

CITATION: *Legal Services Commission v Rowell* [2013] QCAT 397

PARTIES: Legal Services Commissioner
(Applicant)
v
Peter Arthur Rowell
(Respondent)

APPLICATION NUMBER: OCR207-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: 26 August 2013

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**

Assisted by:

Ms Bronwyn Cushing-Sullivan
Practitioner Panel Member
and
Ms Kathleen Anne Keating
Lay Panel Member

DELIVERED ON: 30 August 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Respondent's name is to be removed from the local roll.**
- 2. It is recommended that the Respondent's name be removed from the local roll in New South Wales.**
- 3. The Respondent is to pay the Applicant's costs fixed at \$2,000.00 within 30 days of the date of this order.**
- 4. The Respondent is to pay Tara Cuddeford compensation in the sum of \$7,500.00 within 60 days of the date of this order.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – where the Respondent practised

law without holding a current practising certificate – where the Respondent undertook work for Legal Aid Queensland when it was a condition to hold a current practising certificate – where the Respondent failed to tell a client about a hearing and, at that hearing, consented to an order without taking instructions – where the Applicant referred the matter to the Tribunal – where the Respondent failed to respond to the discipline application – where the Applicant contends the Respondent’s conduct amounts to professional misconduct – where the Applicant claims that the conduct constitutes an admission that the Respondent no longer intends to adhere to professional standards – whether conduct amounts to unsatisfactory professional conduct or professional misconduct – whether the Respondent is a fit and proper person to engage in legal practice

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – MISCONDUCT – COMPENSATION ORDERS – where a compensation order may be made against a law practice – where a *law practice* is defined to include an Australian legal practitioner who is a sole practitioner – where the Respondent does not hold a current practising certificate and is not an *Australian legal practitioner* – where s 417 of the *Legal Profession Act 2007* (Qld) provides that the relevant chapter applies to Australian lawyers and former Australian lawyers – where *Australian lawyer* is defined to mean a person admitted to the legal profession – whether it is in the interests of justice that a compensation order be made by the Tribunal

Legal Profession Act 2007 (Qld), s 5(1), s 6(1), s 417, s 419, s 456(3)(a), s 464, s 466(3)

Legal Services Commissioner v Hoolihan [2007] LPT 3, cited

Legal Services Commissioner v Kellahan [2012] QCAT 263, cited

Legal Services Commissioner v Voll [2008] LPT 1, distinguished

APPEARANCES and REPRESENTATION (if any):**APPLICANT:** Ms S Lane of Counsel**RESPONDENT:** No appearance**REASONS FOR DECISION**

- [1] Mr Rowell is 58. He was admitted to practise as a solicitor in Queensland on 15 July 2002. He was then, for a time, employed as a solicitor by a firm here but from 1 September 2003 until some unknown time in 2011 or 2012 he purported to practice as a sole practitioner under the firm name *PK Lawyers*.
- [2] As will be seen, however, it appears that he never held a practising certificate, necessary for him to practise in Queensland, after 1 July 2009. Queensland Law Society records show that he did not hold a practising certificate issued by it after 1 July 2008. He did, however, have a certificate issued by the Law Society of New South Wales between 1 July 2008 and 30 June 2009. Thereafter, neither Society – nor, it appears, any other competent issuing authority – provided him with a certificate which, under Australian law, he always needed to practise lawfully as a solicitor.
- [3] It is that circumstance which lies behind the first of four charges brought by the Commissioner. The second concerns the fact that Mr Rowell undertook work for Legal Aid Queensland when (unsurprisingly) it was always a condition for referral of Legal Aid work that the practitioner hold a current practising certificate. The third and fourth charges relate to alleged deficiencies in his work for a client, Ms Cuddeford; the third charge concerns his failure to tell her about an important hearing; and the fourth, his appearance at that hearing on her behalf and his act of consenting to an order without her instructions.
- [4] Mr Rowell has never appeared, or filed a response, in these discipline proceedings. An order for substituted service was made by QCAT last year. He did not appear at the hearing in the Tribunal on 26 August 2013.

