

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Poole* [2019] QCAT 381

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

v

**IVAN JOHN POOLE**  
(respondent)

APPLICATION NO/S: OCR216-16

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 19 December 2019

HEARING DATE: 14 August 2018

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President  
Assisted by:  
Ms Julie Cork  
Dr John Keys de Groot

- ORDERS:
- 1. The respondent is publicly reprimanded.**
  - 2. (a) Any practising certificate currently held by the respondent is immediately suspended; and**  
**(b) The respondent is prohibited from applying for a further practising certificate for a period of five years.**
  - 3. The respondent shall pay the applicant's costs of and incidental to this discipline application, such costs to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – GENERALLY – where the respondent is charged with four breaches of the *Australian Solicitors Conduct Rules* 2012 – where the respondent admits the allegations of fact underpinning each charge – where the respondent engaged in conduct likely to bring the profession into disrepute through his dealings with an elderly client of another practitioner including removing the client from hospital without

authorisation and against medical advice, arranging the revocation of a power of attorney, procuring another practitioner to attend upon the elderly man in hospital to obtain a will from which the respondent benefitted and not informing the other practitioner of a Tribunal order as to the man's lack of capacity, capacity issues or the general background to the matter – where the respondent allowed his interest to conflict by purporting to represent two clients in the same matter without informed consent – where the respondent dealt directly with a client of another practitioner in circumstances that were not urgent and without that practitioner's consent – where the respondent made allegations of unsatisfactory professional conduct or professional misconduct against another practitioner without a proper basis for doing so – whether the conduct should be characterised as unsatisfactory professional conduct or professional misconduct under ss 418 or 419 of the *Legal Profession Act 2007* ('LPA') – what orders to make under s 456 of the LPA

*Australian Solicitors Conduct Rules 2012*, r 5, r 11, r 32  
*Legal Profession Act 2007*, s 227, s 418, s 419,  
s 420(1)(a), s 452, s 456, s 462

*Adamson v Legal Services Commissioner* (1990) 1 Qd R 498

*Legal Services Commissioner v Bone* [2013] QCAT 550

*Legal Services Commissioner v Bradbury* [2008] LPT 9

*Legal Services Commissioner v Bussa* [2011] QCAT 388

*Legal Services Commissioner v Laylee & Anor* [2016] QCAT 237

*Legal Services Commissioner v Munt* [2019] QCAT 160

*Legal Services Commissioner v Redmond* [2018] QCAT 231

*Legal Services Commissioner v Shand* [2018] QCA 66

#### APPEARANCES & REPRESENTATION:

Applicant: M Nicholson instructed by Legal Services Commissioner

Respondent: J Merrell instructed by Potts Lawyers

#### REASONS FOR DECISION

- [1] This discipline application under the *Legal Profession Act 2007* ("LPA") contains four charges brought by the Legal Services Commissioner ("LSC") against the respondent solicitor, Ivan John Poole.
- [2] The respondent expressly admitted the allegations of fact underpinning each charge and, by his counsel, admitted that he was subject to orders being made against him.

- [3] The parties filed a Statement of Agreed Facts. There was, by consent of the parties, some amendment of that Statement at the hearing to reflect more accurately the factual substratum. It was common ground at the hearing, and the respondent's counsel expressly accepted, that the Statement (as amended) provided sufficient proof of the respondent's admissions to each of the charges.
- [4] The following narrative, which includes a sufficient description of each of the charges, is derived from the Statement. The narrative has, however, been anonymised to prevent identification of certain affected parties, there having previously been a non-publication order made in this proceeding and a further non-publication order made in the course of the present hearing.
- [5] Where appropriate, the narrative has also been supplemented by uncontentious facts derived from the respondent's affidavit material filed in this proceeding.

### **The conduct and the charges**

- [6] The respondent, Ivan John Poole, was born in New Zealand in 1942.
- [7] The respondent held a principal practicing certificate.
- [8] The respondent was admitted to practice in New Zealand in 1966, and in Queensland on 28 October 1980.

