

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Desacola* [2023]
QCAT 271

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)

v

**CARLITO JOSE DESACOLA (also known as
CARLITO JOSE RAISTRICK)**
(respondent)

APPLICATION NO/S: OCR165-22

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 27 July 2023

HEARING DATE: 2 December 2022

HEARD AT: Brisbane

DECISION OF: Hon Peter Lyons KC, Judicial Member
Assisted by:
Ms Annette Bradfield, Practitioner Panel Member
Ms Julie Cork, Lay Panel Member

ORDERS:

- 1. The Tribunal recommends that the name of the respondent be removed from the local roll of persons admitted to the legal profession, kept under section 37 of the *Legal Profession Act 2007* (Qld).**
- 2. The respondent is to pay the applicant's costs of and incidental to this discipline application, to be assessed on the standard basis on which costs would be assessed if the matter were in the Supreme Court of Queensland, unless the parties otherwise agree.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS –
COMPLAINTS AND DISCIPLINE – PROFESSIONAL
MISCONDUCT AND UNSATISFACTORY
PROFESSIONAL CONDUCT – CRIMINAL OFFENCES
– where the respondent was convicted and sentenced in the
District Court of Queensland for a serious offence – where
the respondent failed to give notice to the Queensland Law
Society that he had been charged with two offences – where
the respondent failed to give notice to the QLS that he had
been convicted of a serious offence – where the respondent
failed to give notice to the QLS of a show-cause event –
where the respondent failed to give a written statement to
the QLS explaining why he continued to be a fit and proper
person to hold a practising certificate – where the respondent

admitted the charges – where the respondent was diagnosed as suffering from a mood disorder and anxiety disorder

Legal Profession Act 2007 (Qld), s 9, s 37, s 57, s 68, s 418, s 419, s 462

Law Society of South Australia v Rodda [2002] SASC 274; (2002) 83 SASR 541, considered

Ziems v The Prothonotary of the Supreme Court of New South Wales [1957] HCA 46; (1957) 97 CLR 279, cited

APPEARANCES & REPRESENTATION:

Applicant: A Ellis, legal officer of the Legal Services Commission

Respondent: Self-represented

REASONS FOR DECISION

- [1] In this discipline application, five charges are brought against the respondent. The first alleges that he was convicted in the District Court of Queensland at Maroochydore of a serious offence. The second alleges that, between 24 April 2018 and 30 April 2018, he failed to give notice to the Queensland Law Society that he had been charged with two serious offences, in contravention of s 57(1)(b) of the *Legal Profession Act 2007* (Qld) (“the LP Act”). (At that time, two charges had been brought against him, but one was not pursued.) The third charge in the discipline application alleges that between 22 February 2021 and 1 March 2021, the respondent failed to give notice to the Queensland Law Society that he had been convicted of a serious offence, in contravention of s 57(1)(a) of the LP Act. A fourth charge alleges that between 22 February 2021 and 1 March 2021, when the respondent was the holder of a local practising certificate, he failed to give notice to the Queensland Law Society of a show cause event, namely, being convicted of a serious offence, in contravention of s 68(1)(a) of the LP Act. The final charge alleges that between 22 February 2021 and 22 March 2021, the respondent failed to give a written statement to the Queensland Law Society, explaining why, despite the show cause event of being convicted of a serious offence, he continued to be a fit and proper person to hold a local practising certificate, in contravention of s 68(1) of the LP Act.
- [2] The respondent admitted the five charges. With respect to Charges 1 and 2, he contended that his criminal proceedings and work obligations weighed heavily on his mind, and he did not turn his mind sufficiently to his reporting obligations, for which he expressed deep regret.
- [3] With respect to Charges 3 to 5, the respondent said that he was physically unable to report his conviction as required, as he was sentenced immediately on conviction, and sent directly to the Brisbane Correctional Centre, on 22 February 2021. He had however been in communication with Ms Lauren FitzGerald of the Queensland Law Society about the trial, so that the Society was aware of the proceedings and its outcome. He also pointed out that he admitted to the allegations long before the discipline application was filed, and referred to the significant effect the conviction and sentence have had on his life, including the loss of his practising certificate, and the significant adverse publicity to which he has been subjected.

