

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Service Commissioner v Reid* [2025] QCAT 225

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

v

**FERGUS FRASER REID**  
(respondent)

APPLICATION NO: OCR108-24

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 26 June 2025

HEARING DATE: 8 May 2025

HEARD AT: Brisbane

DECISION OF: Justice Williams

Assisted by:

Ms Petrina Macpherson, Practitioner Panel Member

Mr Keith Revell, Lay Panel Member

- ORDERS:
- 1. The Respondent's conduct identified in respect of each of Charges 1 and 2 in the discipline application is proved and is found to constitute professional misconduct.**
  - 2. The Respondent is publicly reprimanded.**
  - 3. The Respondent pay a pecuniary penalty in the sum of \$2,500 within 90 days of these orders being made.**
  - 4. The Respondent successfully complete the next available QLS Remedial Ethics Course at his own expense and provide to the Applicant, within a month of having completed the course, evidence of his successful completion of the course.**
  - 5. The Respondent pay the Applicant's costs of and incidental to the discipline application, 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 – where the Respondent's practicing certificate was limited to providing in-house legal

services, volunteer work or approved pro bono projects – where the Respondent purported to act on behalf of a party to a family law dispute who was related to his employer – where the Respondent used an email address set up for the purpose of keeping the emails relating to the family law dispute separate from the emails in relation to his role as in-house solicitor – where the Respondent’s emails included a signature block stating that he was the Group Solicitor at a named ‘dummy’ law firm – where the Respondent’s emails included a disclaimer in respect of legal professional privilege – where the Respondent engaged in false and misleading conduct by representing himself as a legal practitioner of the named ‘dummy’ law firm – whether the conduct was properly characterised as unsatisfactory professional conduct or professional misconduct – whether a pecuniary penalty should be imposed – whether the Respondent should be ordered to undertake the QLS Remedial Ethics Course

*Legal Profession Act 2007* (Qld), s 418, s 419, s 420, s 456, s 462

*Adamson v Queensland Law Society Incorporated* (1990) 1 Qd R 498, cited

*Legal Services Commissioner v Bradshaw* [2009] QCA 126, cited

*Legal Services Commissioner v Challen* [2019] QCAT 273, cited

*Legal Services Commissioner v Cruise* [2019] QCAT 182, cited

*Legal Services Commissioner v De Fraine* [2015] QCAT 292, considered

*Legal Services Commissioner v Desacola* [2013] QCAT 432, considered

*Legal Services Commissioner v Dominic* [2020] QCAT 124, considered

*Legal Services Commissioner v Doyle* [2021] QCAT 347, considered

*Legal Services Commissioner v Gould* [2016] QCAT 533, considered

*Legal Services Commissioner v Kellahan* [2012] QCAT 263, considered

*Legal Services Commissioner v Laylee* [2016] QCAT 237, cited

*New South Wales Bar Association v Cummins* [2001] NSWCA 284, cited

#### APPEARANCES & REPRESENTATION:

Applicant: R K Micairan instructed by the Legal Services Commissioner

Respondent: B Cohen of Bartley Cohen

### **REASONS FOR DECISION**

- [1] This is a discipline application by the Legal Services Commissioner (**LSC**) under s 452 of the *Legal Profession Act 2007* (Qld) (**LP Act**) for disciplinary orders pursuant to s 456 of the LP Act. The discipline application raises two charges against the Respondent, Fergus Reid (**Respondent**): engaging in legal practice in a manner not permitted by the conditions of his corporate practising certificate, and engaging in false and misleading conduct by representing himself as a legal practitioner of a particular firm.
- [2] At the commencement of the hearing of the discipline application, the LSC made an application to vary the discipline application to add the Respondent's state of mind as an element of both charges. Ultimately the LSC did not proceed with the application to vary the discipline application and did not press for cross-examination of the Respondent in respect of his state of mind. Consequently, a potential dispute as to intention does not arise.
- [3] The relevant facts of the Respondent's conduct are not in dispute. However, the proper characterisation of the conduct in each of Charge 1 and Charge 2 and the appropriate sanction in all of the circumstances is in dispute.
- [4] The LSC contends that Charge 1 and Charge 2 are properly characterised as professional misconduct and that the Tribunal should make disciplinary orders including a public reprimand, a penalty in the sum of \$6,000, and that the Respondent undertake and successfully complete the Queensland Law Society (**QLS**) Remedial Ethics Course within 12 months at his own expense.
- [5] The Respondent's primary position is that the Tribunal should find that Charge 1 and Charge 2 are properly characterised as unsatisfactory professional conduct and the sanction should be no more than a public reprimand. Alternatively, if the Tribunal considers a penalty should be imposed, the Respondent contends that it should be in the amount of \$500 to \$1,000 only.
- [6] Accordingly, the issues to be determined by the Tribunal are as follows:
  - (a) Are Charge 1 and Charge 2 proved?
  - (b) Is the Respondent's conduct in Charge 1 and Charge 2 properly characterised as unsatisfactory professional conduct or professional misconduct?
  - (c) What are the appropriate orders pursuant to s 456 of the LP Act?
  - (d) What is the appropriate costs order?
- [7] Before dealing with each of the issues in turn, it is appropriate to consider the relevant statutory provisions.