### *Background*

- [9] At all material times, the respondent:
- (a) was an Australian lawyer as defined by s 5(1) of the LPA.
  - (b) engaged in legal practice as the principal of the law firm known as Ivan Poole Lawyers.
  - (c) acted on behalf of certain parties (identified for present purposes as "MDG") in respect of the proposed management rights of a shopping centre "the Centre").
- [10] An elderly man (identified in these reasons as "ABC") had extensive property interests in South East Queensland. At the relevant time subject to the charges, he was developing a property at the Centre. The development was complicated and was being managed by a number of parties including the ANZ Bank, which was providing the finance for the development, and another party which was responsible for centre management. This arrangement was acknowledged in a deed. One of the terms of the deed was that any appointed property manager had to be experienced, qualified and independent.
- [11] Mr Sean McMahon, a solicitor ("Mr McMahon") had a long-standing personal and professional relationship with ABC and held a Power of Attorney in respect to the development of the Centre, as well as a personal and financial Enduring Power of Attorney.
- [12] Mr McMahon had been ABC's legal representative for a significant period of time and the subject Powers of Attorney had been granted in 2007. ABC was a man with psychological difficulties and was estranged from his family, hence the requirement of the abovementioned Powers of Attorney.

- [13] The relationship between Mr McMahon and ABC began to sour due to some issues, namely:
- (a) MDG who were tenants at the Centre became friendly with ABC;
  - (b) MDG operated through a corporate vehicle. As a result of their friendship with ABC, there was an arrangement whereby ABC wanted to appoint them as the property managers for the Centre, which was a valuable arrangement to MDG.
- [14] However, it did not appear that MDG had any experience as required by the deed and were unsuited to the role. These concerns were raised initially by Mr McMahon and also by the ANZ Bank. ABC, however, was eager for the appointment of MDG as property managers for the Centre.
- [15] At the relevant time, the respondent was the legal representative for MDG and their company. At some stage, prior to the commencement of the charges, ABC met the respondent at the request of ABC in the respondent's role as legal representative for MDG relating to their appointment as property managers for the Centre.
- [16] In March 2013, ABC became unwell and was taken to hospital by Mr McMahon, presenting with congestive heart failure. It appeared that ABC had suffered a stroke after being admitted to the hospital. While in hospital, ABC was diagnosed with mild to moderate dementia.
- [17] The respondent became involved and, together with MDG, removed ABC from the hospital on 17 April 2013 without the knowledge of hospital staff, his medical practitioners and Mr McMahon. This act was done despite correspondence between Mr McMahon and the respondent advising the respondent of ABC's medical condition.
- [18] The removal from the hospital of ABC was against medical advice. It appears that ABC wanted to leave the hospital. ABC left hospital without his medication. Non-compliance with medication was one of the reasons why he became ill in the first place. MDG had made arrangements for ABC to consult with a retired anaesthetist and personal friend following his discharge from hospital.
- [19] On 18 April 2013, the respondent arranged for ABC to attend at the offices of Mr Hughes of Small Meyer Hughes where ABC revoked the Power of Attorney and made certain changes to his will including appointing the respondent as an executor.
- [20] On 19 April 2013, Mr McMahon made an application to the Supreme Court for a declaration of a lack of capacity of ABC. The application was transferred to this Tribunal.
- [21] Medical reports provided to this Tribunal suggested that ABC did not have the capacity to revoke the Power of Attorney on 18 April 2013.
- [22] On 6 September 2013, this Tribunal made orders declaring that ABC lacked capacity and declared the revocation invalid.

*The charges*

Charge 1 – dishonest and disreputable conduct

The charge

*Between 15 April 2013 and 8 March 2014, the respondent engaged in conduct which was likely to a material degree to bring the profession into disrepute contrary to rule 5 of the Australian Solicitors Conduct Rules.*

Australian Solicitors Conduct Rules

**5. Dishonest and Disreputable Conduct**

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practice law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute.