- [4] The respondent provided a document from Dr Arul Ravindran dated 21 September 2022, who diagnosed the respondent as suffering from an Atypical Mood Disorder (likely underlying Bipolar Type 2 Disorder), and generalised anxiety disorder. Dr Ravindran stated that the respondent suffers from a severe psychiatric disability, resulting in his unemployment and inability to work. The respondent has candidly pointed out that he does not seek to suggest that his psychiatric condition had anything to do with the conduct resulting in the criminal conviction, or its aftermath.
- [5] It is necessary to say something brief about the conduct the subject of the charges. The criminal charge was that the respondent was guilty of indecent treatment of a child under 16 years of age, and under 12 years of age, the offence having been committed between 28 September 2017 and 3 October 2017. A second charge relating to the same period was not pursued. The respondent contested the charge. The trial of the charge took place commencing on 17 February 2021, with a verdict of guilty being entered on 22 February 2021.
- [6] The Law Society became aware of the charge shortly before the trial commenced. On 11 February 2021, it wrote to the respondent, asking him to provide a Form 6 Notification, as required by s 57 of the LP Act, and QP9s or court briefs, relating to the charge which had been brought against him. On 16 February 2021, the Society sent a reminder, having received no response. On 17 February 2021, the respondent contacted the Society by phone, and agreed to provide the notification by the end of the week. On 19 February 2021, he sought a further extension, which was granted until 23 February 2021. However, on 22 February 2021, he was taken into custody, and accordingly did not provide the documents required. Nor did he give notice of the conviction, or give notice of a show cause event, or give a written statement explaining why, despite the show cause event of being convicted of a serious offence, he continued to be a fit and proper person to hold a local practising certificate.
- [7] The original criminal conduct involved a sexual assault of an 11 year old child. It occurred in the presence of another child of similar age, and while they had become separated from other children in the group. It continued for a number of minutes. At one point the child attempted to move away, but was restrained. The conduct ceased when the other members of the group returned. The conduct was described by the sentencing Judge as brazen and opportunistic. Nevertheless, the prosecutor submitted that, considering the broader scale for offending of this kind, the respondent's conduct was towards the lower end. The conviction resulted in the imposition of a sentence of 12 months imprisonment, suspended after serving six months.
- [8] The applicant has submitted that the conduct the subject of Charge 1 should be characterised as professional misconduct, and the conduct the subject of the other charges as unsatisfactory professional conduct. There are provisions of the LP Act which are relevant to that submission.
- [9] Thus, s 418 of the LP Act provides:

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.

[10] Section 419 of the LP Act provides:

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 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.

[11] For Charge 1, the critical part of the definition of professional misconduct is that which refers to the conduct of an Australian legal practitioner, happening otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice. In other words, for the definition, the critical question is whether the practitioner is a fit and proper person to engage in legal practice. In considering that question, regard may be had to the suitability matters, which are identified in s 9 of the LP Act. One of those is whether the person has been convicted of an offence, and if so, the nature of the offence, how long ago it was committed, and the person's age when the offence was committed.

[12] Having said that, it would seem to follow from *Ziems v The Prothonotary of the Supreme Court of New South Wales*¹ that conviction for a serious offence, even one involving imprisonment, does not automatically mean that a person is not a fit and proper person to be a legal practitioner. Kitto J said:²

It is not difficult to see in some forms of conduct, or in convictions or some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds

¹ [1957] HCA 46; (1957) 97 CLR 279.

² *Ziems* at p 298.

of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

[13] His Honour also said:³

With the greatest possible respect for those who answer that it is (a necessary conclusion that the barrister was not a fit and proper person to be a member of the Bar), I find myself unable to agree. The conviction is of an offence the seriousness of which no one could doubt. But the reason for regarding it as serious is not, I think, a reason which goes to the propriety of the barrister's continuing a member of his profession. The conviction relates to an isolated occasion, and, considered by itself as it must be on this appeal, it does not warrant any conclusion as to the man's general behaviour or inherent qualities. True, it is a conviction of a felony; but the fact that as a matter of technical classification it bears so ugly a name, ugly because the most infamous crimes are comprehended by it, ought to be disregarded, lest judgment be coloured and attention diverted from the true nature of the conviction. It is not a conviction of a premeditated crime. It does not indicate a tendency to vice or violence, or any lack of probity. It has neither connexion with nor significance for any professional functions. Such a conviction is not inconsistent with the previous possession of a deservedly high reputation, and, if the assumption be made that hitherto the barrister in question has been acceptable in the profession and of a character and conduct satisfying its requirements, I cannot think that, when he has undergone the punishment imposed upon him for the one deplorable lapse of which he has been found guilty, any real difficulty will be felt by his fellow barristers or by judges, in meeting with him and co-operating with him in the life and work of the Bar.

