

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Manz (No 2)* [2019]
QCAT 355

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

v

MATTHEW KENNETH MANZ
(respondent)

APPLICATION NO/S: OCR059-17

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 4 December 2019

HEARING DATE: 5 November 2018

HEARD AT: Brisbane

DECISION OF: Hon Peter Lyons QC, Judicial Member

Assisted by:
Ms Patrice McKay
Mr Michael Meadows

ORDERS: **The Tribunal refuses to make an order for compensation in favour of The Atrium Resort CTS 4043.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where the respondent dishonestly identified to another solicitor the reason his client wanted to assign certain rights associated with a body corporate for a community titles scheme – where the Tribunal characterised this conduct as professional misconduct under s 419 of the *Legal Profession Act 2007* – where that body corporate, The Atrium Resort CTS 4043, filed a notice of intention to seek compensation – whether the pecuniary loss claimed by The Atrium Resort CTS 4043 was suffered because of the professional misconduct found by the Tribunal – whether to make a compensation order

Legal Profession Act 2007, s 464, s 465, s 466

APPEARANCES &
REPRESENTATION:

Applicant: D A Holliday instructed by Legal Services Commissioner
 Respondent: D Atkinson QC instructed by Hopgood Ganim Lawyers

REASONS FOR DECISION

- [1] In reasons published on 10 June 2019, the Tribunal found that the respondent had engaged in professional misconduct, by dishonestly identifying the reason why his client wanted to assign certain rights associated with a body corporate for a community titles scheme under the *Body Corporate and Community Management Act 1997 (Qld) (BCCM Act)* to another solicitor. The discipline application was consequent on a complaint made by the body corporate, The Atrium Resort CTS 4043 (*Atrium*). Atrium has given notice that it seeks a compensation order against the respondent, under ss 458 and 464 of the *Legal Profession Act 2007 (Qld) (LP Act)*. These reasons determine whether such an order should be made.

Background

- [2] In early 2013, Limrock Pty Ltd had the benefit of a caretaking agreement and a letting agreement made with Atrium in 2011 (*2011 agreements*). In March 2013, Limrock and its then director, Ms Linda Downs, were convicted on a number of counts of dishonesty. That, apparently, resulted in the revocation of their letting licences; and Mr Glen Watterson replaced Ms Downs as the director and secretary of Limrock.¹ Limrock then sought to assign the letting business to Mr Watterson, and sought Atrium's approval of the assignment. The respondent acted as the solicitor for Limrock, Ms Downs and Mr Watterson. Atrium's solicitor enquired as to the reason for the assignment, and the respondent replied that his clients had been told by their accountant that the assignment would be advantageous from a tax perspective. That explanation was confirmed in a communication to Atrium's solicitor, by another solicitor employed with the respondent's firm, in accordance with the respondent's instructions. The respondent's conduct relating to these communications was held to be dishonest, and formed the basis of the finding of professional misconduct. The Statement of Agreed Facts records that the respondent was a partner with Mahoney's Lawyers at the time of the misconduct.
- [3] In August 2013, Atrium decided to terminate the 2011 agreements on the ground that the replacement of Ms Downs by Mr Watterson constituted a breach of the agreements; but to have Limrock continue with the letting and caretaking duties on a month to month basis for a period not exceeding six months while new agreements were negotiated. On 13 June 2014, Atrium and Limrock entered into a new caretaking agreement and a new letting agreement. Limrock sought Atrium's consent to the assignment of these agreements to MER Management Pty Ltd. Consent was forthcoming, but Atrium sought to impose a transfer fee under s 124 of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) (Accommodation Module)*. Limrock challenged the validity of the transfer fee

¹ See *The Atrium Resort* [2014] QBCCMCmr 172 at [13]. The respondent's submissions state in paragraph 23 that the licences were necessary for the performance of the obligations under the 2011 agreements.

in protracted proceedings which involved an initial hearing, an appeal to this Tribunal, and a further hearing (together, the *transfer fee proceedings*).

- [4] An issue in the transfer fee proceedings was whether the 2011 agreements had been validly terminated in August 2013. A related issue was whether notice had been given to Atrium under s 123 of the BCCM Act that there was a financier for the agreements, which would have had the consequence under s 126 of that Act, that Atrium was required to give notice to the financier before it could terminate them.

