

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Smith* [2021] QCAT 345

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

**v**

**TRACEY ANNE SMITH**  
(respondent)

APPLICATION NO/S: OCR359-20

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 25 October 2021

HEARING DATE: 18 October 2021

HEARD AT: Brisbane

DECISION OF: Hon Duncan McMeekin QC, Judicial Member  
Assisted by:  
Ms Patrice McKay  
Mr Peter Sheehy

- ORDERS:
- 1. Pursuant to s 456(2)(a) of the *Legal Profession Act 2007 (Qld)*, an order is made recommending that the name of the respondent, also known as Tracey Anne Brewer, be removed from the local roll.**
  - 2. Pursuant to s 456(3)(a) of the *Legal Profession Act 2007 (Qld)*, an order is made recommending that the name of the respondent be removed from the New South Wales roll.**
  - 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 in the Supreme Court of Queensland.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – IMPROPER DEALINGS – where the respondent was a sole practitioner and operated her own firm – where the respondent dishonestly obtained monies from clients – where the respondent failed to respond to matters or take appropriate action – where the respondent entered into void and unenforceable cost agreements with her own firm – where the respondent gave a client incorrect information about the *Australian Solicitors Conduct Rules* – where the respondent self-notified the

applicant of her conduct – where the applicant brought a discipline application against the respondent in this Tribunal – where the respondent has cooperated with the Tribunal and the applicant to a significant degree – whether the respondent engaged in unsatisfactory professional conduct or professional misconduct – whether the name of the respondent should be removed from the local roll

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – TRUST MONEY – where the respondent was a sole practitioner and operated her own firm – where the respondent authorised the use of funds in trust account to pay invoices arising out of work performed as an executor or Power of Attorney – where the respondent received money into general account rather than trust account – where the respondent transferred money from trust account to general account without the necessary authority – where the respondent has cooperated with the Tribunal and the applicant to a significant degree – whether the respondent engaged in unsatisfactory professional conduct or professional misconduct – whether the name of the respondent should be removed from the local roll

*Legal Profession Act 2007* (Qld), s 418, s 419, s 456

*Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498

*Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

*Attorney-General of the State of Queensland v Legal Services Commissioner; Legal Services Commissioner v Shand* [2018] QCA 66

*Barristers' Board v Darveniza* [2000] QCA 253

*Browne v Commissioner of State Revenue* [2004] 1 Qd R 116

*Legal Services Commissioner v Budgen* [2016] QCAT 120

*Legal Services Commissioner v Johnston* [2015] QCAT 480

*Legal Services Commissioner v Madden (No 2)* [2008] QCA 301

*Legal Services Commissioner v Rider-Bell* [2013] QCAT 176

*Legal Services Commissioner v Scott* [2015] QCAT 402

*Legal Services Commissioner v Wright* [2020] QCAT 438

*NSW Bar Association v Cummins* (2001) 52 NSWLR 279

*Re Christie* [2004] AATA 1396

APPEARANCES &  
REPRESENTATION:

Applicant: M Lester (legal officer) instructed by Legal Services Commissioner

Respondent: C DoRozario (solicitor) instructed by Potts Lawyers

## REASONS FOR DECISION

- [1] This is a Discipline Application brought against the respondent, Tracey Anne Smith, a solicitor admitted to practise in this State on 31 January 1994 under the name Tracey Anne Brewer. The respondent is also admitted in New South Wales under the name Tracey Anne Smith.