### **Statutory provisions relevant to characterisation of unsatisfactory professional conduct or professional misconduct**

- [8] In determining the discipline application:
  - (a) Pursuant to s 656C(1) of the LP Act, the Tribunal must be satisfied of the allegations against the Respondent on the balance of probabilities.

- (b) Pursuant to s 656C(2) of the LP Act, satisfaction as to whether proof has been established depends upon the gravity of the allegations in question and the consequences for the Respondent.

[9] Sections 418, 419 and 420 of the LP Act state as follows:

**“418 Meaning of *unsatisfactory professional conduct***

*Unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

**419 Meaning of *professional misconduct***

- (1) ***Professional misconduct*** includes—
- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
  - (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

**420 Conduct capable of constituting *unsatisfactory professional conduct* or *professional misconduct***

- (1) The following conduct is capable of constituting *unsatisfactory professional conduct* or *professional misconduct*—
- (a) conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the commencement of this section;

*Note—*

Under the *Acts Interpretation Act 1954*, section 7, and the *Statutory Instruments Act 1992*, section 7, a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the *Legal Profession Act 2004*.

- (b) charging of excessive legal costs in connection with the practice of law;
- (c) conduct for which there is a conviction for—
  - (i) a serious offence; or
  - (ii) a tax offence; or

- (iii) an offence involving dishonesty;
  - (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;
  - (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
  - (f) conduct of an Australian legal practitioner in failing to comply with an order of a disciplinary body made under this Act or an order of a corresponding disciplinary body made under a corresponding law, including a failure to pay wholly or partly a fine imposed under this Act or a corresponding law;
  - (g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.
- (2) Also, conduct that happened before the commencement of this subsection that, at the time it happened, consisted of a contravention of a relevant law or a corresponding law is capable of constituting unsatisfactory professional conduct or professional misconduct.
- (3) This section does not limit section 418 or 419.”
- [10] In determining whether the relevant conduct amounts to unsatisfactory professional conduct or professional misconduct, the following authorities considering these general principles are of some assistance.
- [11] In *Legal Services Commissioner v Laylee* [2016] QCAT 237, the Tribunal stated the test required to establish unsatisfactory professional conduct as follows:
- “The test required to determine whether conduct is unsatisfactory professional conduct is such that the relevant ‘falling short’ does not embrace all cases of error but must be sufficiently substantial. There must be an appreciable departure from the standard for the conduct to be unsatisfactory professional conduct. An isolated instance, not involving unethical conduct, and more in the nature of conduct which might give rise to an assertion of negligence, is less likely to amount to unsatisfactory professional conduct. Serious, or repeated instances, are more likely to amount to unsatisfactory professional conduct or professional misconduct.”<sup>1</sup>
- [12] In *Legal Services Commissioner v Bradshaw* [2009] QCA 126, McMurdo P considered what must be demonstrated by the applicant to establish whether conduct falls within the statutory definition of unsatisfactory professional conduct and stated as follows:
- “In establishing whether conduct is unsatisfactory professional conduct, the commissioner is not required to prove what a member of the public expects of a reasonably competent Australian legal practitioner. This is not something easily capable of direct proof. But in any case, s 418 refers to what ‘a member of the public is entitled to expect of a reasonably competent Australian legal

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<sup>1</sup> Thomas J at [43].

practitioner’. This is a standard to be determined by the tribunal after considering all the relevant circumstances pertaining in each case.”<sup>2</sup>

- [13] The test for professional misconduct was described by Thomas J in *Adamson v Queensland Law Society Incorporated* (1990) 1 Qd R 498 as follows:

“The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.”<sup>3</sup>

- [14] Having established the test to apply, the relevant factual circumstances can be considered.

### **Are Charge 1 and Charge 2 proved?**

- [15] The LSC sets out the particulars of Charge 1 and Charge 2 in the discipline application, being the relevant facts and contentions relied upon to prove the charge. The Respondent in the response to the discipline application admits the facts.<sup>4</sup>

- [16] As the facts involve a family law dispute involving children, the names of the various companies and people have been anonymised in these reasons to protect the identities of the parties.

- [17] Charge 1 states:

“Between 19 February 2021 and 4 November 2021, the Respondent engaged in legal practice in a manner not permitted by the conditions of his corporate practising certificate.”