The facts

- [23] Mr McMahon, solicitor, was the legal representative of ABC. He was also ABC's validly appointed attorney pursuant to a Power of Attorney dated 11 May 2007 and was acting for ABC in respect of the management rights of the centre.
- [24] On 22 March 2013, ABC was admitted to the hospital by Mr McMahon as he was extremely unwell, suffering from congestive heart failure.
- [25] On 25 March 2013, while in the hospital, ABC suffered a stroke. He remained in hospital, being moved to a rehabilitation ward on 2 April 2013. While in the rehabilitation ward, ABC was under the care of a particular geriatrician and physician. This doctor expressed his concerns to Mr McMahon about the capacity of ABC, opining that ABC was suffering from mild to moderate dementia. The doctor recommended an assessment by a neuropsychologist.
- [26] During the time ABC was hospitalised, MDG visited him. ABC was in contact with the respondent on 8 April 2013 in relation to potential Chinese investment in the Centre.
- [27] On 16 April 2013, Mr McMahon wrote to the respondent advising him not to contact ABC in respect of the management rights and advising him of the vulnerable state of ABC's physical and mental health, including concerns about his capacity.
- [28] On 17 April 2013, the respondent and MDG attended the hospital where they removed ABC from hospital in circumstances where:
- (a) ABC was some 87 years of age and less than a month previously had suffered congestive heart failure and a stroke;

- (b) The respondent did not consult with ABC's treating physician, advise the physician of the proposed removal or seek his view as to whether ABC was well enough to be discharged;
  - (c) The respondent made no enquiries as to ABC's capacity;
  - (d) The respondent did not appraise any medical staff of the fact that they were removing ABC or inform anyone that ABC was leaving the hospital;
  - (e) No formal arrangements approved by ABC's treating medical professionals were made or in place for ABC following discharge;
  - (f) No medication was procured for ABC.
- [29] When medical staff discovered that ABC was no longer in hospital they contacted both Mr McMahon and the Queensland Police Service.
- [30] On 17 April 2013, the respondent and MDG accompanied by ABC, attended the offices of Mr Field of Aylward Game Lawyers seeking to revoke the Power of Attorney. This did not occur.
- [31] On or about 18 April 2013, the respondent arranged for ABC to attend at the offices of Mr Hughes of Small Meyer Hughes where ABC revoked the Power of Attorney and made certain changes to his will including appointing the respondent as an executor.
- [32] On 6 September 2013, this Tribunal made a finding that ABC lacked capacity to revoke the Power of Attorney.
- [33] On 13 December 2013, the LSC wrote to the respondent and informed him that he was being investigated for conduct about his dealings with ABC and confirmed that ABC lacked capacity. The letter to the respondent stated:
- I have enclosed a copy of the complaint for your information. In essence, the complaint is that your conduct was inappropriate in dealing with [ABC], a vulnerable elderly man found by the QCAT to lack capacity.
- [34] On 6 February 2014, the LSC published further material to the practitioners acting for the respondent including the Tribunal's decision of 6 September 2013. Also on 6 February 2014, Mr McMahon corresponded with the respondent about bills the respondent had rendered to the Public Trustee for legal services on behalf of ABC.
- [35] Prior to March 2014, the respondent became aware that the will of ABC did not provide any provision for MDG. ABC informed the respondent that he wanted to change his will to ensure he was also a beneficiary of the will.
- [36] On 4 March 2014, the respondent arranged for ABC to consult a solicitor. The solicitor was known to the respondent.
- [37] The respondent did not disclose to the solicitor anything about the Tribunal hearings involving ABC's capacity issues and/or that ABC was vulnerable and potentially lacking capacity.