### An overview

- [2] The respondent practised as a sole practitioner in her own firm styled ‘Smith Legal Solutions’ and was an accredited specialist in succession law.
- [3] The respondent faces twelve charges in this Tribunal. Given that the parties are agreed on the facts and agreed on the appropriate Orders, and given that those Orders are patently appropriate, these reasons will be relatively brief. Much of what follows is taken from the very helpful submissions of the Commissioner.
- [4] The charges have been usefully summarised as follows in the Commissioner’s submissions:
- (a) three charges of the respondent dishonestly obtaining a total of \$41,360.00 and attempting to dishonestly obtain \$3,280.00 (Charges 2, 4, 10);
  - (b) six charges relating to Estate or Power of Attorney matters where the respondent engaged in misconduct including failing to respond to matters or take appropriate action, entering (as executor or Power of Attorney) into void and unenforceable cost agreements with her own firm, charging large sums of money for work performed as executor and Power of Attorney at professional rates and acting in a conflict of interest situation by authorising the use of funds in the trust account to pay the invoices for that work. Further, in relation to one of the charges, incorrectly informing the client that the *Australian Solicitors Conduct Rules* provides that the respondent can charge for work performed as attorney at professional rates (Charges 1, 3, 5, 7, 8, 9);
  - (c) three charges involving the respondent receiving money into her general account rather than her trust account and transferring money from the trust account to the general account without the necessary authority (Charges 6, 11 and 12).
- [5] On 2 August 2018, and after Ms Smith became aware that the Commissioner had commenced investigations, including into matters involving charging professional fees when she was not so entitled, she notified the Legal Services Commission, through her lawyers, that she had been engaging in “inappropriate billing practices”. On 6 August 2018, Ms Smith handed in her practising certificate to the Queensland Law Society (“QLS”). Only days thereafter, the Executive Committee of the Council of the QLS passed resolutions to appoint officers of the QLS, jointly and severally, as the Receiver for the respondent’s law practice.

### The charges in summary

- [6] Nine of the charges (Charges 1 – 5, 7 – 10) have what the Commissioner has described as “a common theme”. The respondent would have her clients execute a Will or Power of Attorney appointing herself as executor, or attorney for financial matters, the terms of the Will recommending the respondent engage her own firm as the “lawyers of the Estate” and the document containing a clause purporting to permit professional costs to be charged both for work performed as executor and solicitor, or a professional rate for work completed as an attorney, respectively. The respondent then entered into cost agreements with her own firm and invoiced herself as executor or Power of Attorney for such “work”. It is trite law that such agreements are void – one cannot enter into a contract with oneself.<sup>1</sup> The respondent authorised payment of the invoices from her trust account, such payments totalling large sums of money. The amounts involved were grossly disproportionate to the worth of the work done – a costs assessor engaged by the Commissioner opining that in one case the amount charged exceeded a reasonable amount by more than 90%.
- [7] Charges 6, 11 and 12 relate to matters that the respondent self-referred to the Commission where no other records could be located by the Commission. The respondent states that she failed to invoice the executor although monies were transferred from trust (Charge 11), transferred money from the trust account to the general account without the necessary authority (Charge 12), received money into her general account instead of her trust account, and failed to notify within time of a Family Provision application (Charge 6).
- [8] On some occasions the respondent issued invoices for work already performed – i.e., she double charged her client, and sometimes she overcharged to a much greater degree. The respondent accepts that this conduct was dishonest as she knew that her representation that the money was due and owing to her was untrue.
- [9] There have been successful claims on the Fidelity Fund - in respect of Charges 1 and 2 in the sum of \$58,992.60 (the \$64,578.65 charged by the respondent to the Estate less the legitimately incurred figure totalling \$5,656.05); and in respect of Charge 8 in the sum of \$30,696.42.
- [10] As mentioned, the amounts involved were substantial. The Commissioner provides the following table:

Charge number	Amount obtained
1 + 2	\$64,578.65 – properly incurred costs of \$5,656.05 (\$27,450.00 plus GST dishonestly obtained)
3 + 4	\$35,378.34 (\$13,700.00 plus GST dishonestly obtained)
5	\$19,809.00
7	\$13,191.80
8	\$42,286.82 – properly incurred costs of \$10,193.55

<sup>1</sup> See *Browne v Commissioner of State Revenue* [2004] 1 Qd R 116; *Re Christie* [2004] AATA 1396.

9-11	\$33,101.60 (\$480.00 plus GST dishonestly obtained and \$3,280.00 attempted to be obtained dishonestly)
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The amounts in brackets refer to amounts invoiced more than once for the supposed same work.

### The relevant law

- [11] These proceedings are governed by s 456 of the *Legal Profession Act 2007* (Qld) (“the LPA”). Subsection (1) provides:

If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.

- [12] If so satisfied, the orders that may be made include recommending that the name of the Australian legal practitioner be removed from the local roll,<sup>2</sup> and an order recommending that the name of the Australian legal practitioner be removed under a corresponding law from an interstate roll.<sup>3</sup> Those are the orders that the Commissioner seeks.

- [13] The terms “unsatisfactory professional conduct” and “professional misconduct” are defined in the LPA. Section 418 of the LPA provides:

*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.

- [14] Section 419 of the Act provides:

(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 maintain 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 then 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 a 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.

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<sup>2</sup> LPA, s 456(2)(a).

