QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Brown* [2018] QCAT 263
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **PETER MITCHELL BROWN** (respondent)
APPLICATION NO/S:	OCR072-18
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	10 August 2018
HEARING DATE:	10 August 2018
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Dr Susan Dann Dr John de Groot

ORDERS:

1. **The respondent is publicly reprimanded.**
2. **The respondent shall pay a pecuniary penalty in the sum of $4000.**
3. **The respondent is to undertake the ethics course facilitated by the Queensland Law Society within 12 months.**
4. **Any practicing certificate granted to the respondent is to contain a condition that he not accept from 1 July 2018 appointment under a power of attorney and other conditions as remain necessary, to give effect to the conditions of the practicing certificate granted by the Queensland Law Society on 20 June 2018.**
5. **The respondent shall pay the applicant's costs of and incidental to this proceeding, to be assessed on a standard basis, on the Supreme Court scale under the Uniform Civil Procedure Rules 1999, in the manner that costs would be assessed as if this were a matter of the Supreme Court of Queensland.**

CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where respondent failed to act in client's best interests in not investing estate funds – where respondent failed to provide costs agreement to client who was also a friend – where respondent acted in conflict of interest situation by acting as both solicitor and enduring power of attorney – where respondent acted in conflict of interest situation by loaning funds from client – where client was elderly and considered vulnerable – whether respondent breached rule 12.3 of Australian Solicitors Conduct Rules – whether conduct amounts to professional misconduct or unsatisfactory professional conduct – whether the imposition of a sanction is appropriate *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* [2018] QCA 66 *Legal Services Commissioner v Kumar* [2018] QCAT 173 *Australian Solicitors Conduct Rules*, r 12.3 *Legal Profession Act* 2007, s 419, 456, 462
APPEARANCES & REPRESENTATION:	
Applicant:	D A Holliday of counsel, instructed by Legal Services Commissioner
Respondent:	M Black of counsel, instructed by Gilshenan & Luton Legal Practice

REASONS FOR DECISION

[1] The respondent, Peter Mitchell Brown, was admitted to practice as a solicitor on the 13th of December 1990. He has been in sole practice since 1 July 2003 in a firm named Browns Lawyers. Prior to today he had no history of disciplinary infractions. He appears before the tribunal today facing two charges preferred by the Legal Services Commissioner. Charge 1 is that between the 13th of January 2013 and 14 March 2015, he, in relation to matters involving Elaine Joy Smith, engaged in conduct which amounted to unsatisfactory professional conduct or professional misconduct pursuant to the *Legal Profession Act* 2007 ("the Act"). In relation to that charge, numerous particulars are provided but the gravamen of the misconduct in question is set out in particular 1.24 as follows:

> (i) failing to act in Smith's best interests by failing to invest all of the funds held on Ms Smith's behalf but instead retaining some monies in the Browns Lawyers Trust Account which then paid for invoices issued to Ms Smith as detailed at 1.15 above;

(ii) charging a total of $28,712 to Smith by way of fees and circumstances where there was no costs agreement and no provision in the Enduring Power of Attorney documentation providing for such payments;

(iii) acting in a conflict of interest situation by authorising as Enduring Power of Attorney the use of the funds in the Browns Lawyers trust account to pay the invoices detailed at 1.15 above;

(iv) acting in a conflict of interest situation and a position of presumed undue influence by entering into a loan agreement with Smith where a total of $130,000 was lent to the respondent from Smith when Smith was not only the client or former client of the respondent but also the respondent held the Enduring Power of Attorney for Smith. Being in the position of Enduring Power of Attorney, furthered and aggravated the conflict of interest and position of presumed undue influence as is highlighted by the fact that the respondent was able to obtain the funds for himself by drawing cheques on Smith's personal bank account as Enduring Power of Attorney made out in the name of the Browns Lawyers Trust Account.

[2] Those particulars will make a little more sense in a moment when I recite the relevant factual background.

