

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Richards* [2024] QCAT 355

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

v

DARRYL RICHARDS
(respondent)

APPLICATION NO/S: OCR288-23

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 3 September 2024

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Mellifont, President**
Assisted by:
Ms Susan Forrest
Practitioner Panel Member
Ms Julie Cork
Lay Panel Member

ORDERS:

- 1. The respondent is publicly reprimanded.**
- 2. The respondent to pay a pecuniary penalty of \$3,000 within six months.**
- 3. The respondent is prohibited from applying for, or obtaining, a principal practising certificate for a period of one year from the date of this order.**
- 4. The respondent complete, at his own expense, an approved practice management course prior to applying for a principal practising certificate.**
- 5. The respondent must include a copy of these orders and reasons for the decision with any application for a practising certificate in any Australian jurisdiction for a five year period from the date of this decision.**
- 6. The respondent is to pay the applicant's costs of and incidental to the discipline application. Such costs to be assessed on the standard basis in the manner in 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 – where the practitioner failed to honour an undertaking given to the regulator in the course of legal practice – where the applicant brought a charge against the respondent for the substantial departure of competence and diligence expected of a reasonably competent practitioner – where the respondent accepts that the conduct constituted professional misconduct – where the respondent agrees to the proposed sanctions - whether the Tribunal is satisfied as to the agreed characterisation of the respondent’s conduct and the agreed sanction

Australian Solicitors Conduct Rules 2012

Legal Profession Act 2007 (Qld) ss 5(1), 249, 258, 332, 418, 419, 420(1), 443(3), 447, 448(1)(b), 452, 456(1), 456(2), 462(1)

Legal Profession Regulation 2017 (Qld) ss 53, 58

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s32

Adamson v Queensland Law Society Incorporated (1990) 1 Qd R 498

Council of the Law Society (NSW) v Bunton [2020] NSWCATOD 67

Council of the Law Society (NSW) v Fisher [2021] NSWCATOD 73

Council of the Law Society (NSW) v Lewis [2019] NSWCATOD 100

Council of the Law Society (NSW) v Marando [2018] NSWCATOD 194

Council of the Law Society (NSW) v Morgan [2015] NSWCATOD 71

Council of the Law Society (NSW) v Powell [2019] NSWCATOD 24

Council of the Law Society of New South Wales v Downey [2023] NSWCATOD 162

Law Society (NSW) v Thompson [2018] NSWCATOD 57

Law Society (NSW) v Waterhouse [2002] NSWADT 204

Legal Profession Complaints Committee v Detata [2012] WASCA 214

Legal Services Commissioner v Bui [2018] QCAT 424

Legal Services Commissioner v Richards [2018] QCAT 128

Legal Services Commissioner v Wrightway Legal [2015] QCAT 174

APPEARANCES & REPRESENTATION: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] This is a discipline application under s 452 of the *Legal Profession Act 2007* (Qld) ('LPA') for the Queensland Civil and Administrative Tribunal to make orders pursuant to s 456 of the LPA. The discipline application alleges one charge: the respondent failed to honour an undertaking he gave to the Legal Services Commission on 19 January 2021.
- [2] The parties filed a joint Statement of Agreed Facts dated 5 March 2024, in which
- (a) the respondent agreed to the facts underlying the charge and admitted to the charge;
 - (b) the parties agreed that the conduct the subject of the charge should be characterised as professional misconduct; and
 - (c) the parties agreed to what may be an appropriate sanction in the circumstances.
- [3] The applicant submits, and the respondent agrees, that the appropriate finding and orders are that the respondent:
1. engaged in professional misconduct;¹
 2. be publicly reprimanded;²
 3. pay a pecuniary penalty of \$3,000.00 within six months;³
 4. be prohibited from applying for, or obtaining, a principal practising certificate for a period of one year from the date any such order is made;⁴
 5. complete, at his own expense, an approved practice management course prior to applying for a principal practising certificate;⁵ and
 6. must include a copy of any order and reasons in this matter with any application for a practising certificate in any Australian jurisdiction for the period from the date of the decision until a date of at least five years.⁶

ANTECEDENTS

- [4] The respondent is 49 years old. He had been practicing as a solicitor for over eight years at the time of the relevant conduct.
- [5] He has previously been the subject of a disciplinary proceeding. In the matter of *Legal Services Commissioner v Richards* [2018] QCAT 128, the disciplinary charge against the respondent was that he "recklessly misled the court by swearing an affidavit that

¹ *Legal Profession Act 2007* (Qld) s 456(1) ('LPA').

