

**CITATION:** *Legal Services Commissioner v Stower* [2015] QCAT 64

**PARTIES:** Legal Services Commissioner  
(Applicant/Appellant)  
v  
Mark Shelton Stower  
(Respondent)

**APPLICATION NUMBER:** OCR320-12

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Justice Thomas, President**

Assisted by:  
**Mr Ken Horsley**  
Practitioner Panel Member  
**Dr Margaret Steinberg AM**  
Lay Panel Member

**DELIVERED ON:** 25 February 2015

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

1. That the practitioner be publicly reprimanded.
2. That a pecuniary penalty of \$2,000.00 be imposed.
3. In the event that the respondent applies for a practising certificate under the *Legal Profession Act 2007* such a practising certificate be restricted to an employee level for a period of 2 years.
4. That the respondent pay the costs of the Commissioner, fixed at \$1,500.00.
5. The respondent be allowed the period of 12 months to pay the pecuniary penalty and the legal costs.

**CATCHWORDS:** PROFESSIONS AND TRADES – LEGAL PRACTITIONERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – UNSATISFACTORY PROFESSIONAL

CONDUCT AND PROFESSIONAL MISCONDUCT – where respondent charged with failure to reach or keep a reasonable standard of competence and diligence

*Legal Profession Act 2007 (Qld)*, s 268 s 418, s 419, s 420, s 443  
*Queensland Civil and Administrative Tribunal 2009 (Qld)*, s 32

*Legal Services Commissioner v Smith* [2011] QCAT 126

### **APPEARANCES and REPRESENTATION (if any):**

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

### **REASONS FOR DECISION**

#### **The charges**

- [1] The Legal Services Commissioner alleges that the respondent is guilty of professional misconduct and/or unsatisfactory professional conduct. The respondent, whose record has, until now, been unblemished, was admitted as a solicitor of the Supreme Court of Queensland, in 1981. Since that time, he has practised predominantly in the area of family law in Brisbane, Sunshine Coast, and in Cairns.
- [2] Four charges have been brought by the Legal Services Commissioner. Each of them relates to the respondent's failure to comply with his obligations to a client, and the Commissioner. They are:
1. Breach of professional obligations  
 Between October 2010 and 12 June 2012 the respondent failed to provide the file of his client Cynthia Henderson to a costs assessor and to his client. The respondent also failed to advise his client of the whereabouts of her file.
  2. Breach of s 443(3) of the *Legal Profession Act 2007 (Qld)* ("the Act").  
 The respondent failed to comply with a written notice issued on 24 January 2012 by the Legal Services Commissioner pursuant to s 443(3) of the Act.
  3. Failure to lodge external examiners report  
 The respondent contravened s 268(1) of the Act for the financial periods ending 31 March 2010 and 31 March 2011.

4. Breach of s 443(3) of the Act.

The respondent failed to comply with a written notice issued on 24 January 2012 by the Legal Services Commissioner pursuant to s 443(3) of the Act.

### **Background**

- [3] The parties have filed an agreed statement of facts.
- [4] The respondent has also filed an affidavit sworn on 5 August 2013, the contents of which have not been challenged by the applicant.
- [5] After initial post admission employment in Brisbane and on the Sunshine Coast, the respondent relocated to Cairns where he resided and practised successfully as a solicitor from late 1982 to 1998.
- [6] In 1998 the respondent returned to Brisbane, and in late 1999, he acquired a legal practice in Caboolture, which he conducted as a sole practice until April 2010 when the practice was sold to Quinn and Scattini. At this time, the respondent was suffering with severe stress related illness, including chronic anxiety.
- [7] Despite a condition of the sale being that Quinn and Scattini would take over the lease of the premises and all books, records and files of the legal practice, the day before settlement, Mr Michael Quinn demanded that all books records and files be removed from the premises. The respondent urgently arranged removalists and for the records to be placed in storage sheds – all documents being placed in boxes and stored in a random fashion.
- [8] All former support staff of the respondent's law firm resigned shortly after the sale, and so any person who had knowledge of the previous files was not available. A condition of the sale was that the respondent was to remain as a family law consultant for 3 years. However due to considerable number of difficulties experienced working with the purchaser, the respondent prematurely terminated this consultancy in late 2011.