Proceedings

- [5] Atrium lodged a complaint with the Legal Services Commission on about 10 February 2015 in relation to the respondent's conduct. It gave notice of its intention to seek a compensation order on 14 July 2017. When the Tribunal made its finding of professional misconduct, Atrium was directed to give notice whether it wished to pursue that course. It did so on 26 June 2019. Directions were made on 1 July 2019 in relation to the provision of further material, and excusing the Legal Services Commissioner from further participation in the proceedings. Both Atrium (as the complainant) and the respondent have provided submissions and affidavit material.
- [6] The parties have indicated that they are content for the compensation issue to be determined without an oral hearing. The submissions appear comprehensive, and there is no obvious reason for a hearing in the presence of the complainant and the respondent. Accordingly, the Tribunal has decided to determine this aspect of the matter on the basis of documents, and without the parties appearing at a hearing, under s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

Contentions and supporting material

- [7] Atrium contends in its written submissions that it has suffered a loss of \$70,646.44. That sum represents its legal costs in relation to the transfer fee proceedings. It contended that, but for the conduct of the respondent, Atrium would not have consented to the assignment to MER; and accordingly would not have been put in the position of defending its claim for a transfer fee.
- [8] Atrium's position is expanded upon in the affidavit of Mr Bernard Ward, the chairperson of its committee. He referred to the failure of the respondent to notify Atrium that the 2011 agreements were financed contracts for the purposes of the BCCM Act. He stated that much of the legal costs for the transfer fee proceedings would not have been incurred but for the respondent's misconduct. Had the respondent revealed the real reason for seeking to assign the 2011 agreements to Mr Watterson, he would have recommended that Atrium terminate the 2011 agreements under clause 9.1(a) of each agreement and s 128(1)(a) of the Accommodation Module; and that it not enter into any agreements with Mr Watterson. It was likely that that recommendation would have been adopted by Atrium. That would have avoided disputes about whether Atrium had lawful grounds to terminate the 2011 agreements. Accordingly it was placed in the position of having to establish that it had lawful grounds for termination of the 2011 agreements; that it lawfully terminated those agreements; and that notice relating to a financier had not been given under s 123 of the BCCM Act.
- [9] For the respondent, it was submitted that, insofar as the compensation application was based on the respondent's failure to disclose that the 2011 agreements were financed

contracts, that was not the conduct which the Tribunal found to constitute professional misconduct; and accordingly could not provide a basis for a compensation order.

- [10] It was submitted that the conduct on which the Tribunal's finding was based did not cause Atrium to consent to an assignment to Mr Watterson. Nor did it cause Atrium to enter into agreements with Limrock in 2014, and agree to their assignment to MER, which in turn led to the transfer fee proceedings. At least by 21 July 2014, Atrium knew of the convictions and the licence revocations. The costs which it relies on were incurred after that date. There is no credible evidence to show that these costs were incurred as a result of the respondent's misconduct. Moreover, there was no obligation on the respondent to disclose the real reason for the proposed assignment. There is no basis for saying that, but for the misconduct, the respondent would have made Atrium aware of that reason. There were advantages for Atrium in entering into agreements with Limrock in 2014, and agreeing to their assignment to MER; so that its decisions were not a consequence of the respondent's misconduct. Any loss which Atrium suffered from the misconduct was outweighed by the benefits it obtained as a result of the 2014 agreements.

Compensation orders under the LP Act

- [11] The power to make a compensation order is conferred on the Tribunal by s 456(1) and (4)(b) of the LP Act. It is conditioned on the Tribunal being satisfied, after it has completed a hearing of a discipline application, that the respondent has engaged in unsatisfactory professional conduct or professional misconduct. The following provisions are relevant:

464 Meaning of compensation order

A *compensation order* is 1 or more of the following —

- (a) an order that a law practice can not recover or must repay the whole or a stated part of the amount that the law practice charged a complainant for stated legal services;
- (b) an order discharging a lien possessed by a law practice in relation to a stated document or class of documents;
- (c) an order that a law practice carry out stated work for a stated person without a fee or for a stated fee;
- (d) an order that a law practice pay to a complainant an amount by way of compensation for pecuniary loss suffered because of conduct that has been found to be —
 - (i) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner involved in the relevant practice; or
 - (ii) misconduct of a law practice employee in relation to the relevant practice.

465 Compensation order relating to pecuniary loss

- (1) Unless the parties agree, a compensation order that is the type of order mentioned in section 464(d) must not be made unless the disciplinary body making the order is satisfied —

- (a) if there is a complainant in relation to the discipline application— that the complainant has suffered pecuniary loss because of the conduct concerned; and
 - (b) that it is in the interests of justice that an order of that type be made.
- (2) Also, a compensation order of the type mentioned in section 464(d) for a pecuniary loss for which the relevant complainant has received or is entitled to receive either of the following must not be made —
- (a) compensation under an order that has been made by a court;
 - (b) compensation from the fidelity fund, or a fund of another jurisdiction under a corresponding law of that jurisdiction, if a claim for payment from the fidelity fund or other fund has been made or decided.