[14] The conduct of the respondent which is the subject of Charge 1 is reprehensible. However, it has no connection with legal practice. So far as the offending reflects upon the respondent's character, it has little, if anything, to do with the standards of conduct required of a practitioner in the course of legal practice. However there are other considerations to be taken into account.

[15] There is a degree of similarity between the respondent's offence and the offences committed by a practitioner considered in *Law Society of South Australia v Rodda*.⁴ In that case, a practitioner pleaded guilty to two counts of indecently assaulting a child. The offences occurred at his office. He struck up a friendship with a group of school girls. He regularly waited for them at a bus stop outside the office. He engaged in conduct which might well be described as grooming. Only one of the girls continued to meet with him. The practitioner would give her gifts and hug her when she left his office. On two occasions, he engaged in sexual conduct with the girl, in a way that might be regarded as less significant than the conduct in the present case. On his pleas of guilty, he was sentenced to a term of imprisonment, originally of 18 months, but reduced to 12 months on account of a plea of guilty, and suspended.

[16] Doyle CJ (with whom the other members of the Court agreed on this question)⁵ said:⁶

25. In a case like this, where the Court's concern is with criminal conduct unconnected with the practitioner's profession, and with the defects of character or personality that are revealed by that conduct, issues of

³ *Ziems* at p 300.

⁴ [2002] SASC 274; (2002) 83 SASR 541.

⁵ *Williams J* at [34]–[35]; *Besanko J* at [36].

⁶ At [25]–[31].

professional competence in the narrow sense do not arise. Nevertheless, the Court must still consider whether the conduct and the convictions affect Mr Rodda's capacity to act as a practitioner, and how that conduct and those convictions would reflect on the legal profession were Mr Rodda permitted to remain a member of it. Two points were made in *Ziems* that are worth bearing in mind. First, as Fullagar J said (at 290), professional misconduct will usually have 'a much more direct bearing on the question of a man's fitness to practise' than personal misconduct. And, Kitto J said (at 298), while a conviction may 'carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails', nevertheless, there will be many kinds of convictions 'which do not spell unfitness for the Bar ...

26. The offences in question do not reflect directly on Mr Rodda's capacity to act as a practitioner. They do not reveal any lack of competence, or any lack of understanding of the law.
27. But the offences are of a kind that damage the ability of Mr Rodda to maintain the relationship with other members of the profession that is an essential aspect of being a practitioner. Other practitioners would not readily place trust and confidence in a practitioner who has committed such a serious offence. Another practitioner could not assume that Mr Rodda accepts the high standard of conduct which membership of the legal profession requires. In the words of Dixon CJ in his dissenting judgment in *Ziems* (at 285-286), Mr Rodda could not 'command the confidence and respect' of the Court or of his fellow practitioners.
28. More significantly, the offences indicate that Mr Rodda lacks qualities that are essential for the conduct of legal practice. The offences involve a serious breach of the law, even though they might be regarded as impulsive and isolated. Mr Rodda took advantage of a vulnerable and immature young woman. That being so, Mr Rodda cannot be regarded as a person in whom clients, especially vulnerable persons, could place their complete trust. Nor could he command the respect of clients.
29. There is another factor. The reputation and standing of the legal profession in the public eye are important. Public confidence and trust in the legal profession is important to the effective functioning of the profession. That confidence and trust rest in part on the reputation and standing of the profession. The public could not view with respect, and have complete confidence in, a person with such serious and recent convictions. Were the Court to continue to hold Mr Rodda out as a fit and proper person to remain a member of the profession, the standing of the profession as a whole would suffer. The public would rightly doubt the standards of a profession which permitted a person who has recently committed such serious offences to remain one of its members.
30. In summary, Mr Rodda's offences damage his ability to maintain professional relationships with other members of the profession. They disclose character defects that affect his capacity and fitness to be a practitioner. The public could not be expected to put complete trust in him. The offences are of a nature and seriousness such that the public would rightly consider that a profession that occupies the position of the legal profession, and maintains the high standards that it does, could

not properly continue to regard Mr Rodda as a member of the profession.

31. For those reasons I am satisfied that the offences amount to professional misconduct. In the alternative, and the result is the same, I am satisfied that the offences are such that Mr Rodda is not a fit and proper person to remain a legal practitioner.