² LPA s 456(2)(e).

³ LPA s 456(4)(a).

⁴ LPA s 456(4)(j).

⁵ LPA s 456(4)(c).

⁶ LPA s 456(1).

was not true and correct”.⁷ The Tribunal found that the charged conduct constituted unsatisfactory professional conduct, publicly reprimanded the respondent, ordered him to pay a penalty of \$3,000, and costs to the Commissioner of \$7,000.

THE FACTS

- [6] The respondent was admitted to the legal profession by the Supreme Court of Queensland on 8 April 2013.
- [7] At all material times, the respondent was an Australian lawyer as defined in section 5(1) of the LPA.
- [8] The respondent’s practising certificate expired on 30 June 2021, and he has not held a practising certificate since that date.
- [9] From 1 July 2018 until 30 June 2021, the respondent was the Legal Practitioner Director (‘LPD’) of the incorporated legal practice Certus Legal Pty Ltd ACN 626 745 640 trading as Certus Legal (‘Certus Legal’).
- [10] The Legal Services Commission (‘LSC’) had commenced three separate investigations involving the respondent.
- [11] In relation to the first investigation, on 3 December 2020 the LSC advised the respondent that it was of the view that there was insufficient evidence that the respondent, as LPD of Certus Legal, had engaged in unsatisfactory professional conduct or professional misconduct on the grounds that he had breached:
 - (a) section 332 of the LPA in not providing itemised accounts within 28 days;
 - (b) section 53 of the *Legal Profession Regulation 2017* (Qld) (‘Regulation’) in not providing trust account statements as required; and
 - (c) sections 249 and 258 of the LPA and s 58 of the Regulation in relation to the disbursement of trust money.
- [12] In relation to the second investigation, on 16 July 2020, the applicant notified the respondent that certain alleged conduct of the respondent pertaining to the closure of Certus Legal was being investigated.
- [13] In relation to the third investigation, on 3 December 2020, the applicant formed a belief that there was sufficient evidence that the respondent had engaged in professional misconduct on the grounds that he had, in two instances, failed to comply with a notice issued by the applicant under s 443(3) of the LPA.
- [14] On 3 December 2020, prior to the applicant deciding whether to start proceedings under s 447 of the LPA, the applicant invited the respondent to make public interest submissions to the applicant. The purpose of these submissions was to inform the applicant’s decision to either dismiss the three investigations pursuant to s 448(1)(b) of the LPA, or to commence proceedings pursuant to s 447 of the LPA.
- [15] On 20 January 2021, the respondent, through his solicitors, provided a response including public interest submissions to the applicant’s correspondence of 3 December 2020.

⁷ *Legal Services Commissioner v Richards* [2018] QCAT 128, [6].

[16] The respondent's public interest submissions of 20 January 2021 included an undertaking by the respondent dated 19 January 2021, in which the respondent gave an undertaking to:

- (a) enter into a therapeutic relationship with a registered psychologist and receive counselling from that person for a minimum of 3 times before 1 July 2021; and
- (b) provide a report to the Legal Services Commission on or before 1 August 2021 confirming that [he] complied with the undertaking set out in paragraph (a) above.

[17] As a result of the respondent's submissions and based on a number of public interest considerations, which, importantly, included the undertaking made by the respondent, the applicant decided to discontinue action in respect of the three investigations on 12 March 2021.

[18] On 2 July 2021, the respondent emailed the applicant and stated:

I have not yet completed sessions with a psychiatrist. I will notify the LSC when I have done so. I note that I intend continuing sessions as I have had somewhat of a relapse and have not been able to face dealing with the LSC again until now. I apologise for this but note that my mental health has been the reason for this.

[19] At the date the Discipline Application was filed, being 27 November 2023, the applicant had not received any notification from the respondent that he had entered a therapeutic relationship with a registered psychologist.

[20] The respondent through his solicitors has since informed the applicant that he has commenced a therapeutic relationship with a registered psychologist.

THE RESPONDENT'S SUBMISSIONS

[21] The respondent submits that:

- (a) The respondent is regretful for his conduct, and has offered his apology for his failure to meet the terms of his undertaking.
- (b) The respondent has admitted liability and agreed to facts and sanction at the earliest possible time.
- (c) At the time of providing the undertaking in January 2021, the effect of the pandemic was such that the availability of mental health services was strained. The respondent had sought out mental health services with the intention of complying with the undertaking, and had contacted at least three practitioners without a response.
- (d) The respondent allowed his current practicing certificate to expire at the same time as the undertaking was in place to attend a psychologist. He has, since that time, been suffering from ongoing mental health conditions and the pressure and weight of dealing with the issues in relation to his failure to meet the undertaking has had a continuing and cumulative effect on his mental health.
- (e) The respondent identified that he required time out from the profession in order to attend to his mental health needs. He came to this realisation, in part without

the help of a therapeutic practitioner, by removing himself from practice within the profession.