[3] Charge 2 avers that the respondent engaged in conduct in breach of 12.3 of the Australian Solicitors Conduct Rules, in that between the 28th of May 2013 and the 14th of March 2015, he borrowed money from Elaine Joy Smith, a client or former client of the respondent, in breach of rule 12.3 of the Australian Solicitors Conduct Rules 2012.

[4] I note in passing that in the course of argument, and on the basis of material put before the tribunal, it became apparent that the references to Ms Smith being a former client of the respondent are essentially redundant. The matter proceeds on the basis that at the relevant times she was the respondent's client.

[5] The parties have filed an agreed statement of facts, and it is necessary to recount those in some detail. Ms Elaine Joy Smith was born on the 19th of June 1928, and first met the respondent through friends at a local church. She and the respondent then came to be friends themselves. Years later, the respondent carried out legal work for Ms Smith, including the administration of her late husband's estate, and also the sale of her house. On 12 December 2005, Ms Smith executed an enduring power of attorney, appointing the respondent as attorney for financial and personal/health matters.

[6] In January 2013, Ms Smith was admitted to an aged care facility on a permanent basis after being assessed as having high care needs. The respondent arranged for the sale of Ms Smith's personal residence, and on 22 March 2013, the proceeds of sale, namely $421,296.32, were deposited into the trust account of his firm. A total of $388,710 was paid out in various sums from the trust account. The remainder of the funds remained in the firm's trust account. It is accepted between the parties that the respondent failed to act in Ms Smith's best interests by not investing all of the funds held on her behalf, but instead retained some moneys in the firm's trust account which was then used for paying invoices issued to Ms Smith by his firm.

[7] The impugned conduct of the respondent then falls into two categories. One is his conduct in borrowing money from Ms Smith, and the second relates to his conduct in the issuing of invoices to her, which he, by use of the power of attorney which he held, caused to be paid.

[8] As the agreed statement of facts records, on 28 May 2013 the respondent, in a conflict of interest, borrowed money from Ms Smith who was then his client, pursuant to a loan agreement. The loan agreement came about following discussions of a personal nature between the respondent and Ms Smith about the difficult financial position that he was then in. The loan agreement was signed by Ms Smith and provided for an initial loan amount of $30,000, and 'such further or other amounts from time to time as is agreed between the parties'. That sum was called the Principal Amount. Clause 2 of the agreement provided for the respondent as borrower to pay the Principal Amount plus interest at the rate of 5 per cent per annum by monthly instalments. The loan was unsecured. Ms Smith was not separately legally represented, nor did the respondent suggest to her that she should obtain independent legal advice. As is recorded in the agreed statement of facts, this agreed interest rate was above that of the rates then obtainable through commercially available term deposit products.

[9] Between 28 May 2013 and 14 March 2015, the respondent borrowed a total of $130,000 from Ms Smith. There were a total of 10 draw-downs between 29 May 2013 and 13 March 2015, of varying amounts between $10,000 and $20,000. On each of the occasions, in order to obtain the funds, the respondent drew cheques on Ms Smith's personal bank account. He signed the cheques as, "Peter Mitchell Brown, Solicitor, as attorney under power of attorney for E.J. Smith". The cheques were made payable to the firm's trust account.

[10] The respondent did not adjust the monthly repayment amount from the amount stipulated in the loan agreement, despite the increase in the amounts borrowed. However, it is common ground that there was nothing in the loan agreement that required any such increase in the quantum of the monthly repayments.

[11] In any event, he made 26 monthly repayments of $1375, being a total of $35,750, during the period 28 June 2013 to 5 August 2015 when the matter came to the attention of the Queensland Law Society.

[12] The respondent has since repaid all of the moneys borrowed from Ms Smith, including interest at the rate stipulated in the loan agreement.