- [17] As has been said, the conduct of the respondent was reprehensible. Its impact on the victim is not to be underestimated or ignored. However, and notwithstanding my great respect for those who constituted the court in *Rodda*, it is not immediately clear to me that a single instance of conduct of the kind which led to the present respondent's conviction would have a significant impact on the trust and confidence of other practitioners.
- [18] However, I do not consider it necessary to pursue that question further. I also note reliance on the fact that the offences involved a serious breach of the law, but it would seem to follow from *Ziems* that that itself is not sufficient.
- [19] In *Rodda*, reliance was placed on the fact that the practitioner took advantage of a vulnerable and immature young woman. It might be noted that that occurred over a substantial period of time, with other conduct involved to engage the young woman. That is not the case here.
- [20] However, it seems to me that the respondent's conduct is likely to have an adverse impact on the reputation and standing of the legal profession, a matter of some importance. The acceptance in the profession of a person who had committed such an offence recently may lead the public to doubt its standards. For that reason, it seems to me correct to conclude that the conduct, and subsequent conviction, demonstrates that the respondent is not a fit and proper person to be a legal practitioner.
- [21] It is now more than five years since the offence was committed. The question of fitness and propriety are to be decided at the time of this hearing, not at the time of the offending.
- [22] It may be that there is no clear expression by the respondent of regret for his conduct and remorse.⁷ Nevertheless, he has made it clear that he accepts responsibility for his conduct. There is no suggestion of the commission of any similar offences, whether before or after the matter the subject of his conviction. From a very early stage the respondent indicated his acceptance of the allegations against him, and his willingness to co-operate in these proceedings. He appeared in person at the hearing, and his conduct at the hearing was consistent with his earlier conduct in relation to the application. These are promising signs, but fall short of showing sufficient rehabilitation to overcome the effect of the initial conduct and conviction. At this stage, it is considered he is not a fit and proper person to engage in legal practice. Accordingly the conduct the subject of Charge 1 should be found to be professional misconduct.
- [23] Of the matters the subject of the other charges, the most serious is considered to be Charge 2. That failure continued for a substantial period of time. In correspondence, the respondent stated that he understood he was only obliged to report matters having

⁷ But see paragraph 2 of his reply to the Application.

potential to affect his conduct as a legal professional.⁸ It is troubling that he did not understand his reporting obligations. However he went to say that if he is incorrect in his analysis, he fully accepted the dereliction in his reporting duty. This matter is considered to be one of some seriousness, because of the ongoing failure to report. In the case of the other allegations, they occurred in the shadow of his trial and imprisonment. These failures are also serious, though less concerning. Charges 2 to 5 each warrant finding that the respondent engaged in unsatisfactory professional conduct, as sought by the applicant, and not contested by the respondent.

Orders

- [24] The considerations which led to a conclusion that the respondent's conduct should be found to be professional misconduct also warrant an order recommending that the respondent's name be removed from the local roll. No separate order was sought in respect of the conduct the subject of Charges 2 to 5, and it may be considered that the recommendation is a sufficient response to the findings made against the respondent on them.
- [25] The applicant applied for its costs. In a case where findings of misconduct have been made, the Tribunal must make an order requiring the respondent to pay the costs of the applicant, unless the Tribunal is satisfied exceptional circumstances exist.⁹ The respondent relied on his impecuniosity, and his co-operation with the applicant in relation to the application.
- [26] Ms Ellis for the applicant helpfully referred to *Legal Services Commissioner v Scott (No 2)*.¹⁰ There, Fryberg J referred to *Attorney-General for the State of Queensland v Francis*,¹¹ where the Court pointed out¹² that the issue of what are exceptional circumstances in a particular case is one that depends on judicial determination; and to qualify, a circumstance must be one which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon; but it need not be unique, or unprecedented, or very rare.
- [27] It was submitted for the applicant that impecuniosity and co-operation are not exceptional in cases like the present one. That appears to be correct.
- [28] The respondent also sought an order which would give him time to pay. However an order for costs does not usually deal with that question. There appears to be some prospect that a negotiation may be undertaken which would result in a reasonable outcome, and there is no reason to depart from the usual course.
- [29] The respondent also asked for the costs to be fixed. However, there is not material before the Tribunal which would enable it sensibly to follow that course.
- [30] Accordingly, the following orders will be made:
 - 1. The Tribunal recommends that the name of the respondent be removed from the local roll of persons admitted to the legal profession, kept under section 37 of the *Legal Profession Act 2007* (Qld).

⁸ See his email to the applicant of 12 April 2022, at Exhibit CJD3 to his affidavit.

⁹ Section 462(1) of the LP Act.

¹⁰ [2009] LPT 9.

¹¹ [2008] QCA 243.

¹² At [92].

2. The respondent is to pay the applicant's costs of and incidental to this discipline application, to be assessed on the standard basis on which costs would be assessed if the matter were in the Supreme Court of Queensland, unless the parties otherwise agree.