- [38] The respondent told the solicitor not to ask ABC any questions. The respondent simply requested that the solicitor ring ABC who at the time was in hospital and wanted someone to do his will.
- [39] Alerting the solicitor to the issue of ABC's testamentary capacity would have been the professional thing to do.
- [40] The solicitor attended upon ABC in hospital on 4 March 2014. ABC signed a handwritten will that day. A formal typed will in substantially the same terms was prepared on 7 March 2014 and ABC signed this will in which the respondent, MDG and a certain doctor stood to benefit substantially with the respondent to receive a benefit of 16 per cent of ABC's wealth, with MDG to also receive 16 per cent each, and the doctor to receive a benefit of 10 per cent. ABC's estate was conservatively valued at \$50 million.
- [41] The respondent has engaged in conduct which is likely to a material degree to bring the profession into disrepute by:
- (a) contacting Mr McMahon's client directly and/or;
  - (b) removing ABC from hospital without authorisation in circumstances as particularised in paragraph [28] and/or;
  - (c) arranging, in all the circumstances, for the revocation of ABC's Power of Attorney;
  - (d) procuring another legal practitioner to attend upon ABC in hospital to obtain a will from him which benefitted the respondent, MDG and the doctor;
  - (e) not informing the other practitioner of the Tribunal's Order as to ABC's lack of capacity or his capacity issues or background to the matter generally;
  - (f) arranging in all the circumstances for a new will for ABC where he stood to benefit from this new will.

## Charge 2 – Duties concerning current clients

### The charge

*That between 6 February 2013 and 18 March 2013 the respondent in breach of his duty as a solicitor allowed his interest to conflict by purporting to legally represent [MDG and their company] as well as [ABC] in the same matter contrary to rule 11 of the Australian Solicitors conduct rules and the respondent had not obtained "informed consent" from [ABC].*

### Australian Solicitors Conduct Rules

#### **11. Conflict of Duties Concerning Current Clients**

- 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.
- 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the client's interests are adverse and there

is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act except where permitted by rule 11.3.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client;

11.3.2 has given informed consent to the solicitor or law practice so acting.

...

The facts

- [42] ABC and Mr McMahon were involved in the development of the Centre.
- [43] A particular company was the property manager of the Centre.
- [44] Pursuant to a tripartite deed, the ANZ Bank, the lenders for the Centre, had a right of veto over any change to the appointed property manager. The deed outlined that any property managers had to have relevant experience and be independent.
- [45] MDG wished to be appointed as property managers of the Centre. This was also the wish of ABC.
- [46] The respondent was the legal representative for MDG and their company at the relevant time.
- [47] Mr McMahon, on behalf of ABC, attempted to secure the consent of the ANZ Bank to the appointment of MDG as property managers of the Centre instead of the other company.
- [48] The ANZ Bank declined to give their consent to MDG so acting on the basis that they lacked the relevant experience. The ANZ Bank advised that if MDG were appointed they would withdraw funding for the project which would cause damage to the development and potential loss to ABC.
- [49] Notwithstanding this, the respondent continued to purport to act for MDG, their company and ABC in respect to the same matters, namely, the appointment of MDG as the Centre's property managers even though the interests of MDG and ABC were adverse and there was a potential conflict of the duties to act in the best interests of each client.
- [50] The respondent did not obtain ABC's informed consent to act for MDG, their company and ABC at the relevant time.

### Charge 3 – Communication with another Solicitor’s Client

#### The charge

*That between 6 March 2013 and 19 April 2013, the respondent dealt directly with [ABC], a client of another practitioner namely Mr Sean McMahon in circumstances that were not urgent and without the consent of Mr Sean McMahon contrary to rule 33 of the Australian Solicitors Conduct Rules.*

#### Australian Solicitors Conduct Rules

##### **33. Communication with Another Solicitor’s Client**

- 33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:
- 33.1.1 the other practitioner has previously consented;
  - 33.1.2 the solicitor believes on reasonable grounds that:
    - (i) the circumstances are so urgent as to require the solicitor to do so;
    - (ii) the dealing would not be unfair to the opponent’s client;
  - 33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or
  - 33.1.4 there is a notice of the solicitor’s intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with the contact.

#### The facts

- [51] At the relevant time Mr McMahon was the solicitor acting for ABC as well as holding his power of attorney. The respondent was aware of this from his dealings with ABC and Mr McMahon while he was representing MDG. Mr McMahon, over this relevant period, received no formal notice of termination from ABC.
- [52] The respondent corresponded directly with ABC without the consent of Mr McMahon in circumstances that were not urgent on 7 March 2013 and 12 March 2013.
- [53] The letter of 7 March 2013 addressed to ABC from the respondent referred to a meeting of 6 March 2013 attended by the respondent and ABC. This was in circumstances that were not urgent and without the consent of Mr McMahon.
- [54] By a letter to Mr McMahon dated 10 April 2013, the respondent advised that he had met with ABC and spoken to him on the telephone, at ABC’s instigation on 8 April 2013.
- [55] The respondent attended the hospital with MDG on 18 April 2013 without the knowledge of Mr McMahon and removed ABC from the hospital. This was in circumstances that were not urgent and without the consent of Mr McMahon.

