LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v Thomas* [2009] LPT 13
PARTIES:	**LEGAL SERVICES COMMISSIONER (applicant) v BRYNLY WHYNFORD THOMAS (respondent)**
FILE NO:	BS1878 of 2006
DIVISION:	Legal Practice Tribunal
PROCEEDING:	Discipline application
DELIVERED ON:	7 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2009
JUDGE:	Mullins J assisted by Mr K Horsley and Dr M Steinberg
ORDER:	**1. The name of the respondent, Brynly Whynford Thomas, be removed from the roll of solicitors kept by the Supreme Court of Queensland.** **2. The respondent pay the applicant's costs of the application fixed in the sum of $10,000.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS OF DISCIPLINARY ORDERS – In general – where eight charges for determination in discipline application – where no appearance for respondent solicitor – where respondent found not guilty of two charges – where respondent found guilty of unsatisfactory professional conduct in relation to four charges including of neglect, neglect and delay, and swearing a false and/or misleading affidavit – where respondent found guilty of professional misconduct in relation to two charges including one of criminal conduct and one in relation to correspondence with Legal Services Commission – whether respondent had demonstrated unfitness to practice by his conduct and should be removed from the local roll – whether respondent should pay applicant's costs of the application *Legal Profession Act* 2007, s 418, s 419, s 420, s 462, s 647, s 649, s 718, s 746 *Attorney-General v Bax* [1999] 2 Qd R 9, considered *Legal Services Commissioner v Madden (No 2)*

[2008] QCA 301, followed
Legal Services Commissioner v Podmore [2006] LPT 5, considered
Legal Practitioners Complaints Committee v Tomlinson [2006] WASC 211, considered

COUNSEL: B I McMillan for the applicant
No appearance for the respondent

SOLICITORS: Legal Services Commission for the applicant
No appearance for the respondent

[1] **MULLINS J:** The discipline application originally filed against the respondent on 7 March 2006 contained seven charges. On the application of the applicant, the application was varied on 18 March 2008 to remove charges 3 and 5 and add new charges 8, 9 and 10. There are therefore eight charges for determination.

[2] On 18 March 2008 the discipline application was set down for hearing on 10 and 11 June 2008. On 26 May 2008 the respondent filed his affidavit sworn on 23 May 2008 addressing the charges. On 2 June 2008 the hearing dates were vacated. The hearing date of 18 February 2009 was set on 17 November 2008 by order of Byrne SJA. A copy of that order was personally served on the respondent on 29 November 2008. Two letters respectively dated 7 and 11 February 2009 (exhibits 1 and 2) were received by the Chief Justice from the respondent which were passed to the Tribunal. The gist of those communications was that the respondent was admitted for and underwent significant surgery and would be remaining in hospital for some time. The respondent acknowledged that he had been advised that the Tribunal may proceed in his absence and he advised that he had no funds for the purpose of instructing lawyers to appear on his behalf.

[3] There was no appearance for the respondent when the hearing commenced.

[4] The applicant contended that despite the respondent's hospitalisation, the history of the proceeding justified the Tribunal proceeding in the absence of the respondent, in reliance on s 647(1) of the *Legal Profession Act* 2007 (the Act). I decided to proceed in the absence of the respondent in view of the length of time that the disciplinary application had been in progress, that it had elicited a large amount of correspondence from the respondent and that it would not be in the public interest to adjourn the proceeding.

[5] In the course of submissions, the applicant referred to the respondent's affidavit filed on 26 May 2008. I considered the content of the respondent's affidavit in conjunction with the applicant's material in relation to the charges.

Respondent's particulars

[6] The respondent is 64 years old. He and his wife married in 1980 and immigrated to Australia in 1981. The respondent was admitted as a solicitor of the Supreme Court of Queensland in 1981. He ceased in practice as a solicitor on 30 June 2008. He has not previously been the subject of a disciplinary proceeding.

[7] The respondent's wife was articled to the respondent who was practising as a sole practitioner. His wife was admitted as a solicitor in 1995. In July 1999 the respondent transferred his legal practice to his wife and the practice was conducted under the name "The Law Practice Group". The respondent's wife engaged him as a locum tenens during the period 1 July 1999 until 27 April 2001. They separated as a married couple in September 2000. Thereafter they engaged in contested Family Court proceedings concerning the division of their property, in respect of which they did not engage lawyers, but acted themselves.

[8] From 2 May 2001 until 30 June 2008 the respondent practised as a sole practitioner under the name "Thomas Solicitors" at Springwood.

Legislative framework

[9] The discipline application was filed pursuant to the *Legal Profession Act* 2004 (2004 Act). As a result of ss 718 and 746 of the Act, the charges that were originally brought in the discipline application have to be determined in accordance with the provisions of the Act. The charges added by the variation of the application must also be determined in accordance with the Act which had commenced by the time the variation application was made.