[13] Turning then to the issuing of the invoices, over the period 13 January 2013 to 3 April 2014 the respondent issued 12 individual tax invoices totalling $28,712 to Ms Smith. After 22 March 2013, those invoices were paid for from the moneys held on Ms Smith's behalf in the firm's trust account. The invoices do not detail an hourly rate but, rather, listed a "description" of work performed and an amount of money charged. The respondent did not enter into a costs agreement with Ms Smith and the enduring power of attorney documentation did not provide for a clause where costs would be charged. The tax invoices are headed, 'Tax Invoice … Advice' and were issued on the firm's letterhead. In the invoices there was a description of work performed, and words such as, 'advice' and 'perusal of documents', were used, as well as a description of other work including 'arrange and withdrawal of term deposit', 'payment of bills', 'attending the mail redirection', 'arranging of

eradication of bees to property', 'correspondence with Mater Lotteries regarding cancellation of lottery tickets'. As is noted in the agreed statement of facts, all of those matters seem to have been billed at the same hourly rate.

[14] I note in passing that on material recently filed by the parties, it seems that there were different charge-out rates charged, or on the basis of which these invoices were calculated, but at the end of the day nothing turns on that. It seems apparent that the charge-out rates on which the invoices were calculated were commercial charge-out rates reflecting work of a nature performed by the respondent as the principal of a legal firm.

[15] The invoices in question were addressed to Ms Smith care of the law firm, Browns Lawyers. The statement of facts records that the respondent, in a conflict of interest, authorised payment of each of the 12 invoices to Browns Lawyers by utilising the enduring power of attorney, and from 22 March 2013 moneys were transferred from Browns Lawyers Trust account to the general account to effect payment. It is also common ground that the respondent has since repaid the total amount of the 12 invoices, namely $28,712, to Ms Smith.

[16] Finally, the agreed statement of facts records the following:

> The respondent was highly cooperative during the course of the Commissioner's investigation. At all times he acknowledged the wrongfulness of his conduct, and expressed the remorse and regret he has experienced in relation to this actions.

[17] The first matter for the tribunal to address is characterisation of the conduct engaged in by the practitioner. In that regard the applicant was content ultimately to advance the case on the basis that the conduct engaged in by the respondent amounted to professional misconduct within the meaning of section 419(1)(a) of the Act, in that the conduct amounted to 'unsatisfactory professional conduct of an Australian legal practitioner' being conduct that involved, 'a substantial or consistent failure to keep or reach a reasonable standard of competence and diligence'.

[18] There was no challenge from the respondent as to the characterisation of the conduct on that basis.

[19] Importantly, there was no suggestion that the respondent lacked fitness or propriety to engage in legal practice, and ultimately the Commissioner did not urge for a finding of professional misconduct relying on the rubric reflected in section 419(1)(b).

[20] It is clear enough on the facts that have been agreed that the conduct of the respondent involved a serious lack of appreciation of the proper standards of competence and diligence expected of a solicitor in engaging in transactions with their clients.

[21] The terms of the solicitors' rule, which is the subject of charge 2, namely rule 12.3 of the Australian Solicitors Conduct Rules, are quite plain. But as I mused in the course of argument, one hardly needs the express provision in rule 12.3 to appreciate the manifest difficulties that are apt to arise when a solicitor mixes their commercial business with that of a client. And that is precisely what happened here.

[22] The respondent, in what can be seen as an ongoing lapse of judgment, borrowed and continued to borrow money from a client. Compounding that lapse of judgment, was his lack of appreciation of his standing and responsibilities as the holder of the enduring power of attorney, the nature of the roles to be performed under that, and the seriousness of the duties and responsibilities that flow from holding a power of attorney.

[23] Then there was the patent co-mingling, at least in his mind, of his roles when he came to issuing the tax invoices that I have described, in circumstances where of course there was no costs agreement in place and then, effectively authorising the payment of his own tax invoices out of monies that he was holding in trust. All of the behaviour involved, over a considerable period of time, a substantial failure to maintain the reasonable standards of competence and diligence of a legal practitioner in this State.

