QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Anderson* [2020] QCAT 476
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **AIDEN BLAIR ANDERSON** (respondent)
APPLICATION NO/S:	OCR322-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	3 December 2020 (*ex tempore*)
HEARING DATE:	3 December 2020
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Dr John de Groot, Legal Panel Member Dr Margaret Steinberg AM, Lay Panel Member
ORDERS:	**1. On Charge 1, there is a finding that the respondent engaged in unsatisfactory professional conduct.** **2. On Charge 2, there is a finding that the respondent engaged in professional misconduct.** **3. The respondent shall pay the applicant's standard costs of and incidental to this discipline application, such costs to be assessed 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 – NEGLECT AND DELAY – where the applicant brought three charges against the respondent, but subsequently withdrew one charge – where the remaining charges concern a failure to maintain reasonable standards of competence and diligence, and a failure to comply with a notice issued under s 443 of the *Legal Profession Act* 2007 (Qld) – where the respondent has admitted the charges – where the respondent made submissions about the circumstances

surrounding the conduct underpinning each charge, but did not lead any evidence in support of these submissions – whether there should be a finding of unsatisfactory professional conduct under Charge 1 – whether the respondent has provided a reasonable excuse for not complying with the s 443 notice – whether there should be a finding of professional misconduct under Charge 2

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the respondent has not provided explanations for the conduct underpinning the remaining charges – where the respondent has neither expressed contrition nor remorse for his conduct – where the respondent has no previous adverse disciplinary history – where disciplinary proceedings are protective of the public, and not punitive of the practitioner – whether the Tribunal should impose a public reprimand or fine

Legal Profession Act 2007 (Qld) s 418, s 443, s 462

Baker v Legal Services Commissioner [2006] 2 Qd R 249
Legal Services Commissioner v Bone [2014] QCA 179
Legal Services Commissioner v Bui [2018] QCAT 424

APPEARANCES & REPRESENTATION:

Applicant: P Prasad, solicitor for the Legal Services Commission

Respondent: G Porta, solicitor for Porta Lawyers

REASONS FOR DECISION

[1] By a discipline application under the *Legal Profession Act* 2007 (Qld) ("*LPA*") filed in the Tribunal on 28 April 2020, the applicant, the Legal Services Commissioner, brought three charges against the respondent, Aiden Blair Anderson. Charge 1 was that between 30 January and 23 September 2019, the respondent failed to maintain reasonable standards of competence and diligence whilst acting for the buyer in a contract of sale of property. Charge 2 was that on or about 21 June 2019, the respondent failed to comply with a notice, in contravention of s 443(3) of the *LPA*. Charge 3 was that between 29 August and 2 September 2018, the respondent failed to maintain reasonable standards of competence and diligence in relation to the taking of certain instructions from a person who subsequently died.

[2] The respondent filed material in response to the discipline application. The material filed by the respondent, which included a lengthy affidavit affirmed on 10 July 2020, went particularly to Charge 3 of the discipline application. In particular, the affidavit material filed by the respondent significantly undermined the cogency of that charge, as particularised in the discipline application. On 8 September 2020, the parties consented to a number of orders and directions, including an order that the discipline application be varied by the deletion of Charge 3.

[3] I mention that potted history of the matter in deference to a submission today by the respondent that a significant amount of time and energy had been devoted, on his part, to putting Charge 3 to rest, as it ultimately was. The alleged circumstances which were said to give rise to the charge concerned a particularly topical and difficult area of practice; namely, the appropriate approach by a legal practitioner to the question of capacity when taking instructions on wills from clients who are at the end of life.

[4] Charge 3 has been withdrawn, and the circumstances relating to the charge are therefore irrelevant for the determination and consideration of the two charges that remain. The fact remains, however, that the mere bringing of a charge against a legal practitioner is, in itself, a serious step. When that occurs in the context of what is undoubtedly a fraught area of practice, it behoves the Commissioner to ensure that all appropriate enquiries and investigations have been undertaken to satisfy the Commissioner, to the necessary standard, that it is appropriate for the charges to be brought in the first place. If nothing else, that would be a learning from the history of the disposition of Charge 3, as originally formulated under the discipline application. It is not necessary for me to say anything more about that matter; as I've already said, the facts and circumstances relating to Charge 3 are otherwise completely irrelevant for the purposes of today's remnant discipline application.

[5] The two charges with which the Tribunal is now concerned are, effectively, not in issue. The parties have filed a Statement of Agreed Facts in relation to those charges and, by reference to that Statement, it is sufficient to note the following. The respondent was admitted as a solicitor of the Supreme Court of Queensland on 2 February 1982. Between July 1991 and February 1993, he held an employee-level practising certificate, and was employed as a corporate lawyer for a large insurer. Between February 1993 and November 1998, he held an unrestricted principal-level practising certificate and practised as a sole practitioner. He then had varying periods of time both as an employed solicitor and, again, in private practice. He has no previous adverse findings by a disciplinary body. Since the bringing of the discipline application, the respondent has retired from practice, and did not renew his practising certificate after 30 June 2020.

[6] The facts in respect of Charge 1 are set out at length in the Statement of Agreed Facts. In brief, the respondent acted for purchasers of a particular property at Alexandra Headland. Settlement of that property was effected in January 2019. The respondent, however, failed to attend to registration of the transfer of that property in a timely fashion. He received numerous reminders from the vendors' solicitor in relation to the need to effect the transfer, not least because the vendors were continuing to receive water and rates bills for the property. Ultimately, the respondent effected a transfer of the property by lodging the transfer documents for registration in the Titles Office in November 2019.