- [18] In respect of Charge 1 the facts include:

- (a) The Respondent was an Australian legal practitioner holding a corporate practising certificate.

- (b) A condition of the corporate practising certificate was that the Respondent:

“must not engage in legal practice except to provide in-house legal services as defined in the Act or as a volunteer at a community legal service or a pro bono project approved by the Australian Pro Bono Centre (ACN 102 444 557).”

- (c) The Respondent was employed as an in-house solicitor at [Company A].

- (d) On 19 February 2021, the Respondent sent an email to [Mr B]<sup>5</sup> (**19 February Email**). The details of the 19 February Email are dealt with further below.

- (e) The Respondent used an email address containing the name of [D]. This email address was set up and operated by the Respondent for the purpose of keeping the emails with [Mr B] separate from the emails sent in his capacity as in-house solicitor at [Company A].

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<sup>2</sup> At [54].

<sup>3</sup> At 507.

<sup>4</sup> The Respondent disagrees with some of the contentions, but these have largely fallen away. The Respondent conceded at the hearing that a single letter could constitute engaging in legal practice: T1-29 line 6 to T1-30 line 24.

<sup>5</sup> Mr B was the other party to the family law dispute.

- (f) The company law firm name of [D] included a word which was a domain name owned by [Company E] and at no time has [D] been an incorporated legal practice.
- (g) On 1 September 2021 the Respondent sent an email to [Mr B] (**1 September Email**). The details of the 1 September Email are dealt with further below.
- (h) On 8 September 2021 the Respondent sent a further email to [Mr B] (**8 September Email**). The details of the 8 September Email are dealt with further below.

[19] The 19 February Email:

- (a) Contained the subject line “Family Law Matter: [Ms C]”.<sup>6</sup>
- (b) Was sent from the email address with the Respondent’s first name and the company law firm name [D].
- (c) Stated that the Respondent had:
  - “received instructions to act on behalf of [Ms C] regarding her family law matters; namely the parenting arrangements for [Child 1] and [Child 2]”.
- (d) Requested that [Mr B] “not contact her former solicitors ... in relation to this matter” and that all correspondence be directed to the Respondent.
- (e) Discussed child custody arrangements over Easter.
- (f) Contained a signature block:
  - “FERGUS REID
  - GROUP SOLICITOR
  - [D]
  - Email: fergus@[D].com.au” (**Signature Block**).
- (g) Contained a disclaimer in respect of legal professional privilege at the bottom of the email (**Disclaimer**).

[20] The LSC contends that in sending the 19 February Email the Respondent engaged in legal practice in breach of the condition imposed on his practising certificate.

[21] The 1 September Email:

- (a) Contained the subject line “Family Law Matter: [Ms C]”.
- (b) Was sent from the email “fergus@[D].com.au”.
- (c) Made statements in respect of the parenting arrangements for a particular date and in the future.
- (d) Contained the Signature Block and Disclaimer.

[22] The LSC contends that sending the 1 September Email constitutes engaging in legal practice in breach of the condition imposed on the Respondent’s practising certificate.

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<sup>6</sup> Ms C was the purported client of the Respondent.

- [23] The 8 September Email:
- (a) Contained the subject line “Family Law Matter: [Ms C]”.
  - (b) Was sent from the email “fergus@[D].com.au”.
  - (c) Referred to “our client” ten times.
  - (d) Sought [Mr B]’s permission for the enrolment of [Child 1] and [Child 2] at a new school.
  - (e) Contained the Signature Block and Disclaimer.
- [24] The LSC contends that in sending the 19 February Email, the 1 September Email, and the 8 September Email the Respondent:
- (a) acted outside of the restrictions imposed upon his corporate practising certificate under s 353(2)(b) of the LP Act, thereby breaching s 354(1)(a) of the LP Act; and
  - (b) contravened a condition of his practising certificate in breach of s 58 of the LP Act.
- [25] The Respondent:
- (a) admits that in engaging in communications with [Mr B] in relation to [Ms C]’s parenting matters, including sending the 19 February Email, the 1 September Email and the 8 September Email, he acted and contravened the LP Act as alleged; and
  - (b) says that the conduct occurred in the circumstances set out in the letter dated 21 February 2022.
- [26] Charge 2 states:
- “Between 19 February 2021 and 4 November 2021, the Respondent engaged in false and misleading conduct by representing himself as a legal practitioner of [D]”.
- [27] The facts set out at [18] are relied upon as well as the contents of the 19 February Email, the 1 September Email and the 8 September Email at [19], [21] and [23] above.
- [28] Further, the LSC contends that each of the 19 February Email, the 1 September Email and the 8 September Email represented that the Respondent was a legal practitioner of [D] by stating:
- (a) The Respondent was a “Group Solicitor” for [D].
  - (b) The email could be subject to legal professional privilege (as contained in the Disclaimer).
  - (c) That the email was in relation to family law matters.
- [29] The LSC contends that in sending the 19 February Email, the 1 September Email and the 8 September Email and making the representations, the Respondent engaged in false and misleading conduct in circumstances where:
- (a) [D] was not an incorporated legal practice; and
  - (b) the condition of the Respondent’s practising certificate required that he:

“not engage in legal practice except to provide in-house legal services as defined in the Act or as a volunteer at a community legal service or a pro bono project approved by the Australian Pro Bono Centre”.

