

CITATION: Legal Services Commissioner v Wilson [2013] QCAT 307

PARTIES: Legal Services Commissioner
(Applicant)
v
Alan Neil Wilson
(Respondent)

APPLICATION NUMBER: OCR154-10

MATTER TYPE: Occupational regulation matters

HEARING DATE: 25 March 2013; further written submissions received from the Applicant on 6 May 2013 and the Respondent on 22 May 2013

HEARD AT: Brisbane

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

Assisted by:

Mr Ken Horsley
Practitioner Panel Member; and
Dr Susan Dann
Lay Panel Member

DELIVERED ON: 18 June 2013

DELIVERED AT: Brisbane

ORDERS MADE:

1. That on each of the three charges contained in the discipline application filed 28 June 2010 Alan Neil Wilson is found guilty of professional misconduct.
2. That he be publicly reprimanded.
3. That he pay the Commissioner a fine of \$5,000.00 within 180 days.
4. That he pay the Commissioner's costs fixed at \$2,500.00 within 60 days.
5. That, in the event he applies for a practising certificate he does so on the conditions that:
 - a. His practice as a solicitor will be limited or restricted to a part-time basis of not more than three days per week;

- b. In the event he seeks a practising certificate with a lesser or no limitation or restriction, that he provide to the Queensland Law Society a report from his treating doctor advising of his capabilities; and
- c. That he provide to the Queensland Law Society details of his ongoing medical treatment by way of six monthly reports from his treating doctor for a period of three years after receipt of a practising certificate.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – PENALTY – where the respondent misappropriated funds from legal practice accounts – where the respondent submits the conduct was professional misconduct – where the respondent was suffering from a depressive condition at the time of the professional misconduct – where both the applicant and respondent agree that a public reprimand, the payment of the applicant’s costs and the payment of a pecuniary penalty are appropriate sanctions – where the applicant and respondent disagree about the amount of the pecuniary penalty – where the respondent has voluntarily withdrawn from legal practice – nature of appropriate penalty

Legal Profession Act 2007 (Qld), s 245

Attorney General v Bax [1999] 2 Qd R 9, cited
Queensland Law Society v Carberry [2000]

QCA 450, cited

Legal Services Commissioner v Clair [2008]

LPT 5, cited

Legal Services Commissioner v Lindley [2012]

QCAT 673, distinguished

Legal Services Commissioner v Sorban [2009]

LPT 5, distinguished

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

Ms P Prasad Solicitor on behalf of the Legal

Services Commissioner

RESPONDENT: Mr B T Cohen Solicitor for Mr Wilson

REASONS FOR DECISION

- [1] Mr Wilson is 67. He was first admitted as a solicitor in December 1969.
- [2] In 2006 and 2007 he was a partner in a legal firm with another practitioner. On three occasions in those two years he produced fraudulent receipts for the purpose of misappropriating funds from the firm's general account. The total funds misappropriated were \$3,354.50.
- [3] On each occasion Mr Wilson represented to his partner and staff of the firm that he required cheques for the purpose of genuine third party disbursements on behalf of clients of the firm when, in fact, he intended to use and did use the funds for his own private purposes.
- [4] He later repaid the funds in full to the firm.
- [5] These discipline proceedings have a long history, brought about by sad events in Mr Wilson's life since 2007. After the dissolution of his partnership in 2007 he went into sole practice but suffered adverse effects during the global financial crisis and had ongoing financial problems. In May 2009 he accidentally shot himself and sustained severe and extensive facial damage involving a complex and unpleasant convalescence. His marriage broke down. A psychiatrist who has been treating him intermittently since 2000 diagnosed a continuing, at times severe, depressive condition.
- [6] His physical and mental ill health meant that, although the original discipline application in these proceedings was filed on 27 August 2010, their ultimate determination has been delayed.
- [7] His treating psychiatrist, Dr Fredericks, provided a report on 11 October 2010 in which he concluded that Mr Wilson was not then a fit and proper person to practise as a legal practitioner and, by consent, the Tribunal ordered that the proceedings be adjourned for a year on Mr Wilson's undertaking that he would not apply for any kind of practising certificate, or attempt to return to practise as a legal practitioner or legal consultant without the leave of the Tribunal.
- [8] The proceedings were revived, with the consent of all parties, after Dr Fredericks provided a further report on 30 August 2012. The matter ultimately went to hearing before the Tribunal on 25 March 2013 when Dr Fredericks was cross-examined by Ms Prasad, for the Commissioner.
- [9] The Tribunal then directed that the parties file and exchange submissions, which has now occurred.