Practising without a certificate

- [5] The affidavit evidence filed by the Commissioner shows that after 1 July 2009 Mr Rowell did not have a practising certificate issued by either the Queensland, or New South Wales Law Societies. The QLS records show he was admitted here on 15 July 2002 and renewed his Queensland practising certificate annually until 30 June 2008. Thereafter he told the QLS that he was practising on a NSW certificate because his practice was based in Sydney, with a Brisbane branch office. The LSNSW records show, however, that he only held a New South Wales practising certificate from 1 July 2008 until 30 June 2009 and did not, after that date, apply for its renewal.

- [6] Despite that he plainly continued to practise here until sometime in 2011/12. In 2012 the QLS established that he had, at some unknown earlier time, effectively abandoned his practice without notifying either the QLS or the LSNSW. The evidence shows that, in fact, the last known indication that he was still in practice was when he responded to the QLS investigation in a letter of 29 April 2011.
- [7] It is trite that a practising certificate has long been a basis for entitlement to practice as a solicitor, and every practising solicitor is aware of the obligation to renew his or her certificate annually. Unfortunately, the fact that Mr Rowell could practice here on an NSW practising certificate meant that after he failed to renew in either State in 2009 he slipped, as it were, between the cracks. The QLS concedes that, for its purposes, he was an interstate practitioner practising on an NSW certificate and was listed as 'active' in its databases until April 2012. The fault does not, of course, lie with the QLS: Mr Rowell was obliged to inform the Society of his true circumstances and, in particular, to tell it that he had not renewed his certificate in NSW in the years ending 30 June 2010, 2011 or 2012.
- [8] The second charge concerns work Mr Rowell did between 2009 and 2011 as a 'preferred supplier' for Legal Aid Queensland. Under arrangements made with legal practitioners by LAQ it enters into service agreements with preferred suppliers and those service agreements must be signed by the practitioner who must, in the course of doing so, confirm to LAQ that he or she holds an unrestricted practising certificate.
- [9] In his application to LAQ of 21 August 2008 Mr Rowell certified to that effect when, in truth, his Queensland practising certificate had expired on 30 June 2008 and he had applied for a NSW certificate. When that expired on 30 June 2009 and he did not renew it he continued, however, to accept work referred by LAQ.¹
- [10] The Commissioner was not able to refer the Tribunal to any disciplinary cases involving a similar kind of offending. It has been held that, when a practitioner engages in legal practice outside the scope of his or her particular practising certificate, that will amount to professional misconduct under s 419 of the *Legal Profession Act 2007* (Qld) (LPA).²
- [11] On any view undertaking legal work and representing oneself as entitled to practise without being the lawful holder of a current practising certificate of any kind, whether while conducting ordinary client matters or Legal Aid matters must be viewed more seriously than a breach of conditions attached to an actual, current certificate. Misconduct of that order goes to the heart of legitimate practice, and the right to practise, under the LPA and involves offending of a very serious kind. For these reasons, the first and second charges should for be categorised as professional misconduct (rather than the less serious *unsatisfactory professional conduct* under s 418 of the LPA).

¹ In breach of cl 2.3 of the service agreement.

² *Legal Services Commissioner v Kellahan* [2012] QCAT 263.