[10] The concepts of unsatisfactory professional conduct and professional misconduct are defined in ss 418 and 419 of the Act in the same terms as they were defined in ss 244 and 245 of the 2004 Act. To the extent that this discipline application concerns conduct of the respondent that was committed prior to the commencement of the 2004 Act, that conduct must be assessed by reference to the notions of professional misconduct and unprofessional conduct or practice that applied for the purpose of the *Queensland Law Society Act* 1952: *Legal Services Commissioner v Podmore* [2006] LPT 5 at paragraphs [4] to [9].

Charge 1 – Criminal conduct (stalking)

[11] The respondent was charged with stalking his wife in the period between 15 September 2000 and 23 January 2003. On 9 May 2005 he pleaded guilty in the District Court to one count of stalking with circumstances of aggravation which were that some of the acts of stalking involved violence and some of the acts of stalking contravened a court order. A temporary domestic violence order had been made by the Holland Park Magistrates Court in May 2001 that was followed by a protection order in December 2002. He was sentenced for the stalking on 29 June 2005 to two years' imprisonment that was wholly suspended for an operational period of three years. The prosecution conceded at the sentence that the violence was low level and that was noted by the sentencing judge.

[12] The applicant relied on the statement of agreed facts that was tendered by the prosecution, with the agreement of the respondent, at the sentence hearing for stalking. Although the respondent has subsequently disputed that he agreed to that statement of facts, that was the basis on which the sentencing proceeded. The statement of facts annexed documents including the correspondence and documents generated by the respondent that was relied on by the prosecution as conduct comprising the stalking. The following summary comes from the agreed statement of facts. Before the separation of the respondent and his wife, they had been leading independent lives. The separation was effected by the respondent's wife moving out of the matrimonial home. In the following month at the office, the respondent approached his wife from behind and put his hands around her throat and began squeezing her throat. When his wife took an overseas trip in April 2001, she was locked out of the office on her return. When she attended at the office on 30 April 2001 to collect documents, the respondent refused to allow her to leave, they struggled and she suffered a chip fracture of the dorsal aspect of her ring finger. On a couple of occasions the respondent took the car that his wife had been using without telling her. The respondent changed the locks on matrimonial properties over which his wife was exercising control, without notice to her.

[13] The respondent sent four to five emails per day over a period of three months to his wife's brother suggesting that his wife needed psychiatric help. The respondent sent three letters to his wife's elderly parents suggesting she was in need of psychiatric help. The respondent sent letters to the Queensland Law Society complaining about the conduct of his wife. The complaints were either baseless or not conduct appropriate for investigation by the Law Society. The respondent and his wife had founded the Wagner Society and he sent a series of letters to committee members of that Society making allegations against his wife. He purported to enclose a claim and statement of claim issued by him against his wife and other committee members in the Magistrates Court at Beenleigh in relation to the purchase of a ticket for a performance for $275 that he alleged was misappropriated by his wife. No such proceeding was actually issued. The letters were sent on the respondent's law firm's letterhead. The respondent sent a series of letters to a friend of his wife purporting to involve the friend in pending court proceedings. Some of these letters were on the respondent's firm's letterhead.

[14] In February 2002, the respondent's wife was endeavouring to rent one of the matrimonial properties. She organised to meet the prospective tenants at the property, but when she arrived for the meeting, the respondent was speaking to them and they did not contact her again. The respondent then told his wife that he was intending to move into that property, which adjoined the property in which she was living. The respondent sent letters on his firm's letterhead to the tenants of the rented matrimonial properties that were being managed by his wife. The respondent sent large amounts of correspondence to his wife by facsimile at her place of employment. The respondent sent correspondence to his wife that she found to be offensive, harassing, annoying and embarrassing.

[15] For the purpose of the sentence, the respondent's treating psychiatrist provided a report to the court dated 22 June 2005 that was also tendered at this hearing (exhibit 5). The psychiatrist had been treating the respondent since October 2002 and noted

a history of undiagnosed bipolar disorder. The respondent was commenced on anti-depressant medication and a mood stabilising agent. The psychiatrist expressed the opinion that the respondent had improved over the time that he had treated him and that there were certain obsessive personality traits. The respondent's psychiatrist noted that the respondent was under a significant amount of stress in relation to the property settlement with his wife.

[16] The conduct that was relied on to establish the offence of stalking was committed over a lengthy period of time and involved a misapplication by the respondent of the resources available to him as a practising solicitor. The respondent's stalking was partly constituted by the respondent sending letters to various parties on his professional letterhead that suggested the letters were sent by the respondent in his professional capacity as a solicitor, when that was not the case. He also used his professional knowledge of court forms to suggest that he had issued proceedings against his wife and the other committee members of the Wagner Society. It was also relevant that one aspect of the circumstance of aggravation was that the stalking was committed in breach of a Magistrates Court order. The seriousness of the respondent's conduct for the purpose of this application arose from its persistence and repetition. It showed lack of judgment on the respondent's part in how he conducted himself towards his wife after the breakdown of their relationship.