[7] In relation to Charge 2, that arises from the fact that, consequent upon the conduct referred to under Charge 1, a complaint was made to the applicant. The applicant corresponded with the respondent, giving details of the complaint and seeking his response. Despite several follow-ups, in writing and by telephone, no response was received from the respondent. Ultimately, on 6 June 2019, the applicant sent the respondent a notice pursuant to s 443(3) of the *LPA*, requiring him to provide a response to the applicant's enquiries by 20 June 2019. It is not in issue – and, indeed, it is an agreed fact – that the respondent failed to comply with that s 443 notice.

[8] The respondent, as I have already noted, put on affidavit material which particularly addressed the circumstances surrounding the now-withdrawn Charge 3. There has, however, been no material filed on behalf of the respondent concerning Charges 1 and 2. In particular, the respondent has not given any explanation for his failure to lodge the property transfer for registration in a timely fashion, nor for his failure to respond to the repeated enquiries from the applicant or, more directly, to respond to the s 443 notice. Moreover, despite, in effect, admitting the charges, the respondent has not expressed any contrition or remorse. As against that, however, it is noted that the respondent enjoyed a lengthy career in the profession, without blemish and without any adverse findings having been made against him in the course of any disciplinary proceedings.

[9] The first step, for today's purposes, is to determine the appropriate characterisation of the conduct under the charges. The conduct under Charge 1 was an isolated incident; it was, of course, objectively regrettable that the respondent did not attend to the registration of the transfer in a timely fashion. Submissions have been made on his behalf which give some faint shadow of an explanation of the circumstances in the respondent's life at the time, which may have contributed to his dilatoriness. Unfortunately, those submissions are not supported by any evidence, and the Tribunal can place little weight on them.

[10] Nevertheless, it is not suggested that the defaulting conduct under Charge 1 was, in any way, emblematic of some systemic failure in the respondent's practice. It is not suggested that the incident under Charge 1 was anything more than an isolated incident. It should, therefore, be regarded as an incident of practice that fell 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, and should therefore be characterised as unsatisfactory professional conduct within the meaning of that term in s 418 of the *LPA*.

[11] The conduct under Charge 2 is of quite a different category. As this Tribunal has noted on previous occasions,[1] it is important for legal practitioners to understand that it is a fundamental obligation on them, as practitioners, to cooperate with, and respond to enquiries by, the regulatory authorities. A failure to respond to a s 443 notice is a serious matter. That the legislature regards it as a serious matter is made plain by s 443(4), which deems a failure to respond to such a notice to be professional misconduct "unless the practitioner has a reasonable excuse for not complying with the requirement within the period [of 14 days]".

[12] As already noted, the respondent has not provided any, let alone any reasonable, excuse for not complying with the s 443 notice; therefore, the Tribunal is bound by the terms of s 443(4) to make a finding, under Charge 2, that the respondent engaged in professional misconduct.

[13] Turning then to the question of sanction, the applicant has submitted that this is a case in which the respondent ought be publicly reprimanded and fined. The making of a public reprimand against a practitioner is a serious matter that serves the interests of both general and private deterrence. The significance of a public reprimand, apart from it being an open rebuke of a practitioner, is that it stands as a permanent stain on a practitioner's record. It does not go away; it is there for the public, and the profession, to see for all time. In the context of membership of an honourable

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[1] See, e.g., *Legal Services Commissioner v Bui* [2018] QCAT 424, [19].

profession, it is a serious matter to permanently stain a person's reputation by the imposition of a public reprimand. That is why the making of a public reprimand in an appropriate case serves the interests of general and private deterrence. It serves the interests of general deterrence because other members of the profession, who ought understand the significance of a public reprimand and the potential impact of the placement of a public reprimand on their record will have on their future career, will be deterred from engaging in conduct which might earn them that sort of permanent public rebuke. Similarly, a person who is a member of an honourable profession would be personally ashamed by such a public remonstration; that, then, attends to the object of private deterrence, which is to ensure that people who have done the wrong thing have learnt their lesson and will not do it again.

[14] Despite the lack of material filed by the respondent on this issue, it is noted that this respondent practised for many years and has what can colloquially be described as "a clean record". It is not suggested by the applicant that these incidents were typical of the respondent's practice or the manner in which he conducted himself in practice. The Tribunal will, as it must, make formal findings in respect of the conduct under each of the charges; but, given the isolated nature of the incidents and the absence of any other adverse disciplinary history, the Tribunal is not persuaded, but only just not persuaded, that preservation of the public interest requires that there be a public reprimand in this case. It is to be recalled, of course, that these proceedings are protective of the public and not punitive of the practitioner.

[15] In all of the circumstances, it does not seem to the Tribunal that it is necessary, for the purposes of protecting the public, that a public reprimand be placed on the record against this practitioner. Similarly, given the isolated nature of the incidents, the Tribunal does not see any public protective purpose in imposing a fine on the respondent; indeed, to take such a step would verge on the punitive, rather than the protective.

[16] In relation to costs, the respondent submitted that each party should bear its own costs, on the basis that most of the costs in pursuing the matter were expended on Charge 3, which was subsequently withdrawn. That submission, however, runs foul both of the express terms of s 462(1), which mandates the making of an order for costs upon a finding of professional misconduct or unsatisfactory professional conduct except where exceptional circumstances exist, and the principles relating to the recovery of costs under that section, as outlined in cases such as *Baker v Legal Services Commissioner*[2] and *Legal Services Commissioner v Bone*.[3] In short, s 462(1) requires that there be an order that the respondent pay the applicant's costs of the discipline application.

[17] For those reasons, there will be the following orders:

1. On Charge 1, there is a finding that the respondent engaged in unsatisfactory professional conduct;
2. On Charge 2, there is a finding that the respondent engaged in professional misconduct; and

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2 [2006] 2 Qd R 249.
3 [2014] QCA 179.

3. The respondent shall pay the applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a matter before the Supreme Court of Queensland.