- (f) The respondent has now commenced attending therapy. As of April 2024, he has completed four sessions with the intention to continue appointments monthly.
- (g) The respondent has openly acknowledged his failings to the applicant and has indicated his willingness to comply so as to address his obligations pursuant to the undertaking and the proceedings in as efficient manner as possible.

CHARACTERISATION OF CONDUCT

General principles

- [22] By s 456(1) of the LPA, the Tribunal's power to make a disciplinary order is dependent on it being satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct. Sections 418 and 419 of the LPA set out the relevant statutory definitions.

Relevant Definitions

- [23] Section 418 of the LPA provides:

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.

- [24] Section 419 of the LPA provides:

- (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 maintain 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 a 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 or for the grant or renewal of a local practicing certificate.

- [25] In *Adamson v Queensland Law Society Incorporated* (1990) 1 Qd R 498, Thomas J formulated the test for professional misconduct as follows:

The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.⁸

⁸ at 507 (citation omitted).

- [26] Rule 6.1 of the *Australian Solicitors Conduct Rules* 2012 ('ASCR'):

A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

- [27] Section 420(1)(a) of the LPA provides that conduct consisting of a contravention of a relevant law, which includes the ASCR, is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

- [28] It need hardly be said that it is important that legal practitioners honour all undertakings given by them.⁹ It is critical that a practitioner can be relied upon to do what they say they are going to do.¹⁰ This is regardless of the practitioner's subjective intention on entering the undertaking or whether the undertaking was offered in error or as an oversight.¹¹ It is irrespective of any change in circumstances, no matter how radical, or any hardship experienced by the practitioner concerned.¹²

- [29] In the *Legal Services Commissioner v Bui*, it was held:

...a failure to abide by an undertaking strikes at the heart of a solicitor's call to practice. A solicitor's word is his or her bond and a person in legal practice who fails to live up to their word commits a grave infraction of the minimum standards of probity which the community can expect of members of the legal profession. the privilege of being a member of the legal profession carries with it the responsibility of being a trustworthy person.¹³

- [30] In the matter of *Council of the Law Society of NSW v Powell*, it was observed:

It is an everyday occurrence in all areas where lawyers practice that legal practitioners provide undertakings to fellow practitioners and to a wide range of commercial and statutory entities both on their own behalf and on behalf of clients. Other legal practitioners and commercial and statutory entities rely upon compliance with those undertakings in their everyday activities. Such reliance is integral to the efficient and effective functioning of a whole range of activities within our community. It is essential that undertakings given by legal practitioners be genuinely provided and that they be honoured. It is for these reasons that *prima facie*, a breach by a legal practitioner of an undertaking, whether given during legal practice or not, will arguably constitute a most serious matter, and may, in relevant circumstances, adversely impact upon the integrity of the profession in the eyes of the public.¹⁴

⁹ *Legal Profession Complaints Committee v Detata* [2012] WASCA 214, [48]-[54]; *Law Society of New South Wales v Thompson* [2018] NSWCATOD 57, [4], [9].

¹⁰ *Council of the Law Society of New South Wales v Fisher* [2021] NSWCATOD 73, [104].

¹¹ *Legal Profession Complaints Committee v Detata* [2012] WASCA 214, [52]; *Council of the Law Society of New South Wales v Fisher* [2021] NSWCATOD 73, [104], [143].

¹² *Legal Profession Complaints Committee v Detata* [2012] WASCA 214, [52].

¹³ [2018] QCAT 424, [16].

¹⁴ [2019] NSWCATOD 24, [20].

Unsatisfactory professional conduct or professional misconduct?