[17] Under s 420 of the Act, conduct for which there is a conviction for a serious offence (which covers stalking) is capable of constituting unsatisfactory professional conduct or professional misconduct. The applicant relied on the decision of the Full Court of the Supreme Court of Western Australia in *Legal Practitioners Complaints Committee v Tomlinson* [2006] WASC 211. In that matter a solicitor's name was struck from the roll of practitioners after he had been convicted of stalking his former girlfriend over a period of four months. There was psychological evidence that the practitioner was suffering a post traumatic stress disorder in response to the break-up with his girlfriend from which he had not recovered by the time of the application before the Full Court. He had not undergone treatment after being informed about the psychological evidence of his condition. The court at paragraph [22] described the stalking as "conduct inimical to his capacity to practice *(sic)* as a legal practitioner and there can be no confidence, in the circumstances, that that capacity will be restored." In order to protect the public, the practitioner's name was struck off the relevant roll.

[18] The acts that comprised the stalking in the Western Australian case were more serious than those of the respondent, but the respondent's conduct was committed over a much lengthier period. The circumstances of the respondent's offending conduct justify its characterisation as professional misconduct.

Charge 2 – Neglect and delay (Hamilton complaint)

[19] In January 2001 Ms Hamilton retained the respondent to act in a claim for criminal compensation. The respondent received approval of a grant of aid from Legal Aid Queensland, subject to Ms Hamilton making a co-contribution of $350. Ms Hamilton had paid the total of $350 by 21 September 2001. Ms Hamilton attended

on the respondent on 7 November 2001 for the purpose of giving further instructions. Between November 2001 and October 2002 the respondent took no material steps to progress the matter. On 12 February 2003 the respondent prepared and delivered a brief to counsel. At no time did the respondent advise Ms Hamilton of the statutory time limit for bringing an application for criminal compensation. If she did have a good claim, it would have been statute-barred on 18 February 2003. Ms Hamilton was subsequently advised by other solicitors that as the offender was convicted of stalking, and not assault, she could not have been successful in a claim for criminal compensation.

[20] The gist of the complaint that is particularised in the disciplinary application in respect of the respondent's conduct in acting for Ms Hamilton is that, as a result of his failure to maintain reasonable standards of competence and/or diligence, the complainant's claim for criminal compensation became statute-barred. As there was not a claim that could be successfully pursued, the respondent's conduct did not have the consequence that is relied upon by the applicant to show lack of competence. The Tribunal must decide the charge on the basis of the allegations that are made by the applicant: *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301 at paragraph [93]. It therefore follows that the respondent must be found not guilty of charge 2.

Charge 4 – Neglect and delay (Adamson complaint)

[21] In November 2002 Ms Adamson retained the respondent to act on her behalf in the administration of the estate of her deceased mother. The administration of the estate required a grant of probate to transfer the mother's house property in New South Wales. Between February and June 2003 the respondent did not take any material step to progress the matter. On 4 June 2003 he wrote to solicitors in New South Wales about the certificate of title and those solicitors then advised on 13 June 2003 that a grant of probate would be required. Between June 2003 and June 2004 the respondent did not take any material step to progress the matter. The grant of probate was obtained from the Supreme Court on 15 July 2004. The respondent failed to collect the grant of probate or deliver it to Ms Adamson until after 16 September 2004.

[22] The respondent addressed this charge in paragraphs 89 and 90 of his affidavit. In relation to the delays in collecting the grant of probate from the registry of the court, the respondent explained that it was the registry's fault, because they put the grant of probate in the wrong pigeonhole. In relation to the delays in the administration of the estate, the respondent blamed difficulties he had in dealing with the New South Wales solicitor who was holding the title deed. The gravamen of the complaint was that there were at least two periods, each of three months, and one period of six months where no steps were taken by the respondent to advance the administration of the estate. That was not addressed by the respondent. Such delays were serious enough to justify a finding of unprofessional conduct or practice within s 3B of the *Queensland Law Society Act* 1952. That makes the respondent guilty of unsatisfactory professional conduct.

Charge 6 – Neglect (Monaghan complaint)

[23] In February 2004, Mr Monaghan retained the respondent to act for him in respect of family law property proceedings. The respondent attended before the Federal Magistrates Court when an order was made that the parties attend at a conciliation conference at Relationships Australia Queensland on 30 July 2004. A letter was sent to the respondent's firm dated 1 July 2004 by the Federal Magistrates Court confirming the details of the appointment for the conciliation conference that was ordered by the Federal Magistrate. Mr Monaghan attended the conference without the respondent who had informed him that there was no need for him to attend the conciliation conference. The allegation made by the applicant is that the respondent failed to maintain reasonable standards of competence and/or diligence by failing to attend the conciliation conference in accordance with the order made by the Federal Magistrate.

