

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Challen* [2019] QCAT  
273

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

v

**PETER LESLIE CHALLEN**  
(respondent)

APPLICATION NO/S: OCR094-16

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 17 September 2019

HEARING DATE: 12 September 2018

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President

Assisted by:

Ms Julie Cork

Mr Michael John Douglas Meadows

- ORDERS:
- 1. The respondent, Peter Leslie Challen, is publicly reprimanded.**
  - 2. Pursuant to s 456(4)(a) of the *Legal Profession Act 2007*, the respondent shall pay a penalty of \$10,000.**
  - 3. The respondent shall pay the applicant's costs of and incidental to the discipline application, such costs to be assessed on the standard basis 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 – SOLICITOR'S COSTS – where the respondent is charged with one charge of charging a client fees that were grossly excessive – where the overcharging occurred in relation to one client and one matter over a period of some 18 months – where there was no dishonesty or improper motive – where the respondent accepts that that conduct constituted professional misconduct – where the respondent has taken significant steps by way of rehabilitation – whether the conduct should be characterised as professional misconduct under s 419 of

the *Legal Profession Act 2007* – whether to order a public reprimand of the respondent and that the respondent pay a pecuniary penalty under s 456 of the *Legal Profession Act 2007*

*Legal Profession Act 2007*, s 420(1)(b), s 456

*Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408

*Legal Services Commissioner v Brown* [2018] QCAT 263

*Legal Services Commissioner v Jackson* [2017] QCAT 207

*Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149

*Legal Services Commissioner v McDonald* [2018] QCAT 82

*Picamore Pty Ltd v Challen* [2015] QDC 67

*Re Veron; Ex parte Law Society of New South Wales* (1966) 1 NSW 511

#### APPEARANCES & REPRESENTATION:

Applicant: G R Rice QC instructed by Legal Services Commissioner  
Respondent: G M Cranny, solicitor of Gilshenan & Luton

#### REASONS FOR DECISION

- [1] In this discipline application under the *Legal Profession Act 2007* (“LPA”), the applicant Legal Services Commissioner (“LSC”) has proceeded against the respondent solicitor, Peter Leslie Challen, with one charge, namely that between 1 March 2011 and 12 September 2012, the respondent charged his client, Picamore Pty Ltd (“Picamore”), fees that were grossly excessive.
- [2] The matter proceeded before this Tribunal on the basis of an Agreed Statement of Facts, from which the following is derived.

#### Background

- [3] The respondent was and is a sole practitioner in Brisbane, and the principal of Hawthorn Cuppaidge & Badgery (“HCB”).
- [4] On 1 March 2011, the respondent purchased the law practice of John Neave O’Donaghue at Kenmore. After the purchase, the respondent registered the business name “John Neave O’Donaghue Solicitors” (“JNODS”). Thereafter, the respondent traded from the premises of both law firms, effectively operating under two business names and out of two separate locations. Mr O’Donaghue remained at JNODS in Kenmore as a consultant, and the respondent remained at HCB in Brisbane city.
- [5] Prior to the respondent’s purchase and registering of JNODS, Picamore had instructed Mr O’Donaghue to act on behalf of the company and the company’s investors/guarantors in connection with a dispute involving property near Byron Bay,

New South Wales (“the Picamore matter”). At the time of the respondent’s purchase, Mr O’Donaghue had acted for those clients for approximately 12 years.

- [6] The respondent was first introduced to the Picamore matter by Mr O’Donaghue in early June 2011. Mr O’Donaghue continued to have carriage of the Picamore matter until October 2011.
- [7] The respondent’s involvement in the Picamore matter between June and October 2011 was initially familiarising himself with the extensive history of the matter, participating in conferences with Mr O’Donaghue and the client, and investigating factual and legal issues concerning potential matters in dispute.
- [8] Despite there being no conflict of interest, it was agreed in or about late September 2011 that the respondent would have carriage of the matter on behalf of Picamore and Mr O’Donaghue would have carriage of the matter for the investors/guarantors.
- [9] Before the respondent’s involvement, Mr O’Donaghue had not entered into any costs agreement with Picamore or its investors/guarantors. When he became aware of this in October 2011, the respondent entered into two costs agreements: one between HCB and Picamore, and one between JNODS, Picamore and the investors/guarantors.
- [10] The costs agreement between Picamore and HCB estimated total legal costs in the range of \$70,000 - \$90,000. That range was an estimate for HCB’s initial investigation into, and advice on, the matter prior to any court action being commenced. HCB indicated in the costs agreement that they were unable to estimate litigation costs at that stage.
- [11] On 6 October 2011, the respondent rendered a tax invoice to Picamore in the sum of \$77,923.10 for costs and outlays incurred between March and October.
- [12] Following that invoice, proceedings against Picamore and its investors/guarantors were commenced in the Supreme Court of New South Wales in Sydney. The respondent then took full carriage of the matter on behalf of Picamore and the investors/guarantors in October 2011.
- [13] HCB rendered further tax invoices to Picamore, prepared by the respondent, as follows:
- (a) 10 November 2011 - \$20,092.80
  - (b) 8 February 2012 - \$25,852.34
  - (c) 5 April 2012 - \$8,753.87
  - (d) 30 April 2012 - \$40,759.42
  - (e) 21 June 2012 - \$81,569.96
  - (f) 22 August 2012 - \$31,972.06
- [14] For the purposes of the court proceedings in New South Wales, the respondent retained the services of two Sydney law firms: one to act for Picamore, and the other to act for the investors/guarantors. The firm acting for the investors/guarantors subsequently briefed a Sydney barrister.