[12] An order identified in s 464(d) will be referred to in these reasons as a pecuniary loss order. Under s 466, the amount of compensation the subject of such an order may not exceed \$7,500, unless both the complainant and the law practice consent to the order.

[13] There are a number of noteworthy features about these provisions. One is that a compensation order is one of a number of orders which the Tribunal might make on the completion of the hearing of a discipline application against an Australian legal practitioner; yet, unlike most of the other orders that might be made, it is made against a legal practice, rather than the practitioner who is the respondent to the discipline application. Another is that a pecuniary loss order is limited to compensation for pecuniary loss suffered because of the misconduct found by the Tribunal. Finally, the Tribunal must be satisfied that it is in the interests of justice to make “an order of that type”.

Consideration

[14] No basis has been identified for the implicit contention by Atrium (through Mr Ward) that the fact that the respondent did not disclose that the 2011 agreements were finance agreements involved some misconduct on the part of the respondent. That difficulty may be put to one side. Whatever the position, that conduct was not the conduct on which the Tribunal’s finding against the respondent was based. Any loss suffered as a consequence of the non-disclosure has not been the subject of a finding of misconduct, and accordingly does not provide a basis for making a compensation order under s 464(d) of the LP Act. The respondent’s submissions on this aspect of the matter should be accepted.

[15] The true basis for the claim otherwise appears to be that, had Atrium known the real reason for the proposed assignment to Mr Watterson in April 2013, it would then have terminated the agreements on the basis of the convictions of Limrock and Ms Downs. That would have meant that much of the costs actually incurred would have been saved.

[16] Mr Ward identified the principal issues in the transfer fee proceedings as being whether Atrium had lawful grounds to terminate the 2011 agreements in August 2013; whether it validly terminated those agreements; and whether notice was given under s 123 of the BCCM Act (so that s 126 of that Act applied to restrict Atrium’s right to terminate). Knowledge of the convictions of Limrock and Ms Downs would have

provided an additional ground for termination. Mr Ward has not identified a basis for finding that Atrium would not have relied on both grounds. Nor has he sought to demonstrate that, if Atrium had terminated the 2011 agreements on the basis of the convictions, the other issues would not have arisen. It is therefore difficult to be satisfied about the extent to which costs would have been saved, if Atrium had known of the convictions.

- [17] Nor has Mr Ward sought to demonstrate that, if Atrium had known of the convictions, it would not have continued to engage Limrock on a month to month basis; it would not have entered into new agreements with it; and it would not have agreed to assignments to MER, or some other body. The respondent's submissions appear to identify reasons why it would, at least in part, follow that course. Atrium has not sought to contest these submissions. Moreover, Mr Ward's recommendations do not go so far; they relate only to an assignment to Mr Watterson; and agreements with him. It might also be observed that Mr Ward described the convictions as being convictions based on the dishonest withdrawal and conversion of money belonging to lot owners; and relies on knowledge of that fact for his expressed belief that the lot owners would have adopted his recommendations. It seems inevitable that the lot owners would have been aware of the nature of the conduct of Limrock and Ms Downes in August 2013, and most likely of the convictions, when Atrium decided to continue with the services of Limrock on a month to month basis.
- [18] However, the difficulties discussed to this point may be put to one side. Atrium's claimed loss depends on the proposition that, had it known the true reason for the proposed assignment to Mr Watterson, it would not have suffered the loss which would provide the basis for the order it seeks. That is not the same as saying that, but for the misconduct, it would not have suffered loss. As the respondent contends, had he not provided the untrue explanation for the proposed assignment, that does not mean he would have provided the true explanation. It was open to him simply to provide no explanation. Given the nature of the explanation, it is unlikely that he would have received instructions to disclose it.
- [19] It has not been suggested that Atrium, in some way, relied on the explanation put forward by the respondent when it resolved to terminate the 2011 agreements. All that has been advanced is the proposition that it was likely that, if Atrium had known of the convictions, it would have relied on them to terminate the agreements.
- [20] It follows that Atrium has not demonstrated that the loss on which it relies when seeking a compensation order is loss suffered because of the misconduct found by the Tribunal. It has not established that a compensation order should be made.

Conclusion

- [21] The following orders are made:
1. The Tribunal has determined that no order be made for payment of the compensation sought by The Atrium Resort CTS 4043.