Ms Cuddeford's matter

- [12] The third and fourth charges relate to Mr Rowell's work in a Legal Aid family matter for Ms Cuddeford. The third charge concerns the fact that he failed to tell her of a court hearing in her matter listed for 11 October 2010. It was a hearing in respect of an application made by her ex-husband for amendments to existing parenting arrangements.
- [13] She only discovered the matter was listed for hearing accidentally, on the day itself, and by the time she arrived at court Mr Rowell had already entered into consent orders on her behalf without instructions from her, or having made any attempt to contact her and obtain instructions.
- [14] The third charge alleges that he failed to maintain reasonable standards of competence and diligence in failing to tell her of the court hearing. The fourth charge concerns the allegation that he entered into the consent order without instructions from her.
- [15] These matters were extensively investigated by the QLS. Between December 2010 and April 2011 Mr Rowell actually responded to letters of enquiry from the Society, with details of Ms Cuddeford's allegations. He asserted, in short, that he had told her of the hearing, and that the orders to which he consented were consistent with her previous instructions.
- [16] She responded to those allegations in some detail. She denied, in particular, Mr Rowell's claims of a telephone conversation shortly before the hearing date on 11 October 2010 and contends, plausibly, that he simply did not tell her of the date. She produced emails including, in particular, one she sent to Mr Rowell on the previous day, Sunday 10 October 2010, which makes no mention of the hearing on the following day.
- [17] In the course of its investigations the QLS obtained Mr Rowell's file. It did not contain any note of a telephone conversation with Ms Cuddeford about the hearing, nor her email to him of 10 October. Further investigations followed with an additional response from Mr Rowell, and a further one from Ms Cuddeford. Eventually, Mr Rowell ceased responding to enquiries from the QLS.
- [18] The evidence for and against these contrary assertions casts grave doubt upon Mr Rowell's claims. He failed to produce anything, beyond his own assertion, to corroborate his claim of a telephone conversation in which he advised Ms Cuddeford of the hearing date. Had such a conversation occurred it would be a surprising and troubling thing if the solicitor did not record it on the file, in some way. Against that, Ms Cuddeford's evidence is comprehensive, and persuasive – in particular, the email she produced, and her version of events (in which she only learned of the hearing on the morning of it and rushed, as it were, to the court but arrived too late) – that she was not told.

- [19] As to the fourth charge, Mr Rowell does admit that he signed the consent order without instructions from Ms Cuddeford and, impliedly, without making any attempt to contact her to take her instructions. He says that he thought the orders were in accordance with her previous instructions; she says that she would have objected to the proposed terms. That is not, however, the question. In light of Mr Rowell's admission, charge four must be taken as proven.
- [20] The Commissioner presses for the third and fourth charges to be categorised, also, as *professional misconduct*. The Commissioner's submissions point to the Tribunal's decision in *Legal Services Commissioner v Voll*³ in which the practitioner failed to advise clients of a hearing in a Tribunal, appeared without the clients and, when the clients' application was dismissed (in the absence of an evidence to the contrary, the Queensland Building Tribunal accepted the evidence of the director of the respondent in that matter) filed an application seeking that the matter be relisted – but, again, without instructions from the client. The lawyer claimed to have told the clients of the hearing by telephone, but the client denied that and the lawyer could not produce any diary note or record of that event.
- [21] On any view the solicitor's misconduct in that case, compounded by subsequent untruthfulness, was serious and was found to involve (in the words used in the definition of *professional misconduct* in s 419) a '*consistent failure to reach or keep a reasonable standard of competence or diligence*'.
- [22] While Mr Rowell's misconduct here did not, initially, involve misbehaviour in the Tribunal itself at the same level as *Voll*, it is compounded by his subsequent attempts to excuse himself to the QLS and, in particular, to falsely claim that he had informed his client of the hearing date when the evidence is compelling that this was untrue. In light of those additional elements and what subsequently happened, both the third and fourth charges should also, properly, be categorised as professional misconduct.

Sanction

- [23] Mr Rowell has ignored the most basic of professional obligations and knowingly misrepresented to the QLS and LAQ that he was entitled to practise as a lawyer in Queensland, when he was not. He has behaved in a similarly cavalier way in regard to his representation of Ms Cuddeford.
- [24] His subsequent behaviour in the face of investigations undertaken by the QLS reveal a similar disrespect for his professional obligations: he ceased responding to the QLS during its investigations; closed his practice without telling it he had done so; failed to respond to the discipline application; and has, effectively, disappeared without seeking to address this matter in any further way.

³ [2008] LPT 1.