- [15] In mid-September 2012, the Sydney firm which was acting for the investors/guarantors told the respondent that they were being instructed directly by Picamore and the investors/guarantors, and that the services of the other Sydney law firm were being cancelled. Picamore then emailed the respondent and advised him to stay in “pause mode”.
- [16] By that time, the respondent had billed Picamore a total of some \$286,000, all of which had been paid to the respondent.
- [17] The only cost estimate which had been provided was the initial estimate in October 2011.
- [18] In July 2013, Picamore applied for an assessment of the invoices that had been rendered by the respondent. A costs assessor, Ms Davis, filed a certificate of assessment in the Brisbane District Court on 5 February 2014. She had assessed the costs payable by Picamore and its directors at \$106,378 plus GST.
- [19] The respondent then applied to the District Court for a review of that assessment. The matter ultimately came before McGill SC DCJ, whose judgment was delivered on 31 March 2015.<sup>1</sup> His Honour ordered that the amount of the assessment be increased by \$20,304. This made the total of the assessed fees payable by Picamore \$126,682 plus GST. It meant that Picamore had been overcharged by \$160,241.55.
- [20] That amount, along with all legal costs ordered by the Court on the standard basis, was repaid by the respondent to Picamore.

### **Characterisation of the conduct**

- [21] By s 420(1)(b) of the LPA, the charging of excessive legal costs in connection with the practice of law is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct under the LPA. This reflects the well-established position at common law that gross overcharging by a solicitor may constitute professional misconduct.<sup>2</sup>
- [22] Whilst a disparity between the amount of fees charged and the amount derived on an assessment is not necessarily conclusive of a finding of overcharging, it is nevertheless appropriate for the Tribunal to have regard to the extent of the disparity, and the reasons for the differential, to determine whether a finding of professional misconduct ought be made. It is sufficient for present purposes to repeat and adopt the observations made in this Tribunal by Thomas J in *Legal Services Commissioner v Jackson*:<sup>3</sup>

[95] It is a well-established principle that a Tribunal not bound by the rules of evidence may take into account findings of another court or tribunal.<sup>4</sup>

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<sup>1</sup> *Picamore Pty Ltd v Challen* [2015] QDC 67.

<sup>2</sup> See, for example, *Re Veron* (1966) 1 NSWLR 511 at 517.

<sup>3</sup> [2017] QCAT 207.

<sup>4</sup> *General Medical Council v Spackman* [1943] AC 627 at 637; *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 288, 303; *In re a Solicitor* [1993] QB 69; *Wilks v Medical Board of South Australia* [2010] SASC 287.

- [96] In *Nikolaidis*, the observation was made that a disparity between a bill of costs as rendered and a bill of costs as taxed did not necessarily lead to the conclusion of overcharging, and the evaluative judgment of the Tribunal or Court, based upon practical legal experience, is relied on in deciding whether the difference amounts to gross overcharging.<sup>5</sup>
- [97] It is undoubtedly the case (and is broadly accepted) that whilst the taxed amount is not necessarily the sole factor to be taken into account, the Tribunal is entitled to rely upon the taxed amount as the appropriate standard, and to determine, by reference to that taxed amount, that the amount in fact charged was grossly excessive. In *D'Allesandro*, the court concluded that there was no basis upon which it should interfere with that approach.<sup>6</sup>
- [98] The decision of McGill DCJ is significant in that it deals with the assessment of the quantum of the costs upon which the Tribunal is entitled to rely as the appropriate standard to consider whether the amount in fact charged was grossly excessive. Importantly, the reasons also undertake an analysis of the reasons why the reductions were made. These reasons are significant in considering the particular circumstances and the conduct of the practitioner in those circumstances.
- [99] As has been outlined in a number of the authorities,<sup>7</sup> the assessment of the practitioner's conduct is dependent upon a range of factors of which the discrepancy between costs charged and costs taxed is one.
- [100] Reference has been made to other factors including difficulty, novelty or complexity, experience of the practitioner, quality of the work, the amount of time spent and any retainer agreement.<sup>8</sup> Where there is a retainer agreement, which governs the practitioner/client relationship, and which is the basis on which the practitioner agreed to act in the matter, the terms of this agreement are of particular significance.
- [23] The reasons for judgment of McGill DCJ on the review of the assessment in the present case are in evidence before this Tribunal and form part of the Agreed Statement of Facts. His Honour's reasons reveal that the principal reasons for the disparity between the fees rendered and those assessed were:
- (a) excessive and unreasonable time charges for preparation of pleadings and correction of errors, preparation of affidavits, conferences and attendances, perusal or examination of documents, correspondence with New South Wales agent, and communications with the client;
  - (b) charges for self-education and research which were not expressly or impliedly requested by Picamore;
  - (c) incomplete telephone calls;