[24] That being said, it must also be acknowledged that the behaviour in question was not conduct which could or should be characterised as criminally dishonest. There is no suggestion of dishonesty in the matter, and to that extent, both for the purposes of characterisation of conduct and ultimately for the purpose of sanction, the present case is to be contrasted with cases such as the recent matter dealt with in this tribunal of *Legal Services Commissioner v Kumar*.[1] But even though the present respondent's conduct was not of that egregious standard, it was nevertheless, on the whole, conduct which in the view of the tribunal clearly amounted to professional misconduct within the meaning of section 419 (1)(a) of the Act.

[25] Accordingly, in all the circumstances, the tribunal considers that both charge 1 and charge 2 have been made out and it is appropriate to make a finding that the respondent engaged in professional misconduct.

[26] One turns, then, to the question of sanction for having engaged in professional misconduct, and I note, again, as was articulated in the terms of the agreed statement of facts, that the respondent conducted himself with a very high degree of cooperation during the course of the applicant's investigation. He has acknowledged the wrongfulness of his conduct. He has expressed remorse and regret.

[27] Having made findings of professional misconduct, the tribunal's discretion under section 456 of the Act is enlivened, and the discretion conferred under that section is very broad indeed.

[28] It is unnecessary for present purposes to recount the wide variety of orders which are exemplified by the terms of the subsections of section 456 of the Act. The finding of professional misconduct is based on the conduct committed at the time it occurred. For the purposes of assessing the appropriate sanction, however, it is appropriate to have regard to subsequent events and various acts and courses of rehabilitation undertaken by the respondent. So much is clear, if authority be necessary for that proposition, from the judgment of the Court of Appeal in

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1 [2018] QCAT 173.

Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand.[2]

[29] There are a significant number of matters to which the tribunal needs to have regard in terms of assessing and fixing the appropriate sanction.

[30] On the one hand, of course, there is the objective seriousness of the conduct. Whilst not criminal or dishonest conduct, the behaviour was nevertheless a serious lapse of judgment in circumstances where the respondent was dealing with a person of advanced years and apparently suffering from some difficulty or disability in attending to their own affairs. At the very least, the respondent was dealing with an old person who had entrusted to the respondent the responsibility of appropriately dealing with her affairs. So those circumstances alone clearly flavour the seriousness of the misconduct in question.

[31] There are, however, a range of matters to be taken into account, both generally in mitigation but also as indicative of rehabilitation on the part of the respondent. I have already mentioned several times the fact that this was not a case of dishonesty. It is also clear that this was a case of misjudgement which was quite out of character for the respondent. He otherwise has an unblemished legal professional record.

[32] The tribunal has been provided with a raft of references by professional colleagues, all of whom, the tribunal would observe, are professionals of high standing. The references uniformly speak of the respondent's personal good character and professional good character, and uniformly express surprise at this lapse of judgment on the part of the respondent. Another consistent theme through the references is that the respondent is a person who over the years has held himself to high standards.

[33] Another relevant factor is that the respondent has made full reparation. He repaid the loan in full, and repaid the invoiced amounts in full. It is, I suppose, theoretically possible that he might have sought to carve out from the amounts repaid on the invoices sums representing work for which he might otherwise lawfully have been entitled to recover, but he did not take that step. He has simply made repayment in full of the money.

[34] He has demonstrated insight into the misconduct in this case and the circumstances of his misconduct. So much is clear from the affidavit he has filed. He accepts and has a clear understanding of where he went wrong. It is, I should note parenthetically, a pity that he felt that he had to have regard to the subsequent issuing of a guidance note by the Law Society in order to clarify in his own mind the ambit of his responsibilities in cases such as the present, but that being said, there is no doubt that he is now well and truly apprised of those matters.

[35] I have already mentioned on several occasions his full and frank cooperation with the Legal Services Commissioner, and with the Law Society. He has acknowledged the wrongfulness of his conduct and expressed remorse. There is no evidence that there has been any repeat of the conduct in question, and I note that one of the documents provided to the tribunal today is a letter from the Law Society, which

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[2] [2018] QCA 66.

both outlines the recent history of conditions which have attached to the respondent's practising certificate since this misconduct was uncovered, and also confirms that he has been compliant and cooperative in all respects.

