to reoccur, does not bear directly on the performance of the respondent's work as a solicitor or on his relationship with clients."[13]

[45] Whilst the offence of the present respondent was somewhat more serious than that in *CBD*, the circumstances overall bear some comparison. In that case no additional sanction was considered necessary by the Tribunal or the Court of Appeal in view of the fact that the respondent's ability to practice had been effectively curtailed through being deprived of a practising certificate and then by the effect of his conviction and proceedings before the Tribunal and the Court. In the present case, however, I consider that there are reasons which justify the imposition of a further prescribed period during which the respondent should be declared ineligible to practice.

[46] With the assistance of the panel, I am of the view that the present case does not support a finding that the respondent solicitor is permanently unfit to practice, or that he is not a fit and proper person to be a legal practitioner of the Supreme Court.[14]. Accordingly, this is not a case where the respondent's name should be struck from the roll of practitioners.

[47] The Tribunal has an unfettered discretion to "make any order as it thinks fit",[15] and the examples enumerated in s 456(2) are mere examples of orders that might be considered appropriate.

[48] One of those orders is "an order that a local practising certificate not be granted to the practitioner before the end of a stated period" (LPA s 456(2)(c)). A similar result could be achieved by ordering that the respondent refrain from applying for a practising certificate for a stated period (LPA s 456(4)(e)).

[49] The respondent's offences were serious and distasteful enough to require a significant period of disqualification or suspension from practice. It is desirable to signify the seriousness with which such conduct is regarded, and to enable rehabilitation to take place, and to maintain public confidence in the profession.

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13 *CBD* above at para [33]
14 *Watts* above [2016] QCA 224 at [47].
15 LPA, s 456.

[50] It is by no means certain that the respondent would succeed if he were to apply for a practising certificate after the end of the intended suspension, or even that he would wish to do so.

[51] Bearing in mind that two years have elapsed over which he has not practised, a further period of four years disqualification represents the period that best recognises the above factors. He is already 52 years of age, and the prospect of further professional activity may be, to say the least, beset with difficulty.

Costs

[52] The Commissioner is entitled to a costs order (s 462(5)(b)) and no exceptional circumstances exist to order otherwise.

[53] In the absence of any submissions from the respondent on this point, there is no apparent reason to deny the Commissioner's request for costs to be assessed on the Supreme Court scale and paid by the respondent within 30 days of verification of the assessment to the respondent.

Orders

[54] The following orders will be made –

1. The tribunal is satisfied the respondent Gary Robert Woodman had engaged in professional misconduct.

2. A local practising certificate must not be granted to the respondent before the expiry of four years from the date of this order.

3. The respondent must pay the applicant's costs of this proceeding to be assessed on the Supreme Court scale within 30 days of his receipt of such assessment.