- [56] The respondent dealt with Mr McMahon's client, ABC, in circumstances that were not urgent, where no notice was given to Mr McMahon and the contact was without the consent of Mr McMahon.
- [57] Mr McMahon wrote directly to the respondent on 16 April 2013 advising him of ABC's medical condition including capacity issues and pointing out that ABC was his client and directed him to cease dealing with ABC directly. Following this letter, the respondent "dealt with" ABC by assisting his removal from hospital. On 17 April 2013, ABC signed a costs agreement with the respondent.

#### Charge 4 – unfounded allegations

##### The charge

*That between 6 March 2013 and 13 March 2013 the respondent made allegations of unsatisfactory professional conduct or professional misconduct against Mr Sean McMahon, another Australian Legal Practitioner, without a proper basis for doing so contrary to rule 32 of the Australian Solicitors Conduct Rules.*

##### Australian Solicitors Conduct Rules

#### **32. Unfounded allegations**

32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that the available material by which the allegation could be supported provides a proper basis for it.

##### The facts

- [58] On 7 March 2013, the respondent corresponded directly with ABC making an allegation of conflict of interest and acting without instructions on the part of Mr McMahon stating:

It seems obvious that he is acting on occasions without consulting you for instructions ...

It also seems that you are not generally kept informed, or is Sean McMahon seeking your instructions and on the very worst of views making decisions to further his interests and/or those of [the incumbent Centre manager] whom of course he does not represent.

- [59] On 12 March 2013, the respondent corresponded directly with ABC making an allegation of misleading conduct stating: 'We agree with statements at the meeting which obviously upset you, as to the current bank account and the writer believes you were misled.'
- [60] The allegations were about Mr McMahon and his dealings with ABC.
- [61] The respondent had no proper basis for making these allegations against Mr McMahon contrary to rule 32 of the *Australian Solicitors Conduct Rules*.
- [62] In May 2018 the respondent sent, via the office of the LSC, a letter of apology to Mr McMahon personally. He apologised for the part he played in the conduct which is

the subject of all of the charges, and said that in all instances his conduct was inappropriate and regrettable. He accepted full responsibility for his conduct, and said that he realised he had acted inappropriately. He expressed remorse, and stated that he was truly sorry for the way in which he had conducted himself.

- [63] On 20 June 2018, Mr McMahon sent an email directly to the respondent in which he accepted the apology which had been tendered by the respondent.

### **Characterisation of the conduct**

- [64] The LSC contends that there ought be findings of professional misconduct in respect of each of Charges 1 and 4 and of unsatisfactory professional conduct on each of Charges 2 and 3. Counsel for the respondent argued for findings of unsatisfactory professional conduct on each of the charges.

- [65] The LPA contains non-exhaustive definitions of the terms “unsatisfactory professional conduct” and “professional misconduct”:

#### **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.

#### **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.

- [66] The LPA also provides to the effect that a contravention by a solicitor of the *Australian Solicitors Conduct Rules* (“ASCR”) is capable of constituting unsatisfactory professional conduct or professional misconduct.<sup>1</sup>

- [67] In *Legal Services Commissioner v Redmond*,<sup>2</sup> Hon Peter Lyons QC sitting as this Tribunal, observed:

---

<sup>1</sup> LPA, s 227; s 420(1)(a).

<sup>2</sup> [2018] QCAT 231.

[27] Because these definitions are inclusive, and because these (or similar) expressions were in common use before the LP Act was enacted, common law tests for the assessment of such conduct remain relevant. In *Adamson v Queensland Law Society Inc*,<sup>3</sup> Thomas J said, with respect to professional misconduct:

... 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.