- [10] In his most recent report Dr Fredericks, who has been consulted by Mr Wilson regularly every three or four weeks for some years, concluded that his depressive condition has improved considerably and that he might, now, be considered a fit and proper person to practise as a lawyer, without any substantial risk of committing any similar misconduct in the future. Any return to work should be careful and staged, Dr Fredericks believes, and Mr Wilson should remain under ongoing psychiatric treatment and supervision for another two – three years if he returns to practice.
- [11] In his written submissions the Commissioner concedes that, in light of Dr Fredericks' report, and his evidence at the hearing, the Tribunal can be satisfied that Mr Wilson is now a fit and proper person to practise as a lawyer, without any substantial risk to the public but subject, of course, to those practical and medical constraints. In light of Dr Fredericks' evidence, the Tribunal agrees.
- [12] Written submissions filed on Mr Wilson's behalf by his solicitor contain an acknowledgement that his offending is properly categorised as *professional misconduct*¹, which is the more serious of the two *key concepts* contained in the *Legal Profession Act 2007*; and, that a public reprimand, the payment of the Commissioner's costs and the payment of a pecuniary penalty are appropriate sanctions.
- [13] The Commissioner also submits that, in the event Mr Wilson applies for a practising certificate, he might be permitted to practise on a limited or restricted basis – e.g., part-time, up to three days a week; or, if he seeks a certificate with fewer constraints, that he provide the Queensland Law Society with a report from his treating doctor in respect of his capabilities; and, in any event, to ensure the supervision recommended by Dr Fredericks, that if he returns to practice then he should also provide the Society with details of his ongoing medical treatment by way of six monthly reports from his treating doctor for a period of two – three years.
- [14] Otherwise, the Commissioner contends for a public reprimand, and the payment of costs and a pecuniary penalty. Costs, it is said, should be set at \$2,500.00. Mr Wilson, through his lawyer, accepts all this. In light of his long and blemish-free history as a legal practitioner, the psychiatric illness he was suffering when he offended, his repayment of the sum he misappropriated, and his cooperation in these proceedings the Tribunal accepts that these sanctions are adequate, and appropriate.
- [15] The parties disagree, however, about the amount of the pecuniary penalty. The Commissioner contends for a fine in the range \$7,000.00 - \$10,000.00. Mr Wilson's solicitor's submissions argue for a lower fine, in the order of \$2,500.00.

¹ *Legal Profession Act 2007 (Qld) s 245.*

- [16] The penalty to be imposed in these matters is intended, so far as a fine is concerned, to reflect principles of general and personal deterrence.²
- [17] The Commissioner's submissions refer to a number of cases said to support a fine in the range for which he contends.³ *Clair* involved misappropriation of clients' funds of \$4,247.11. In *Sorban* the practitioner created a false document to mislead his clients and another lawyer, but not for any direct pecuniary gain.
- [18] In *Lindley* the practitioner gave advice to a client in the course of his employment with a firm of solicitors, and then asked the client to deposit the sum of \$200.00 into his own bank account. He then created a false invoice, and receipt, and retained the \$200.00 and did not account to his employer for it. He was publically reprimanded, and fined \$7,000.00. In the course of that decision the Tribunal observed that he was unemployed and might have difficulty finding employment, but the care he had taken to conceal the misappropriation, including the creation of false documents, aggravated the nature of the offending.
- [19] The present case has some similar elements but, also, some distinguishing and indeed unusual aspects. They arise from both his personal history and circumstances, and the evidence from his psychiatrist.
- [20] Until these events Mr Wilson had, throughout his long career as a lawyer for almost 40 years, an otherwise unblemished record. He made early admissions, and was entirely and appropriately cooperative throughout the proceedings.
- [21] Dr Fredericks said, in his first report of 11 October 2010, that in his opinion (based upon his knowledge of Mr Wilson, since 2000, as his patient) the offending conduct was '*completely out of character*' and occurred at a time when Mr Wilson was suffering from a significant depressive illness and was under marked pressure occupationally, financially, and maritally.
- [22] Dr Fredericks also said that, in his opinion, Mr Wilson's depressive illness in 2006-7 would have '*significantly impaired his functioning and his judgement and his conduct, which resulted in the current disciplinary charges, is likely to have been caused at least in part by his psychological state at that time*'.
- [23] These unchallenged conclusions receive some historical corroboration from Mr Wilson's long record of unblemished practice between 1969 and 2006.

² *Attorney General v Bax* [1999] 2 Qd R 9 at 21 per Pincus J; *Queensland Law Society v Carberry* [2000] QCA 450, at [38].

³ *Legal Services Commissioner v Clair* [2008] LPT 5; *Legal Services Commissioner v Sorban* [2009] LPT 5 ('*Sorban*'); *Legal Services Commissioner v Lindley* [2012] QCAT 673 ('*Lindley*').

- [24] He has also, of course, suffered the grave physical injuries mentioned earlier. He has since separated from his wife. He has no capital and his only income is from a Centrelink pension. He has also voluntarily withdrawn from legal practice since a time shortly after these proceedings were commenced.
- [25] This unusual conjunction of circumstances compels the conclusion that this is not a case in which a substantial fine is necessary to ensure adequate, personal deterrence. That said, any penalty must also reflect the seriousness of the offending and, also, matters of general deterrence.
- [26] When Mr Wilson's personal history, his circumstances in recent years, his present circumstances, and Dr Fredericks' evidence are balanced against the nature and elements of his offending, a fine in the order of \$5,000.00 may be said to fairly reflect these countervailing factors.
- [27] The orders will be:
1. That on each of the three charges contained in the discipline application filed 28 June 2010 Alan Neil Wilson is found guilty of professional misconduct.
 2. That he be publicly reprimanded.
 3. That he pay the Commissioner a fine of \$5,000.00.
 4. That he pay the Commissioner's costs fixed at \$2,500.00.
 5. That, in the event he applies for a practising certificate he does so on the conditions that:
 - a) His practice as a solicitor will be limited or restricted to a part-time basis of not more than three days per week;
 - b) In the event he seeks a practising certificate with a lesser or no limitation or restriction, that he provide to the Queensland Law Society a report from his treating doctor advising of his capabilities; and
 - c) That he provide to the Queensland Law Society details of his ongoing medical treatment by way of six monthly reports from his treating doctor for a period of three years after receipt of a practising certificate.
- [28] The submissions from Mr Wilson solicitor's refer to his financial circumstances and seek time for him to pay costs, and the fine. The costs of \$2,500.00 should be paid within 60 days. The fine of \$5,000.00 should be paid within 180 days.