[24] The respondent addressed this charge in paragraphs 7 to 13 of his affidavit. Although the respondent explained why he rationalised that the attendance by him was not essential, he did not fulfil his obligation in acting for Mr Monaghan in his family law property proceedings. The respondent was wrong when he advised the client that there was no need for the respondent to accompany him to the conciliation conference. He did not appreciate, and failed to take the steps to ascertain, what the conciliation conference required both of him and his client. The lack of competence in the circumstances is properly characterised as unsatisfactory professional conduct.

Charge 7 – Neglect and delay (Arnell estate)

[25] The respondent was appointed the sole executor and trustee of the last will of Mr Arnell who died unexpectedly on 13 February 2004. Probate of the deceased's will was granted to the respondent on 15 July 2004. Mr Arnell was survived by four children, one from his first marriage and the other three from his second marriage. They were the beneficiaries under the will. Solicitors acting for the beneficiaries regularly requested information from the respondent from March 2004. The respondent did not give informative responses. He wrote many letters to the solicitors for the beneficiaries, but they provided little information and were not responsive to the reasonable requests made on behalf of the beneficiaries. On 21 July 2004 the three younger children applied for an order that the respondent be removed as the executor and trustee under the will. That order was made by Douglas J on 16 August 2004 who found that there had been unwarranted delay in the administration of the estate by the respondent and failure to communicate with the beneficiaries. Douglas J requested the Registrar of the court to forward the affidavits to the Law Society for its consideration.

[26] The respondent addressed this charge in paragraphs 1 to 3 of his affidavit. He relied on the chronology of his file which showed his significant level of attendance to the estate. The problem was his frequent letter writing and other attendances did not advance the matter in the usual way and gave rise to the complaints by the beneficiaries that were found to justify the respondent's removal as executor and

trustee. Even though the delays occurred over a period of six months only, the manner in which they occurred amounted to unsatisfactory professional conduct on the respondent's part.

Charge 8 – Breach of duty of candour (Overton complaint)

[27] Ms Overton retained the respondent in June 2003 to act as her solicitor in family law proceedings. Ms Overton had been in a de facto relationship and there was a child of that relationship. An application was made by the grandmother of the child seeking a contact order. Her former de facto partner made an application seeking a residence order or, alternatively, an order for contact. There was also a property owned jointly by Ms Overton with her de facto partner to be dealt with. Ms Overton entered into a client agreement with the respondent that provided for the respondent's costs and outlays to be charged on any property transferred or distributed to her in consequence of the matter.

[28] In October 2003 Ms Overton moved to Sydney and informed the respondent of her contact details in Sydney. The respondent received several letters and other telephone calls from the respondent's firm at her Sydney address. Apart from the court hearings at which the respondent represented Ms Overton, Ms Overton dealt almost exclusively with the respondent's articled clerk.

[29] By December 2003 Ms Overton was concerned with the way her matters were being handled by the respondent and made a direct approach to barrister, Mr Laws, on the recommendation from another person for whom Mr Laws had acted. On 23 December 2003 Ms Overton sent a letter (with no address shown for her) to the respondent instructing him to copy all filed documents and correspondence to Mr Laws. The respondent did not do so. The respondent sent a letter dated 23 December 2003 to the Ms Overton by facsimile to a New South Wales number advising that the applications may be able to be resolved by negotiation and that it may not be necessary to brief counsel to appear on the hearing date. Mr Laws had drafted a letter for Ms Overton which she attached to her letter dated 7 January 2004 to the respondent and expressly adopted the terms of the letter. Ms Overton requested the respondent to deliver up her files immediately. When the respondent did not respond to the further request made by Ms Overton, she advised him on 8 January 2004 that she accepted his conduct as repudiation of his retainer.

[30] On 12 January 2004 the respondent filed in the Family Court a notice that he had ceased to represent Ms Overton. That notice recited that the respondent had received notice in writing from Ms Overton on 7 January 2004 and a further notice in writing from Mr Laws that the respondent was no longer instructed in the matter. The notice recited that he was instructed that the future address for service of Ms Overton was care of Mr Laws. He also advised in the notice that the last known address of Ms Overton was care of her father at his address at Beenleigh. The respondent advised Ms Overton by letter that this notice had been filed with the court. Ms Overton also filed a notice of address for service in the Family Court dated 19 January 2004 that showed her address for service as the address of her father at Beenleigh. Ms Overton did not state in her affidavit why she nominated to the court the Beenleigh

address as her address for service. Ms Overton returned to Sydney sometime in January 2004 and remained there until July 2004.