Such conduct has also been described as conduct that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency (*Allinson test*).<sup>4</sup>

[68] It is well accepted that the question whether or not a practitioner's misconduct in a particular case amounts to unsatisfactory professional conduct or professional misconduct is generally a matter of degree and each case will be determined on its own facts.<sup>5</sup> It is also clear that not every professional failing constitutes unsatisfactory professional conduct. In *Legal Services Commissioner v Bone*,<sup>6</sup> Wilson J said:<sup>7</sup>

Both sections 418 and 420 of the LPA contain flexible tests, such that not every error which a practitioner may make will constitute unsatisfactory professional conduct. Decided cases suggest, rather, that a finding of that kind will usually involve repeated errors or a significant departure from accepted standards of competence.

[69] And in *Legal Services Commissioner v Laylee & Anor*,<sup>8</sup> Thomas J said:

[43] The test required to determine whether conduct is unsatisfactory professional conduct is such that the relevant 'falling short' does not embrace all cases of error but must be sufficiently substantial. There must be an appreciable departure from the standard for the conduct to be unsatisfactory professional conduct. An isolated instance, not involving unethical conduct, and more in the nature of conduct which might give rise to an assertion of negligence, is less likely to amount to unsatisfactory professional conduct. Serious, or repeated instances, are more likely to amount to unsatisfactory professional conduct or professional misconduct.

[44] In this context, it must be borne in mind that the consequences for a respondent, whose conduct if found to have been unsatisfactory professional conduct, are very serious, and so findings of such conduct should only be made where the 'falling short' is sufficiently substantial and very obvious. The Tribunal must be satisfied by reference to the Briginshaw standard.

---

<sup>3</sup> (1990) 1 Qd R 498, 507.

<sup>4</sup> See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6<sup>th</sup> ed, 2017), [23.85].

<sup>5</sup> *Legal Services Commissioner v Bussa* [2011] QCAT 388, per Wilson J at [10].

<sup>6</sup> [2013] QCAT 550.

<sup>7</sup> At [65], and omitting references.

<sup>8</sup> [2016] QCAT 237.

- [70] In relation to Charge 1, the respondent submitted that, whilst his conduct did amount to such a departure from the requisite standard of competence and diligence as to be unsatisfactory professional conduct, it would not have been regarded as disgraceful or dishonourable by the respondent's professional colleagues of good repute and competency and therefore not be characterised as professional misconduct.
- [71] In respect of his part in removing ABC from the hospital, it was argued that the respondent was involved in "very particular and unique circumstances",<sup>9</sup> namely the respondent believed:
- (a) that ABC was of sound mind;
  - (b) that ABC wanted to be removed from the hospital; and
  - (c) that ABC wanted to revoke his existing power of attorney.
- [72] Although it was conceded that the respondent inappropriately aligned his actions to what he thought were in the best interests of ABC, it was argued that this was an isolated event where the respondent had not planned or set out to be involved in the removal of ABC from the hospital.
- [73] In relation to his involvement in having ABC see a new solicitor about a new will, it was argued that this occurred in circumstances where:
- (a) ABC had asked the respondent to assist him to draw a will on numerous occasions;
  - (b) the respondent informed ABC that he did not practice in that area of law and could not help him; and
  - (c) neither ABC's litigation guardian nor the litigation guardian's lawyers were returning ABC's calls.
- [74] The respondent's evidence is that he did not inform the solicitor about the Tribunal's decision on ABC's capacity because he did not want to taint or influence the solicitor's opinion about ABC's will making capacity. The solicitor, it seems, formed his own view about ABC's capacity and drew a new will for him. The respondent says that, while he knew that ABC wished to leave some amounts to him and others, it was not the respondent's intention to benefit from having the solicitor assist ABC with a new will, nor did he know how much ABC was proposing to leave him under the new will.
- [75] The Tribunal does not accept any of these arguments. At the time the respondent engaged with MDG to remove ABC from the hospital, the respondent well knew that:
- (a) ABC was not his client;
  - (b) Mr McMahon was ABC's solicitor and attorney;
  - (c) ABC was suffering from vulnerable physical and mental health, including concerns about his capacity;

---

<sup>9</sup> Respondent's submissions, para 62.