- [25] It is open to the Tribunal to conclude, as the Commissioner urges, that Mr Rowell's conduct constitutes an admission that he no longer intends to adhere to professional standards.⁴
- [26] The level of offending, warranting four findings of professional misconduct, compels the conclusion that he is not a fit and proper person to practise law. His name should be removed from the roll of practitioners. Similarly, it is appropriate in the circumstances that the Tribunal also recommend that his name be removed from the local roll in New South Wales.⁵
- [27] The Commissioner also seeks costs, fixed at \$2,000. In light of the work involved in preparing the charges and bringing them in the Tribunal (including an additional complexity – the need to apply for an order for substituted service, with associated expense for advertising, etc.) the claim for costs is manifestly reasonable. It will also be ordered that the respondent pay the Commissioner's costs fixed at \$2,000 within 30 days.

Compensation claim by Ms Cuddeford

- [28] Ms Cuddeford gave notice of her intention to seek a compensation order under s 464 of the LPA, and provided a statement and details in 2012.
- [29] The Tribunal has power to order that a *law practice* pay compensation to a complainant for pecuniary loss caused by professional misconduct.⁶ It may only do so if satisfied that the complainant has suffered pecuniary loss because of the misconduct, and that it is in the interests of justice that an order be made.
- [30] An order may be made against a *law practice*, a term defined to mean an *Australian legal practitioner* who is a sole practitioner.⁷ Mr Rowell was either a sole practitioner or a law firm. Technically, at the time of the offending involving Ms Cuddeford he was not an *Australian legal practitioner* because he did not at the time hold a current local practising certificate or a current interstate practising certificate.⁸
- [31] Ms Cuddeford's application is saved, however, by s 417 in Chapter 4 of the LPA ('*Complaints and discipline*') which provides that the chapter applies to '*Australian lawyers and former Australian lawyers in relation to conduct happening while they were Australian lawyers (but not Australian legal practitioners)*'.⁹ Under s 5(1) of the LPA an *Australian lawyer* is a person who was admitted to the legal profession – as Mr Rowell was.
- [32] Ms Cuddeford claims on one of two bases: first, that but for Mr Rowell's incompetent and negligent conduct she would have been represented by a legal practitioner funded by LAQ but because (presumably) legal aid

⁴ *Legal Services Commissioner v Hoolihan* [2007] LPT 3.

⁵ *Legal Profession Act 2007* (Qld) s 456(3)(a).

⁶ *Ibid* Chapter 4, Part 4.10.

⁷ *Ibid* s 464, Schedule 2.

⁸ *Ibid* s 6(1).

⁹ *Ibid* s 417(1).

was withdrawn after October 2010 she has incurred legal costs of over \$110,000.

- [33] In the alternative she claims in respect of specific items billed to her after 11 October 2010 that relate, she says, directly to the need to rectify ‘... *the damage caused to my position before the court ... by Mr Rowell*’.
- [34] The first ground is not, with respect, one which can immediately be seen to be sustainable. If she did not qualify for legal aid after October 2010 (or, chose to be privately represented) that is not something which might be said as an immediate or likely consequence of Mr Rowell’s misconduct.
- [35] The second ground involves items extracted from the bills of the lawyers she subsequently retained and her involvement with the QLS, the Commissioner and QCAT. They have been carefully itemised and amount to just under \$8,800.
- [36] Ms Cuddeford has supported her application for compensation with detailed calculations showing that she incurred professional fees and personal expense engaging lawyers to remedy the difficulties which arose because of Mr Rowell’s misconduct and the Tribunal is satisfied that her submissions, and calculations, establish that she has suffered pecuniary loss; and, that the interests of justice warrant an order in her favour.
- [37] The order cannot exceed \$7,500 unless the law practice consents;¹⁰ Mr Rowell cannot be located and has done nothing to signify consent.
- [38] It will be ordered, then, that Mr Rowell pay Ms Cuddeford compensation fixed at \$7,500 within 60 days.

¹⁰

Ibid s 466(3).