[31] The respondent sent a bill of costs to Ms Overton at the Beenleigh address. It was dated 15 January 2004, but Ms Overton believed that she did not receive it until well after 20 January 2004. Ms Overton did not suggest in her affidavit that she contacted the respondent to advise him not to treat the Beenleigh address as her address.

[32] The respondent issued a claim and statement of claim in the Magistrates Court at Beenleigh against Ms Overton for the sum of $22,040.80 for professional services, as per the bill of costs dated 15 January 2004. The address for service of Ms Overton was shown as the Beenleigh address and that is where the claim and statement of claim were served on Ms Overton's mother on 23 February 2004 who accepted service and advised the process server that she would pass the documents onto Ms Overton.

[33] There was some delay in Ms Overton's parents passing the documents that were served on behalf of the respondent to Ms Overton and she missed the time limit for filing a defence. The respondent obtained judgment in default of a defence being filed on 24 March 2004. He obtained an enforcement warrant for seizure and sale of property on 31 March 2004 and that was registered on the respondent's interest in the real property that she owned with her de facto partner that was the subject of a property settlement between them. The applicant alleged that the respondent breached his duty of candour to the Magistrates Court when he obtained default judgment against Ms Overton, because he did not disclose to the Magistrates Court that Ms Overton's last know address was the address at which he had corresponded with her in 2003 in Sydney, there was no reason to believe she resided at the Beenleigh address and that he had recently corresponded with Ms Overton at the Sydney address.

[34] The respondent provided an explanation in paragraphs 14 to 49 of his affidavit for why he used the Beenleigh address in the Magistrates Court proceedings. When the respondent's father came to pick up Ms Overton's file on or about 24 December 2003, the respondent told him that he could not give him the file until he had rendered an account. The respondent asked Ms Overton's father where he should send the account and Mr Overton told the respondent to send it to the Beenleigh address, as Ms Overton would be there until there until the matter with the child was sorted out. The applicant did not obtain an affidavit from Mr Overton for the purpose of the application.

[35] The respondent explained that he had telephoned the number that Ms Overton had given him in Sydney and spoke with a relative who advised him that Ms Overton was not there and that she stayed with them while she was in Sydney. Although he respondent did not identify the timing of that telephone call, it affected his approach, as he had decided the relative was evasive and he was concerned that Ms Overton was reluctant to pay his costs.

[36] The time for judging whether the respondent breached his duty of candour was at the time he filed the request for judgment in the Magistrates Court. Although paragraph 8.12 of the particulars of charge 8 relied on by the applicant claims that "at all material times" the respondent knew, or ought to have know that Ms Overton's last know address was the Sydney address, that allegation has to be confined to the respondent's state of knowledge at the time it is alleged that he breached his duty of candour.

[37] It is for the applicant to prove the allegation of fact that is relied upon to establish the charge on the balance of probabilities: s 649 of the Act. The respondent had the process server's report of the acceptance of service of the claim and statement of claim and the advice that Mr Overton had given him about where to send his account. In the absence of evidence from Mr Overton, I am not satisfied that the applicant has established that the respondent knew, or ought to have known, that Ms Overton's address was her Sydney residence. Ms Overton also seemed to have endorsed the use of her parents' address by herself nominating that to the court as her address for service. The respondent must be found not guilty of charge 8.

Charge 9 – Swearing false and/or misleading affidavit

[38] Ms Overton filed an application to set aside the default judgment obtained by the respondent. On 20 August 2004 the respondent swore an affidavit that was filed in response to the application. The applicant relied on two passages from the respondent's affidavit to support charge 9 that the respondent's affidavit was false and/or misleading.

[39] For the same reason that I have not been satisfied in relation to charge 8, I consider that to the extent that paragraph 6 of the respondent's affidavit is relied on by the applicant, it cannot be said that the applicant has shown that the respondent's knowledge of Ms Overton's address at the time of service of the claim and statement of claim was other than as set out in paragraph 6. Paragraph 6 did not purport to deal with the respondent's knowledge of Ms Overton's address at all times:

> "The client was served at her last known address which was in Beenleigh. Her home address in Beenleigh was the address for all communication. The Process Server asked her mother the usual questions in relation to service and she responded in the affirmative."

[40] The position in relation to paragraph 9 of the respondent's affidavit is different. The relevant part of paragraph 9 that is relied on by the applicant is:

> "References to communication with Sydney related to a fax number which was given in Sydney and, so far as I am aware, only one document, was faxed. After the client gave up her apartment in Sunnybank all communication was with the address in Beenleigh. The client's father attended at the office and advised that all communication should be made to the Beenleigh address and I note the client gives the Beenleigh address as her address for the purpose of this application."