[36] Another relevant factor is that there has been some delay in having the matter finalised.

[37] There are other matters to take into account in the imposition of the appropriate sanction. As I have already noted, it is not part of the tribunal's finding today that the respondent be in any way considered to be unfit for practice. There is no evidence, nor any suggestion, that he poses a risk to the public or his clients by being permitted to continue in practice, subject only of course to his continuing observance of the undertakings that he has given to the Law Society to refrain from accepting appointments under powers of attorney.

[38] This incident with Ms Smith has had a significant impact on the respondent's personal and professional life. He has, for example, had to sell his family home in order to make good the money. It is clear on the material before the tribunal that any orders which would preclude the respondent from practising would have the effect not only of preventing him from earning an income, it would likely have the practical effect of shutting down the respondent's firm, which in turn would have obvious dire impacts on the numerous employees of that firm, including the respondent's wife who works in the firm as a practice manager.

[39] The applicant appropriately did not suggest that this was a case which called for consideration of whether the respondent's name would be removed from the roll. That is clearly not in scope for the misconduct in this case. The applicant did, however, at least flag the prospect that the tribunal might consider the imposition of a period of suspension. On reflection, however, and taking into account the numerous factors in mitigation and the matters of rehabilitation to which regard should properly be had, and also having regard to the fact that this is not a case in which there is any challenge or adverse finding in respect of the respondent's fitness and propriety to practice, the tribunal does not consider that a suspension is warranted in the circumstances of this case.

[40] That conclusion is reinforced when one considers the obvious and immediate adverse impacts that a suspension would have, not only on the respondent personally but also on the firm and its employees.

[41] It is, however, appropriate for there to be a public reprimand in respect of this conduct.

[42] 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 professional consequences when one engages in professional misconduct of this type.

[43] In a sense, I suppose, a public reprimand could be seen as a public shaming of the respondent within the ranks of the profession and to the general public, and to that extent it has an ongoing deterrent value.

[44] Given the nature of the conduct, in this case the issuing of a public reprimand seems appropriate.

[45] The nature of the conduct which I have described at some length above also warrants the imposition of a pecuniary sanction, which in this case will be a penalty of $4000. Again, there is a deterrent value to the making of such an order. It is to make clear to the respondent and to members of the profession that a failure to meet the expected standards of professional conduct, particularly when dealing with persons who may be regarded as vulnerable, such as elderly clients, is a matter which is and will be treated seriously by the tribunal.

[46] The respondent has appropriately undertaken to engage in the ethics course facilitated by the Queensland Law Society. That is an essential part of his ongoing rehabilitation. It will also be appropriate for his practicing certificate to continue to be conditioned such that he not accept appointments under powers of attorney. In other words, there will be a continuation of the conditions currently imposed on his practicing certificate.

[47] Finally, the applicant Commissioner seeks costs. Having regard to the provisions of section 462(1) of the Act, there are no exceptional circumstances which would bring this case outside the prima facie operation of that section. Indeed, the respondent expressly conceded that it would be appropriate in the circumstances for a costs order to be made.

[48] Accordingly, the directions of the tribunal are as follows:

1. The respondent is publicly reprimanded.

2. The respondent shall pay a pecuniary penalty in the sum of $4000.

3. The respondent is to undertake the ethics course facilitated by the Queensland Law Society within 12 months.

4. Any practicing certificate granted to the respondent is to contain a condition that he not accept from 1 July 2018 appointment under a power of attorney and other conditions as remain necessary, to give effect to the conditions of the practicing certificate granted by the Queensland Law Society on 20 June 2018.

5. The respondent shall pay the applicant's costs of and incidental to this proceeding, to be assessed on the standard basis, on the Supreme Court scale under the Uniform Civil Procedure Rules 1999, in the manner that costs would be assessed as if this were a matter of the Supreme Court of Queensland.