- (d) MDG, who were the respondent's clients and with whom he acted in concert in removing ABC from the hospital, stood to reap personal benefit from their actions.
- [76] Directly dealing with another solicitor's client in this manner and in these circumstances was patently disgraceful by all accepted standards of the legal profession.
- [77] The respondent's conduct in arranging for ABC to see the solicitor to make a new will was also, in this Tribunal's view, disgraceful by the standards of the profession. At the time he made the arrangements, and despite the explanations advanced by his counsel, the respondent:
- (a) well knew that ABC already had a solicitor and attorney, namely Mr McMahon;
  - (b) knew of this Tribunal's findings concerning ABC's lack of capacity;
  - (c) knew that he was being investigated by the LSC in relation to his dealings with ABC.
- [78] The respondent sought to minimise the seriousness of his misconduct by saying that he had told the new solicitor not to ask him (i.e. the respondent) any questions. In the circumstances just described, by which the respondent well knew that there were serious questions about ABC's capacity, his conduct amounted to a wilful withholding of relevant information which was, of itself, both disgraceful and dishonourable by the standards of the profession. The respondent himself has admitted that alerting the solicitor to these issues "would have been the proper thing to do". The respondent also admitted that his conduct was likely to bring the profession into disrepute to a material degree in the respects set out above in [41].
- [79] It is the view of the Tribunal that the respondent's conduct under Charge 1 should be characterised as professional misconduct, and it finds accordingly.
- [80] As to Charge 2, there is no contest that the respondent breached r 11 of the ASCR by purporting to simultaneously represent ABC and MDG. It is clear that ABC and MDG had conflicting interests which would have ineluctably impinged on the loyalty needed to be shown by the respondent to his individual clients.<sup>10</sup>
- [81] In so doing, the respondent engaged in conduct which fell significantly short of the requisite standard of competence and diligence. The Tribunal finds that this conduct was unsatisfactory professional conduct.
- [82] Similarly, by communicating directly with ABC, the respondent patently breached r 33.1 of the ASCR. That, too, was conduct which fell significantly short of the requisite standard of competence and diligence. Rule 33.1 embodies the so-called "no contact" rule, the chief rationale of which is to prevent a lawyer from circumventing the protection that legal representation provides to a client.<sup>11</sup> The respondent's conduct was completely unsatisfactory in this regard, and so much was effectively

---

<sup>10</sup> See generally the discussion in *Dal Pont*, op cit, at [7.05]

<sup>11</sup> *Legal Services Commissioner v Bradbury* [2008] LPT 9 at [26]

admitted by him before this Tribunal. On Charge 3 the Tribunal finds that the respondent engaged in unsatisfactory professional conduct.

- [83] In relation to Charge 4, it is to be noted that the unfounded allegations of misconduct were not made by the respondent to Mr McMahon, but were made by the respondent directly to Mr McMahon's client, ABC. Counsel sought to explain these statements as a "misguided approach to wanting to assist [ABC]", and argued that it was not sufficiently serious to justify a finding that the respondent was not a fit and proper person to engage in legal practice (thereby invoking the terms of s 419(1)(b)). That may well be. But, in the view of this Tribunal, the respondent's conduct was both disgraceful and dishonourable by the appropriate standards of the profession. It was a clear case of white-anting, with the respondent casting unfounded slurs on the professionalism and competence of the person he knew to be ABC's solicitor and attorney.
- [84] The Tribunal finds that the conduct under Charge 4 amounted to professional misconduct.