<sup>3</sup> LPA s 456(3)(a).

- [15] Regard may also be made to the common law. It has long been regarded that to make a finding of professional misconduct there must be proof of conduct which “would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency”.<sup>4</sup> In similar terms, in *Adamson v Queensland Law Society Incorporated*, Thomas J formulated the test for professional misconduct as follows:<sup>5</sup>

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.

### **The characterisation of the conduct**

- [16] It is not disputed that all the charges, save Charge 6, involve serious dishonesty. As the Commissioner submits in respect of Charges 1 – 5, 7 – 9, and 10: the nature of the misconduct (entering into void and unenforceable agreements, manufacturing false invoices thereby giving an air of legitimacy to the process, and charging grossly excessive fees); the period over which the conduct was carried out (the earliest misconduct took place in 2012 and the fraudulent taking of monies over an approximate three year period), so it was no lone isolated act; and the amounts involved, all lead inexorably to the conclusion that there must be a finding of professional misconduct.
- [17] Charges 11 and 12 involve the transferring of money from the trust account to the general account without the necessary authority. No explanation has been put forward by the respondent as to why she did not request the authority. The only mitigating factor is that the charges result from the respondent’s self-reporting of the conduct. Nonetheless, given the amounts involved, this conduct too should also be characterised as professional misconduct.
- [18] Charge 6 involves the late notification to an Estate of a Family Provision application (two weeks late) and the receiving of \$880.00 into the general account instead of the trust account. That is best characterised as unsatisfactory professional conduct.

### **Mitigation**

- [19] The parties are agreed that the respondent has cooperated to a significant degree. That cooperation has included:
- (a) notifying the Commissioner of relevant information in relation to Charges 6 to 12;
  - (b) voluntarily handing in her practising certificate;
  - (c) continuing to provide information to the Commissioner about her conduct throughout the investigation;
  - (d) cooperating with the QLS and receivers appointed;
  - (e) agreeing to orders to enable new lawyers to take over her estate files to the advantage of her clients; and

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<sup>4</sup> *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

<sup>5</sup> [1990] 1 Qd R 498, 507.

- (f) cooperating with the prosecution of the disciplinary proceedings, including complying with all directions, settling an agreed statement of facts, and agreeing to the final orders.

[20] The respondent has lost her practise, her home, faces criminal charges, and bears the shame of losing her previous good name. To her credit the respondent has accepted responsibility for her conduct and shown great respect for the disciplinary process. Through her solicitor she has apologized to her victims and the profession.

### **The appropriate sanction**

[21] Despite these mitigating features it is evident that in a case of serious dishonesty in the discharge of the professional duty the practitioner must be struck off. No submission is made to the contrary. There are many examples in the cases of such orders being made in like circumstances. The Commissioner draws our attention to *Legal Services Commissioner v Wright*,<sup>6</sup> *Legal Services Commissioner v Rider-Bell*,<sup>7</sup> *Legal Services Commissioner v Budgen*,<sup>8</sup> *Legal Services Commissioner v Johnston*,<sup>9</sup> and *Legal Services Commissioner v Scott*.<sup>10</sup>

[22] The point of course is not punishment but protection of the public and the standing of the profession.<sup>11</sup> Of pertinence here are the remarks in *Barristers' Board v Darveniza*:<sup>12</sup>

Generally speaking the quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices.

...

### **Orders**

[23] We order as follows:

1. Pursuant to s 456(2)(a) of the *Legal Profession Act 2007* (Qld), an order is made recommending that the name of the respondent, also known as Tracey Anne Brewer, be removed from the local roll.
2. Pursuant to s 456(3)(a) of the *Legal Profession Act 2007* (Qld), an order is made recommending that the name of the respondent be removed from the New South Wales roll.
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 in the Supreme Court of Queensland.

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<sup>6</sup> [2020] QCAT 438.

<sup>7</sup> [2013] QCAT 176.

<sup>8</sup> [2016] QCAT 120.

<sup>9</sup> [2015] QCAT 480.

<sup>10</sup> [2015] QCAT 402.

<sup>11</sup> See *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301, [122]; *Attorney-General of the State of Queensland v Legal Services Commissioner*; *Legal Services Commissioner v Shand* [2018] QCA 66; *NSW Bar Association v Cummins* (2001) 52 NSWLR 279, 284.

<sup>12</sup> [2000] QCA 253, [33].