- [31] A breach of an undertaking commonly results in a finding of professional misconduct.¹⁵ However, this is not always the case. In *Law Society (NSW) v Waterhouse*, the NSW Administrative Decisions Tribunal stated:

Although ordinarily we would expect that non-compliance with a solicitor's undertaking would be regarded as professional misconduct, there are in our view particular circumstances here which put the conduct in the less serious category of unsatisfactory professional conduct.¹⁶

- [32] An undertaking given to a regulator and/or professional association are particularly serious.¹⁷ In *Council of the Law Society (NSW) v Morgan*, it was stated that:

...when the provision of an undertaking of this nature is required by the Law Society or the Commissioner as a condition precedent to permitting a solicitor to resume or continue in practice, any breach of the undertaking is for that reason all the more serious.¹⁸

- [33] Conduct that has warranted positive determinations of professional misconduct include circumstances where a practitioner has failed to honour an undertaking given to a professional body. Examples include a failure to comply with an undertaking to:

- (a) provide the Queensland Law Society a monthly report on the progress of a repayment plan with the Australian Taxation Office;¹⁹
- (b) the Council of the Law Society of New Wales to attain three CPD points by a specific date;²⁰
- (c) the Law Society of New South Wales to complete the next practice management course;²¹ and
- (d) the Law Society of New South Wales to undertake and complete an approved trust accounting course.²²

- [34] In this matter, both the applicant and respondent submit that the conduct amounts to professional misconduct pursuant to s 419 of the LPA. They submit the conduct is of such a substantial departure from the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner that the Tribunal can be satisfied that the conduct amounts to professional misconduct. The Tribunal agrees.

¹⁵ *Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174; *Council of the Law Society (NSW) v Fisher* [2021] NSWCATOD 73, [64], [144].

¹⁶ [2002] NSWADT 204, [26]

¹⁷ *Council of the Law Society (NSW) v Fisher* [2021] NSWCATOD 73, [139].

¹⁸ [2015] NSWCATOD 71, [81].

¹⁹ *Legal Services Commissioner v Bui* [2018] QCAT 424.

²⁰ *Council of the Law Society of New South Wales v Bunton* [2020] NSWCATOD 67.

²¹ *Law Society of New South Wales v Thompson* [2018] NSWCATOD 57.

²² *Council of the Law Society of New South Wales v Marando* [2018] NSWCATOD 194. Matters of a similar nature to the matters in paragraph 33, (a) – (d) include *Council of the Law Society of New South Wales v Lewis* [2019] NSWCATOD 100. *Council of the Law Society of New South Wales v Powell* [2019] NSWCATOD 24; *Council of the Law Society of New South Wales v Fisher* [2021] NSWCATOD 73.

SANCTION

- [35] As discussed above, a breach of an undertaking is serious, particularly when it is to a regulator.
- [36] Here, the giving of the undertaking was a key factor taken into account by the Legal Services Commissioner in determining what action to take in respect of the three active investigations at the time.
- [37] At the time of the complained conduct, the respondent was a legal practitioner director, a position of high responsibility.
- [38] The respondent has shown insight and remorse by:
- (a) cooperating with the applicant throughout the investigation and proceedings;
 - (b) taking steps to comply with the undertaking;
 - (c) acknowledging that his conduct fell below the appropriate standard and agreeing to both the characterisation and sanction;
 - (d) providing an apology for his conduct, in which he recognised that his mental health caused him issues in responding, and had accordingly taken steps to cease legal practice;
 - (e) disclosing to the applicant by email on 2 July 2021 that he had failed to receive counselling from a registered psychologist three times before 1 July 2021;
 - (f) openly accepting responsibility for his conduct and taking steps to address his prior non-compliance;
 - (g) expressing remorse and regret for his conduct, personally acknowledging it has fallen not only below what is expected by the applicant, but that which he would expect of himself; and
 - (h) admitting and willingly accepting the sanctions, including those directed at retraining in the hope of rectifying personal deficiencies and returning to the profession as a more knowledgeable practitioner having learned from his mistakes.
- [39] In *Legal Services Commissioner v Bui* the Tribunal ordered:
- (a) in respect of the first charge regarding the practitioner's failure to honour an undertaking, the practitioner's practising certificate be cancelled immediately; and
 - (b) in respect of the second charge regarding the practitioner's breach of s 443(2) of the LPA, the practitioner pay a penalty of \$2,500.00.²³
- [40] In that case, the solicitor's breach of their undertaking was considered by the Tribunal as being 'long standing and patent', and the solicitor demonstrated a repeated disregard for the processes of the applicant over three and a half years. Further, the solicitor was unable to provide the Tribunal with any explanation for his failure to comply with the undertaking.²⁴ Ultimately, the Tribunal held that the protection of

²³ [2018] QCAT 424, [30].