### **Discussion**

#### **Charge 1**

- [9] Between October 2010 and 12 June 2012 the respondent acted on behalf of Cynthia Henderson.
- [10] A costs award was made and the client instructed the respondent to obtain a costs assessment.
- [11] Between October 2010 and November 2011 Cynthia Henderson sought progress reports – the respondent failed to respond or provide the information requested. The respondent failed to provide the file to the

nominated costs assessor, or any costs assessor, and also failed to deliver the file to the client.

- [12] Section 418 of the Act provides that “unsatisfactory professional conduct” includes conduct of an Australian legal practitioner happening in connection with the practice of the law that falls short of the standard of confidence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [13] Pursuant to s 419 of the Act, “professional misconduct” includes 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 confidence and diligence.<sup>1</sup>
- [14] Charge 1 essentially involves a failure to prosecute a matter on behalf of a client in a timely way and is exacerbated by the failure to provide the file to the client on request.
- [15] Failure to attend to clients affairs in a timely way can amount to either unsatisfactory professional conduct or professional misconduct. It is the duty of a solicitor to act with competence and diligence on behalf of a client, and in this context, to carry out the client’s instructions in a timely way.<sup>2</sup>
- [16] In neglecting to provide the file to the costs assessor, and not responding to his client’s requests for the files, the respondent failed in his professional duty to act in his client’s best interests. The conduct is not repeated or sufficiently substantial to be characterised as professional misconduct under s 419 of the Act.
- [17] The respondent’s conduct does however constitute unsatisfactory professional conduct as defined in s 418 of the Act.

### **Charges 2 & 4**

- [18] Charges 2 and 4 relate to a failure to comply with a written notice.
- [19] It is essential that practitioners respond promptly to requests by the Legal Services Commissioner. Failure to respond properly may indicate a disregard for the requirements of the Act and is a serious matter.
- [20] Section 443(4) of the Act provides that an Australian legal practitioner is taken to have committed professional misconduct where the practitioner fails to comply with a notice and the failure continues for a 14 day period unless the practitioner has reasonable excuse for not complying with the requirement within the period.
- [21] By virtue of s 443(4) of the Act, the conduct of the respondent in failing to comply with the written notices constitutes professional misconduct.

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<sup>1</sup> *Legal Profession Act 2007 (Qld) s 419(1).*

<sup>2</sup> *Legal Services Commissioner v Smith [2011] QCAT 126.*

### Charge 3

- [22] Charge number 3 relates to failure to have trust records externally examined.
- [23] Section 268(1) of the Act requires that a law practice must, for each financial period for the practice, and within 60 days after the end of the period, have its trust accounts externally examined by the practice's external examiner.
- [24] The respondent failed to have the trust account records externally examined for the financial periods ending 31 March 2010 and 31 March 2011.
- [25] By virtue of s 420 (1) of the Act conduct which constitutes a contravention of a relevant law (which includes the Act) is capable of constituting unsatisfactory professional conduct or professional misconduct.
- [26] The Tribunal finds that, in this case, the conduct of a practitioner in failing to have the trust account records externally examined constitutes unprofessional conduct within the meaning of s 418 of the Act.

### Penalty

- [27] The circumstances of the respondent in this case are very unfortunate.
- [28] For most of the respondent's professional career, his record has been unblemished. He conducted a successful legal practice in Cairns for a period of around 18 years and also after moving to Brisbane for a period of around 10 years, until he sold the Caboolture practice to Quinn and Scattini.
- [29] The conduct which is the subject of the complaints made by the Legal Services Commissioner all occurred after the sale to Quinn and Scattini had taken place.
- [30] The failure to provide the relevant file to the costs assessor and then to produce the file to the client in a timely way seems to have occurred because, after settlement, the respondent's files were placed, on short notice, in storage sheds at Caboolture and "all documents were crammed into boxes and piled up in sheds in a random fashion".<sup>3</sup>
- [31] As to the particular client file, at the time of swearing the affidavit, the respondent had located the file and delivered it to the office of the Legal Services Commissioner.<sup>4</sup>
- [32] For the same reason (that is the way in which the files were relocated into the storage sheds at Caboolture) the respondent was unable to provide records to the auditor. Again, as at the date of swearing the affidavit, the

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<sup>3</sup> Affidavit of Mark Sheldon Stower sworn on 5 August 2013 paragraph 17.