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<sup>5</sup> *Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 at [117].

<sup>6</sup> *D'Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 at 220, 221; *Legal Services Commissioner v Keddie* [2012] NSWADT 106 at 17; *De Pardo v Legal Practitioners Complaints Committee* [2000] FCA 335 at [45].

<sup>7</sup> *De Pardo v Legal Practitioners Complaints Committee* [2000] FCA 335 at [45].

<sup>8</sup> *D'Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 at 214.

- (d) the absence of file records to support claims;
- (e) duplication of claims.

[24] The applicant expressly conceded that the evidence did not demonstrate either dishonesty on the part of the respondent or wilful overcharging. It is clear, however, that it is not necessary for some malicious intent to be proved before a finding of professional misconduct can be made. The fact of gross overcharging, in itself, may be sufficient to found a finding of professional misconduct, even in the absence of fraud, dishonesty, or malicious intent. Whilst the fact of a disparity may not be determinative, the extent of the discrepancy between charged costs and assessed costs is a relevant factor for consideration. It can also be accepted that reasonable minds may differ as to an appropriate range for the reasonableness of costs charged. But where the costs charged go beyond the bounds of professional propriety,<sup>9</sup> then the question as to whether the overcharging is of such a magnitude as to warrant a finding of professional misconduct comes more sharply into focus.

[25] In the present case, the overcharging against this client occurred over a period of 18 months. It was overcharging by a very significant factor. Moreover, as was submitted by the LSC, and as is apparent from a review of the reasons for judgment of McGill SC DCJ, much of the overcharging arose from inefficient and/or unproductive work, without discernment or discrimination by the respondent as to whether the charges were reasonable. That being said, the LSC accepted that the evidence did not show a systematic practice of overcharging in the respondent's practice, nor did the evidence suggest that the flaws apparent in the respondent's approach in the present case were replicated in other matters.

[26] It was conceded and accepted on the behalf of the respondent that his conduct in this case constituted professional misconduct.<sup>10</sup> It seems to this Tribunal that this is an appropriate concession in the present case.

[27] Despite this being a circumscribed set of circumstances involving billing practices in one matter with one client, the Tribunal has concluded that the very significant extent of the overcharging in this case and the reasons for that overcharging having occurred lead to a conclusion that the respondent should be found to have committed professional misconduct.

### **Appropriate orders**

[28] The Tribunal having made this finding of professional misconduct, the discretion arises under s 456 of the LPA to make any order the Tribunal thinks fit. This is a wide discretion, which is exercised primarily in protection of the public under the maintenance of proper professional standards.<sup>11</sup>

[29] The respondent was admitted as a solicitor in Queensland in February 1973. He has been continuously engaged in legal practice since that time, and for the vast bulk of his career has been a partner or principal of his firm. This is the first disciplinary finding against the respondent after more than 45 years in practice. No other complaints have been made against the respondent since the circumstances which

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<sup>9</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, per Kirby P at 422.

<sup>10</sup> Respondent's written submissions filed 17 May 2018, para 3.

<sup>11</sup> *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 at [122].

gave rise to the present matter, nor have any other clients requested an assessment of his firm's costs.