[41] Although the communications that were sent from the respondent's firm to Ms Overton after she moved to Sydney were generated by his articled clerk, a perusal of the file would have shown that there were a number of communications in November 2003 from the respondent's firm to Ms Overton in Sydney and that it was wrong to state that after Ms Overton had left Sunnybank "all communication was with the address in Beenleigh". In addition, the respondent's facsimile of 23 December 2003 was sent to Ms Overton at a New South Wales number. The respondent was reckless in asserting that all correspondence was sent to the Beenleigh address. To that extent, the applicant has proved that the respondent made a representation in his affidavit sworn on 20 August 2004 that was false and/or misleading at the time the affidavit was sworn. In the circumstances, however, that could not be characterised as any more then unsatisfactory professional conduct.

Charge 10 – Correspondence to the Legal Services Commission

[42] The applicant alleged that the respondent's correspondence to the Legal Services Commission (the Commission) between 26 April 2006 and 5 September 2007 was conduct that would justify a finding that he is not a fit and proper person to engage in legal practice. In that period the respondent sent 112 letters and facsimiles to the Commission. The correspondence is exhibited to the affidavit of Mr Brittan who is the manager of complaints at the Commission.

[43] In order to properly consider the submissions made by the applicant based on this correspondence, it is relevant to summarise the course of the correspondence. In some instances more than one copy of the same letter were sent by the respondent by facsimile to the Commission on the same day. On 26 April 2006 the respondent made a complaint to the Commission against the prosecutor and his own defence counsel in relation to the sentence hearing. On 15 May 2006 the Commission dismissed the compliant against the defence counsel. There was a lengthy letter in response from the respondent dated 16 May 2006. On 17 May 2006 the Commission dismissed the complaint against the prosecutor. On 22 May 2006 the respondent sent a letter to the Commission to explain that his letter of 16 May 2006 was "simply correcting the record". The Commission responded on 23 May 2006. The respondent then wrote a letter dated 24 May 2006 to the Commission in respect of both the prosecutor and his defence counsel. On 7 June 2006 the respondent advised the Commission that he had raised the matter of the prosecutor's conduct with senior counsel who gave him advice about approaching the Director of Public Prosecutions and the Attorney-General.

[44] On 13 June 2006 the respondent wrote directly to the Commission in response to the Commission's letter addressed to solicitors who had been acting for him in relation to the Overton complaint. The respondent sent another letter dated 13 June 2006 to the Commission about the same matter. By letter dated 21 June 2006 and two letters dated 22 June 2006 the respondent raised further matters with the Commission in relation to the Overton complaint. On 6 July 2006 the respondent wrote a letter to the Commission inquiring whether there were any outstanding queries to which he had failed to respond. The respondent sent another letter on 6 July 2006 seeking "a copy of the prosecution material" relating to the disciplinary

proceeding. On 7 July 2006 the Commission received by post a letter from the respondent dated 19 June 2006 about the Overton compliant.

[45] On 4 August 2006 the Commission replied to the respondent's letter of 7 June 2006 about the prosecutor, advising that nothing had changed the Commission's previous determination not to take any further action on the complaint. The respondent sent a letter to the Commission dated 14 September 2006 about the circumstances of his plea of guilty to the stalking charge and that he considered that he should pursue his complaint against his defence counsel. The Commission treated that as a complaint against the defence counsel and advised the respondent on 19 September 2006 that the matter had been referred to the barrister for a response. There were three letters from the respondent received on 20 September 2006 in response to that proposal. The respondent then sent a lengthy letter dated 22 September 2006 on the issue of whether he had intended to plead guilty to stalking with the circumstance of aggravation of violence. The Commission then advised the respondent on 22 September 2006 that his further letter had been forwarded to the barrister for comment. There were further letters on the same matter from the respondent dated 29 September and 4 and 9 October 2006. By letter dated 25 October 2006 the respondent informed the Commission of the further inquiries that he had been making in relation to his sentencing and made a statement in the letter:

> "It is a matter of some alarm that every instrumentality, including even my own counsel, refuse to investigate the clear evidence in support of the contentions raised by me."

[46] By letter dated 26 October 2006 the Commission advised that it took exception to that statement in the letter dated 25 October 2006 as the respondent's complaint against his counsel was still being investigated by the Commission. On 1 November 2006 the respondent advised that the statement had not been directed to the Commission.

[47] On 8 and 15 November 2006 the respondent advised the Commission on the progress of the steps that he was taking in relation to the agreed statement of facts that was put before the court on the sentencing. On 30 November 2006 the Commission advised the respondent that it proposed to take no further action on the respondent's complaint against his defence counsel. The respondent sent two letters dated 4 December 2006 to the Commission in response.