<sup>4</sup> Affidavit of Mark Sheldon Stower sworn on 5 August 2013 paragraph 26b.

respondent had located most of the old accounting records and had delivered them to a bookkeeper and an accountant with a view to satisfying the trust account auditor requirements.<sup>5</sup>

[33] In relation to the failure to respond to notices, the respondent swears:

the above outlined difficulties contributed to a constant exacerbation of my stress/anxiety related illnesses resulting in me being basically mentally paralysed when dealing with the official contact from the Law Society and the applicant, where correspondence from them would either be left unopened or unattended to, as I couldn't cope with those issues despite both medical and psychological treatment. Thus, this mental state of mind at the time being relevant to charges 2 and 4.<sup>6</sup>

[34] The above mentioned difficulties referred to were those associated with the sale of the practice to Quinn and Scattini.

[35] These matters are, of course, a possible reason for the conduct, rather than an excuse.

[36] As to his financial position, the respondent swears that:

in relation to my current financial position, for the first 9 months of unemployment I was able to utilise a superannuation withdrawal to pay for my medical expenses (as I was not covered by insurance) and general living expenses. However, I have been required to rely upon Centrelink new start allowance of approximately \$500.00 per fortnight particularly since Quinn and Scattini defaulted in their payment obligations under the contract of sale and the large amount I am owed is unlikely to be recovered due to Mr Michael Quinn's own disciplinary proceedings in this Tribunal and his pending or current bankruptcy.<sup>7</sup>

[37] The respondent continues:

I have no other liquid assets and am expecting forthcoming legal action from the taxation office for late lodgement of returns.<sup>8</sup>

[38] With respect to each charge, the practitioner has outlined reasons for his conduct.

[39] The practitioner has cooperated with the Legal Services Commissioner and has not defended the charges which have been brought against him.

[40] The Legal Services Commissioner submits that the practitioner should be reprimanded and that a pecuniary penalty should be imposed in the range of \$2,000 to \$5,000. The Legal Services Commissioner also submits that, in the event the respondent applies for a practising certificate, it should be restricted to an employee level for at least one year to prevent the practitioner from practising as a principal immediately.

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<sup>5</sup> Affidavit of Mark Sheldon Stower sworn on 5 August 2013 paragraph 26c.

<sup>6</sup> Affidavit of Mark Sheldon Stower sworn on 5 August 2013 paragraph 21.

<sup>7</sup> Affidavit of Mark Sheldon Stower sworn on 5 August 2013 paragraph 24.

<sup>8</sup> Affidavit of Mark Sheldon Stower sworn on 5 August 2013 paragraph 25.

- [41] In his submission, the practitioner indicates that he has no objection to such an order and says “if in the future, I ever again apply to the Queensland Law Society for a practising certificate, same [will] be restricted to an employee level only”.<sup>9</sup>
- [42] The various aspects of the conduct of the practitioner amount to either unprofessional conduct, or the more serious professional misconduct.
- [43] Disciplinary proceedings are not directed to punishment of the individual practitioner but rather to protection of the public. An aspect of the protection of the public is to deter other practitioners from engaging in the conduct which is the subject of the proceedings. With this purpose in mind, it is appropriate that the practitioner be publicly reprimanded and fined and also that a condition be placed upon the granting of a practising certificate to the practitioner in the future.
- [44] In all the circumstances, the Tribunal makes the following orders:
1. That the practitioner be publicly reprimanded.
  2. That a pecuniary penalty of \$2,000.00 be imposed.
  3. In the event that the respondent applies for a practising certificate under the *Legal Profession Act 2007* (Qld), such a practising certificate be restricted to an employee level for a period of 2 years.
  4. That the respondent pay the costs of the Commissioner, fixed at \$1,500.00.
  5. The respondent be allowed the period of 12 months to pay the pecuniary penalty and the legal costs.

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<sup>9</sup> Submissions of the respondent, paragraph 5.