### **Appropriate orders**

- [85] Having made those findings of professional misconduct and unsatisfactory professional conduct, the Tribunal's discretion to make orders under s 456 of the LPA is enlivened.
- [86] It is appropriate to recall the following observations previously made by this Tribunal:<sup>12</sup>

[43] In approaching the question as to the orders which ought be made as a consequence of that finding, the following propositions are well-established:

- (a) In this disciplinary jurisdiction, orders are shaped in the interests of the protection of the community from unsuitable practitioners, and in determining what orders should be made 'regard should primarily be had to the protection of the public under the maintenance of proper professional standards'.<sup>13</sup>
- (b) An order removing a practitioner's name from the roll should only be made when the probability is that the practitioner is permanently unfit to practice.<sup>14</sup>
- (c) The determination is as to present fitness, not fitness at the time of the offending conduct.<sup>15</sup>

- [87] Whilst the LSC initially urged for an order that the respondent's name be removed from the roll of practitioners, counsel for the LSC equally, and properly, conceded that the issue for consideration in that context is whether the respondent's character is

---

<sup>12</sup> *Legal Services Commissioner v Munt* [2019] QCAT 160.

<sup>13</sup> *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 at [122]; and see *Legal Services Commissioner v Meehan* [2019] QCAT 17 at [31].

<sup>14</sup> *Watts v Legal Services Commissioner* [2016] QCA 224 at [46].

<sup>15</sup> *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320 at [17].

so “indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to be upon the roll”.<sup>16</sup> Although the point was not expressly conceded, counsel for the LSC nevertheless acknowledged that there were numerous factors in the respondent’s favour which would be consistent with a lesser sanction.

[88] Recalling that the time for assessing the sanction is as at the hearing, not as at the time of the misconduct, the following matters are relevant:

- (a) The respondent has had a very long career in the law, with no prior disciplinary history;
- (b) The events in question occurred some time ago. There is no suggestion that his conduct in the meantime has caused any concern; on the contrary; he took steps within his practice to filter issues which might raise ethical concerns before embarking on any action;
- (c) He co-operated fully with the LSC and, as is apparent from these reasons, not only made appropriate admissions but joined in the filing of a comprehensive Statement of Agreed Facts;
- (d) The respondent gave Mr McMahon a full and unreserved apology which, it should be noted, Mr McMahon accepted very graciously;
- (e) The respondent has displayed insight and remorse;
- (f) He tendered positive references from a high profile member of the local community and a long-term friend and client;
- (g) The respondent has deposed to a number of health issues, including the need to be treated for depression as a consequence of having to deal with this complaint.

[89] In short, on the evidence before this Tribunal, this misconduct amounts to a single, and obviously regrettable, occurrence in an otherwise long and unblemished career. The Tribunal is not satisfied that, as at the time of hearing, the respondent was demonstrably permanently unfit to practice.

[90] That being said, these were serious incidents of misconduct. The public interest and the interests of the profession require that it be clearly understood that practitioners who engage in disgraceful and dishonourable conduct, as occurred here, will be subject to serious sanctions. Whilst it is clearly not the purpose of orders under s 456 to punish the practitioner for having engaged in misconduct, the public interest requires that orders be fashioned which have a deterrent effect, both on the individual practitioner and on the profession more generally.

[91] At the time of the hearing, it was foreshadowed that the respondent would, in any event, be retiring from practice. That may be, but this Tribunal is nevertheless of the view that the serious nature of the misconduct and the protection of the public warrant the making of an order that the respondent be suspended from practice for a considerable period of time. The making of such an order is, in any event, called for by the principle of general deterrence. The Tribunal will accordingly order that:

---

<sup>16</sup> *Legal Services Commissioner v Shand* [2018] QCA 66, per McMurdo JA at [57].

- (a) any practising certificate which the respondent currently holds be immediately suspended, and
- (b) the respondent be prohibited from applying for a further practising certificate for a period of five years.

[92] In the circumstances of the case, and so as to act as a permanent record of the public's and the profession's disapproval of his misconduct, the respondent will be publicly reprimanded.

[93] It was not suggested that there were any exceptional circumstances such as to allow a departure from the general rule as to costs prescribed by s 462(1) of the LPA.

[94] Accordingly, there will be the following orders:

1. The respondent is publicly reprimanded;
2.
  - (a) Any practising certificate currently held by the respondent is immediately suspended, and
  - (b) The respondent is prohibited from applying for a further practising certificate for a period of five years.
3. The respondent shall pay the applicant's costs of and incidental to this discipline application, such costs to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.