[48] On 7 December 2006 the Commission sent a letter to the respondent advising that the Commissioner had decided to start an investigation into the respondent's conduct in relation to the information that was provided to the Commission during the investigation of the respondent's complaint against his defence counsel. The respondent supplemented his letter of 4 December 2006 with one sent on 8 December 2006 and responded to the Commission's letter of 7 December 2006 with letters sent on 11, 13, 19, 19, 20 and 20 December 2006. The Commission responded to the letters of 19 and 20 December 2006 by letter dated 22 December 2006. That was received by the respondent on 8 January 2007 and the respondent sent a letter of the same date requesting a response to the queries made in his letters of 11, 13 and 19 December 2006. The Commission responded by letter dated 15 January 2007 to which the respondent replied on 16 January 2007. The

respondent sent a further letter dated 18 January 2007 raising the issue of legal professional privilege to which the Commission responded on 22 January 2007.

[49] The respondent sent a letter to the Commission dated 30 January 2007 in response to the Commission's letter dated 29 January 2007 dealing with the discipline application against the respondent. By letters dated 8 and 9 February 2007, the respondent informed the Commission about his proposed application for a re-hearing of his sentence. The Commission responded by letter dated 13 February 2007. Further letters about the proposed application for re-hearing were sent by the respondent to the Commission on 13, 14 and 28 February 2007.

[50] By letter dated 4 March 2007 the respondent addressed matters raised in the Commission's letter dated 15 January 2007. The respondent raised the difficulties he had in gathering information for his application for a re-hearing of his sentence. The Commission replied on 27 March 2007 to which the respondent responded on 28 and 29 March 2007. The Commission advised the respondent on 29 March 2007 that it was proposing to list the discipline application for mention on 18 April 2007 to which the respondent replied on 30 March and 2 April 2007.

[51] On 3 April 2007 the respondent replied to the Commission's letter dated 30 March 2007 which had dealt with the allegation in the respondent's letter dated 28 March 2007 against an employee of the Commission. Another letter on that topic was also sent by the respondent on 3 April 2007. Further letters were sent by the respondent to the Commission on 3 and 5 April 2007 relating to the discipline application.

[52] The respondent updated the Commission on the progress of his application for a re-hearing of his sentence by letter dated 18 April 2007. Further lengthy letters from the respondent were sent to the Commission on 19 and 20 April 2007. The respondent sent a letter to the Commission on 21 April 2007 about the Arnell complaint. There was a further letter from the respondent on 21 April 2007 and two letters on each of 22 and 23 April 2007. There were two letters on 2 May 2007 and a letter on 4 May 2007 from the respondent to the Commission about the proposed application for re-hearing of the sentence. On 14 May 2007 the respondent raised with the Commission a query which he said was relevant to his application for re-hearing. The Commission replied to that letter on 16 May 2007 to which the respondent replied on 18 May 2007 by two letters. Further letters were sent by the respondent on 25 May 2007 and two letters on 7 June 2007.

[53] In early July 2007 the Commission inquired of the respondent about the progress of the application for re-hearing of the sentence. The respondent sent letters dated 5, 6 and 7 July 2007 in reply. The Commission requested further information of the respondent by letter dated 10 July 2007 to which the respondent replied by three letters dated 11 July 2007. In those letters the respondent made allegations against staff of the Commission that provoked a letter from the Commission dated 12 July 2007 describing the respondent's letters dated 11 July 2007 as "scandalous and insulting".

[54] The respondent sent further letters to the Commission about the proposed application for re-hearing on 14, 16, 16, 17, 23, 27 and 31 July 2007. The respondent provided the Commission with further updates on 7 and 22 August 2007. In its letter dated 28 August 2007 the Commission advised the respondent that there was a case management conference of the discipline application scheduled for 6 September 2007. The respondent replied on 29 August 2007 by three letters. Two further letters were sent by the respondent on 30 August 2007 and three further letters were sent by him on 31 August 2007. After a letter of reply from the Commission was sent on 31 August 2007, a further letter in reply was sent by the respondent on 31 August 2007.

[55] In the particulars of charge 10, the applicant alleged that in the course of his voluminous correspondence with the Commission, the respondent failed to take all reasonable care to maintain the integrity and reputation of the legal profession, in that the correspondence was discourteous, offensive, unbecoming of a solicitor and likely to bring the legal profession into disrepute.

[56] Some of the correspondence was responsive to letters that were sent to the respondent by the Commission. In general terms, however, the correspondence showed that the respondent lacked judgment in communicating with the Commission and lacked insight about his behaviour that had resulted in the stalking conviction and his inability to treat that episode as finished after the sentencing and his abandonment, on legal advice, of his appeal against the sentence. The way in which the respondent generated multiple letters on the same day or in the space of a few days was not a reasonable and professional way to respond to correspondence from the Commission.