- [30] As already noted, there was no allegation, nor any suggestion, of any dishonesty or wilfulness on the part of the respondent in the present matter. The overcharging was confined to one client and one matter, and did not reflect any systematic overcharging in his practice, nor any intent to defraud to obtain personal gain.
- [31] Some argument was advanced on behalf of the respondent in the present matter that he may perhaps not have been as responsive as he could have been in relation to the initial assessment of costs, and that he may have been remiss in putting as much evidence before the District Court as he could have with respect to the nature and extent of the work undertaken for the clients. That being said, however, it was conceded that the respondent did engage with the costs assessment process.
- [32] In respect of the current disciplinary proceeding, it is clear that the respondent provided full co-operation throughout the investigation and the proceeding itself.
- [33] The respondent also filed an affidavit before this Tribunal in which he properly recognised the shortcomings which had been demonstrated in his file management, and which contributed significantly to the reduction in his allowable fees. He also recognised the difficulties associated with cross-jurisdictional proceedings and the issues that had arisen from the lack of clarity surrounding the roles of the different lawyers involved in the Picamore matter.
- [34] Importantly, the respondent deposed to the rehabilitative professional development he has undertaken since this incident, and the fact that he has been proactive in ensuring that his legal practice will avoid any such issues in the future. He voluntarily engaged an external legal practice management consultant to review his firm's costs processes and practices. An affidavit has been filed by that consultant which confirms the attendance by the consultant at the respondent's firm in which he:
- (a) reviewed costs disclosure/agreement documentation and recommended amendment;
  - (b) discussed costs communication practice and arrangements with the respondent, and offered recommendations and guidance;
  - (c) facilitated a two hour training session regarding costs communication; and
  - (d) provided a documented report to the respondent, which included detailed recommendations.
- [35] The respondent also supplied the Tribunal with some six written references from senior barristers and a number of clients. These references speak in the most positive of terms of the respondent's integrity, honesty, and professional expertise.
- [36] It is not suggested that there is any doubt as to the respondent's fitness to practice.
- [37] It seems to the Tribunal, on the material before it, that there is little purpose to be served in formulating orders for the purpose of achieving personal deterrence in the case of this respondent. This was an isolated incident, from which he has demonstrably learned a very expensive lesson.

- [38] The public interest is, however, achieved by making orders which will serve as a general deterrent, i.e. a clear message to the profession and the public that gross overcharging is professionally unacceptable and attracts serious sanction.
- [39] First, there will be an order that the respondent be publicly reprimanded. The respondent conceded that this was an appropriate order in this case. The impact of such an order being made cannot be understated, particularly when it is made against a practitioner of significant seniority and an otherwise unblemished professional record. As this Tribunal has previously said:<sup>12</sup>

The making of a public reprimand is a serious step by the Tribunal and not one which should be taken or regarded lightly. The public reprimand is and will continue to be a permanent public blemish on the respondent's professional record. It is and will continue to stand as a permanent reminder to the respondent, to the profession and to the public at large that there are adverse personal consequences when one engages in professional misconduct of this kind.

- [40] Secondly, the parties were agreed that this was a case in which general deterrence would also be served by an order for the respondent to pay a monetary penalty.<sup>13</sup> The parties acknowledged that the quantum of such a penalty lies within the discretion of the Tribunal, but suggested a figure of \$20,000. In argument, counsel for the LSC properly conceded that he was unable to point to any comparable decisions to indicate that this would be an appropriate level of penalty for a case such as the present, but said that this amount had been arrived at on an "intuitive" basis, informed by a view as to the degree of misconduct and the degree of the discrepancy. It was submitted for the LSC that whatever fine was imposed should be substantial to give effect to the seriousness of the matter as a whole and also in the interests of general deterrence.
- [41] The solicitor who appeared for the respondent before the Tribunal effectively acknowledged the "intuitive" basis on which that suggested figure had been reached, but also pointed out that this position had been arrived at before publication of the reasons in *Legal Services Commissioner v McDonald*.<sup>14</sup> In that case, the professional misconduct by the solicitor was very significantly more serious than that involved in the present case, and involved systematic falsification of timesheets and gross overcharging of more than \$500,000. The orders in that case included a public reprimand, a penalty of \$20,000, and a prohibition on holding a principal's practising certificate for five years.
- [42] In the present case, having regard to the respondent's mitigating circumstances, his otherwise unblemished length of practice, the isolated circumstances of the professional misconduct, the absence of dishonesty or improper motive, and the significant steps taken by way of rehabilitation, it is the view of the Tribunal that the public interest in general deterrence would be served in this case by a penalty of \$10,000.
- [43] It was conceded on behalf of the respondent that he must bear the costs of the discipline application.

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<sup>12</sup> *Legal Services Commissioner v Brown* [2018] QCAT 263 at [42].

<sup>13</sup> LPA, s 456(4)(a).

<sup>14</sup> [2018] QCAT 82.

**Conclusion**

[44] For the foregoing reasons, the decision of the Tribunal is as follows:

1. The respondent, Peter Leslie Challen, is publicly reprimanded.
2. Pursuant to s 456(4)(a) of the *Legal Profession Act 2007*, the respondent shall pay a penalty of \$10,000.
3. The respondent shall pay the applicant's costs of and incidental to the discipline application, such costs to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.