²⁴ *Legal Services Commissioner v Bui* [2018] QCAT 424, [18]-[22].

the public demanded that the respondent's practising certificate be immediately cancelled.²⁵

[41] Other examples of sanctions imposed where a practitioner has failed to honour an undertaking given to regulatory body include:

- (a) *Council of the Law Society (NSW) v Bunton*²⁶ in which the NSW Civil and Administrative Tribunal (NSW Tribunal) reprimanded the practitioner and ordered the practitioner to pay \$1,200 costs. The NSW Tribunal took into consideration that the respondent did not have any other relevant disciplinary history, and readily admitted their misconduct and the seriousness of it.
- (b) *Law Society (NSW) v Thompson*²⁷ in which the NSW Tribunal reprimanded the respondent and order the respondent to pay the applicant's costs.
- (c) *Council of the Law Society (NSW) v Marando*²⁸ in which the NSW Tribunal reprimanded the solicitor, ordered a fine of \$10,000 and the solicitor to pay the Law Society's costs. In this case, the solicitor failed to honour an undertaking given to the Law Society of New South Wales (relating to a condition directly affecting the solicitor's right to practise) for almost five years, which the NSW Tribunal said warranted a substantial fine of \$10,000.00.
- (d) In *Council of the Law Society of New South Wales v Downey*,²⁹ the Tribunal held that in order to denounce the respondent's conduct in breaching an undertaking, both for the benefit of the practitioner and to remind the profession at large of the high standard of conduct expected of legal practitioners, the appropriate sanction was a reprimand, a fine of \$3,000 and payment of costs of the Council.

CONCLUSION

[42] The Tribunal has considerable sympathy for the mental health struggles of the respondent and the complexities presented by the Covid pandemic to comply with the first undertaking.³⁰ Nonetheless the respondent ought, when it became apparent to him that he would not be able to comply with the first undertaking, have contacted the applicant to advise of the difficulties he was having. He did not do that. The first time he advised the applicant of the difficulties was on 2 July 2021, the date after which the undertaking was to be complied with.

[43] The Tribunal observes the importance of practitioners prioritising their mental health, not only for their own well being, but also so that they are able to discharge the high standards expected of lawyers. In this case, the respondent failed to honour an undertaking which was directed to that purpose. The Tribunal notes that the practitioner has, since that failure, actively engaged in treatment and has said that they

²⁵ *Legal Services Commissioner v Bui* [2018] QCAT 424, [17].

²⁶ [2020] NSWCATOD 67.

²⁷ [2018] NSWCATOD 57.

²⁸ [2018] NSWCATOD 194

²⁹ [2023] NSWCATOD 162. In this case, the solicitor's breach of his undertaking given to another solicitor to provide the original lease document to him within seven days of settlement amounted to professional misconduct. The settlement took place in reliance on the impugned undertaking.

³⁰ That is, the undertaking to enter into a therapeutic relationship with a registered psychologist and receive counselling from that person for a minimum of 3 times before 1 July 2021

he will continue to do so. The Tribunal has cause to hope that the practitioner will continue to prioritise his mental health in the future.

- [44] In all the circumstances, the Tribunal is satisfied that the breach of the undertaking should be characterised as professional misconduct.
- [45] The Tribunal considers that taking into account all the circumstances, the appropriate sanction is that the respondent be publicly reprimanded, pay a pecuniary penalty of \$3,000 and that:
- (a) the respondent be prohibited from applying for, or obtaining, a principal practising certificate for a period of one year from the date the order is made;
 - (b) the respondent complete, at his own expense, an approved practice management course prior to applying for a principal practising certificate; and
 - (c) the respondent must include a copy of these orders and these reasons with any application for a practising certificate in any Australian jurisdiction for the period of five years from the date of this decision.

COSTS

- [46] Section 462(1) of the LPA states:

A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.

- [47] The applicant seeks an order pursuant to s 462 of the LPA that the respondent pay the applicant's costs of and incidental to the Discipline Application, such costs to be assessed on the standard basis in the manner in which costs would be assessed if the matter were in the Supreme Court of Queensland. The respondent does not contest the making of such an order.

ORDERS

1. The respondent is publicly reprimanded.
2. The respondent to pay a pecuniary penalty of \$3,000 within six months.
3. The respondent is prohibited from applying for, or obtaining, a principal practising certificate for a period of one year from the date of this order.
4. The respondent complete, at his own expense, an approved practice management course prior to applying for a principal practising certificate.
5. The respondent must include a copy of these orders and reasons for the decision with any application for a practising certificate in any Australian jurisdiction for the period of five years from the date of this decision.
6. The respondent is to pay the applicant's costs of and incidental to the Discipline Application. Such costs are to be assessed on the standard basis in the manner in which costs would be assessed if the matter were in the Supreme Court of Queensland, unless the parties otherwise agree.