[57] The respondent addressed this correspondence in paragraphs 83 and 84 of his affidavit filed on 26 May 2008. His explanation was that he felt he was confronted with an aggressive attitude from the Commission and he responded in kind:

> "I suspect those letters are being made the subject of the further charges of writing disrespectful correspondence. I cannot remember what the letters said. They were rattled out as thought took me. They were written in anger and in circumstances of perceived persecution."

[58] The correspondence of the Commission that is properly included in Mr Brittan's affidavit to give a complete picture of the correspondence from the respondent that is the subject of charge 10 did not exhibit an "extremely aggressive attitude".

[59] Paragraph 84 of the respondent's affidavit stated:

> "I cannot really remember what the dealing with the Commission was, though I am aware that I wrote some hostile letters to them and those letters probably became more hostile after the Commission jumped up and down with glee and told me that they would use them against me."

[60] The applicant submitted that the respondent's correspondence was erratic, rude, and offensive and unresponsive to the Commission's correspondence.

[61] No doubt the respondent felt under pressure after the filing of the discipline application. His reaction to that pressure, revealed by his correspondence with the Commission, was not professional, showed a complete lack of judgment and insight about his own conduct, and confirmed that he was not fit to practise as a solicitor. The correspondence which is the subject of charge 10 amounted to professional misconduct on the part of the respondent of a very serious kind.

Findings

[62] The findings in respect of each of the charges are:

Charge 1	The respondent is guilty of professional misconduct
Charge 2	Not guilty
Charge 4	The respondent is guilty of unsatisfactory professional conduct
Charge 6	The respondent is guilty of unsatisfactory professional conduct
Charge 7	The respondent is guilty of unsatisfactory professional conduct
Charge 8	Not guilty
Charge 9	The respondent is guilty of unsatisfactory professional conduct
Charge 10	The respondent is guilty of professional misconduct

Submissions of the applicant

[63] The applicant relied primarily on charges 1 and 10 to submit that the respondent's demonstrated unfitness to practise by his conduct that resulted in the stalking conviction had not changed as it was replicated by the course of his correspondence with the Commission between April 2006 and September 2007. The applicant therefore submitted that the only appropriate disciplinary order in the circumstances was that the respondent's name be removed from the local roll. The applicant also sought an order for costs fixed in the amount of $10,000, given the lengthy history of the disciplinary application and the voluminous affidavit material that was required to support it. The applicant submitted that both the delays in the resolution of the application and extent of the material generated by the applicant were due to the conduct of the respondent that was the subject of the charges and while the discipline application was progressing.

Conclusion

[64] The conduct that resulted in the stalking conviction was committed by the respondent while he was stressed as a result of the breakdown of his marriage and ensuing Family Court proceedings. The psychiatrist's report that was relied on at the sentencing was somewhat positive about the respondent's likely future conduct. This was because the respondent was receiving treatment from the psychiatrist for his bipolar disorder and his significant depressive mood swings were a reaction to the criminal and Family Court proceedings (which it was anticipated would eventually resolve). Despite the improvement that was apparent at the time of the preparation of that report for the purpose of the sentence, the cautious optimism was not reflected in the subsequent behaviour of the respondent in his dealings with the Commission that are the subject of charge 10. The obsessional personality traits

that were noted by the respondent's psychiatrist appeared to dominate that correspondence.

[65] The power given by the Tribunal to remove the name of a practitioner from the relevant role of practitioners is exercised for the protection of the public and for the standing of the legal profession: *Attorney-General v Bax* [1999] 2 Qd R 9, 22. While the respondent's conduct that was the subject of the charges 4, 6, 7 and 9 would not, by itself, show unfitness to practise, the conduct that was the subject of charges 1 and 10 demonstrated unequivocally the respondent's unfitness to practise.

[66] The order that should be made is that the name of the respondent be removed from the local roll.

[67] Under s 462 of the Act, the Tribunal must make an order requiring a person whom it has found guilty to pay costs, unless the Tribunal is satisfied exceptional circumstances exist. As the applicant has largely succeeded in proving the charges against the respondent, but particularly the more serious charges 1 and 10, there is no reason not to make an order for costs against the respondent. No doubt the rationale for the applicant seeking that the quantum of the costs be fixed is to bring the matter to a conclusion. Even on a standard basis, I can estimate from the volume of the material relied on by the applicant on the application in relation to the charges that have been proved and the chronology of the steps required to progress the application (exhibit 3) that the assessed costs on a standard basis of the applicant in respect of this proceeding must be in excess of $10,000. It is therefore reasonable and appropriate in the circumstance to make the order for costs fixed in the sum of $10,000 that was sought by the applicant.

[68] The formal orders that will be made are:

1. The name of the respondent, Brynly Whynford Thomas, be removed from the roll of solicitors kept by the Supreme Court of Queensland.
2. The respondent pay the applicant's costs of the application fixed in the sum of $10,000.