- [30] The Respondent relies on the matters raised in respect of Charge 1 and further:
- (a) Admits that the Signature Block could reasonably have been understood as representing the Respondent as the or a “Group Solicitor” for [D].
  - (b) Says that:
    - (i) The Respondent did not turn his mind to the impression that the Signature Block might leave on [Mr B] as the recipient of the emails; and
    - (ii) The Respondent did not intend to mislead, deceive, or create any false impression in [Mr B].
- [31] The following evidence was included in the Hearing Book (marked Exhibit 1):
- (a) Letter from the Respondent’s solicitor to the Legal Services Commission (**Commission**) dated 21 February 2022.
  - (b) Letter from the Commission to the Respondent’s solicitor dated 6 July 2023.
  - (c) Letter from the Respondent’s solicitor to the Commission dated 20 July 2023.
  - (d) Affidavit of David John Edwards affirmed 21 August 2024.
  - (e) Affidavit of the Respondent affirmed 15 November 2024.
- [32] There are a few further factual matters that arise for consideration.
- [33] The Charges particularise three emails, but six emails were sent by the Respondent. The Respondent accepts that the six emails were sent and they form part of the wider conduct. It is appropriate to briefly consider the additional emails, being:
- (a) Email from the Respondent to [Mr B] dated 19 March 2021 (**19 March Email**) in relation to care of [Child 1] and sharing responsibility for the care of [Child 1]. The email has the Signature Block and Disclaimer and refers to [Ms C] as the Respondent’s client.
  - (b) Email from the Respondent to [Mr B] dated 1 October 2021 (**1 October Email**) in relation to arrangements for [Child 1]’s and [Child 2]’s first day at a new school. This email has the Signature Block and Disclaimer and also refers to [Ms C] as the Respondent’s client.
  - (c) Email from the Respondent to [Mr B] dated 4 November 2021 (**4 November Email**) in relation to parenting arrangements for [Child 1]. This email does not have the Signature Block or Disclaimer, but does refer to [Ms C] as the Respondent’s client. This email is also in response to an email from [Mr B] raising an issue in respect of the parenting arrangements.
- [34] The Respondent relies upon the letter dated 21 February to the Commission as providing context to the admitted conduct, including:
- (a) [Company A] is the “family office” of a relative.
  - (b) [Ms C] is the partner of the Respondent’s relative.

- (c) There were no current legal proceedings between [Ms C] and [Mr B]. [Ms C]'s solicitor was on maternity leave and the Respondent was asked to assist by corresponding with [Mr B], [Ms C]'s ex-partner, in relation to parenting arrangements.
- (d) There was a protection order in place that required contact from [Mr B] to [Ms C] through her solicitor.
- (e) The Respondent did not turn his mind to whether his in-house practising certificate permitted him to assist [Ms C] in the way requested.
- (f) The emails communicated what [Ms C] wished to say to [Mr B], as [Ms C] did not wish to engage directly with [Mr B].
- (g) The Respondent did not charge [Ms C] and was trying to assist [Ms C].

[35] On the basis of the admissions by the Respondent and the evidence, the Tribunal is satisfied that the relevant facts constituting Charges 1 and 2 have been established on the balance of probabilities, taking into account the gravity of the allegations in question and the consequences for the Respondent.

**Is the Respondent's conduct in Charge 1 and Charge 2 properly characterised as unsatisfactory professional conduct or professional misconduct?**

- [36] Given the close inter-relationship between Charge 1 and Charge 2, the parties sought to characterise the Respondent's conduct consistently in respect of both charges. That is, the misleading and deceptive conduct (Charge 2) is one of the features of the Respondent's overall conduct and therefore the characterisation should be consistent in respect of both charges.
- [37] The LSC contends that the appropriate characterisation is professional misconduct. The Respondent accepts that the conduct is unsatisfactory professional conduct and contends that it does not amount to professional misconduct.
- [38] Several comparative authorities are referred to in the submissions and provide some assistance in the characterisation exercise, although it is acknowledged that each case turns on its own facts.
- [39] In *Legal Services Commissioner v Kellahan*,<sup>7</sup> the legal practitioner did legal work for his business partner, including property and family matters. Relevantly, at the time the legal practitioner had a practising certificate under which he was only entitled to carry out legal work for his employer.
- [40] The parties submitted that the conduct in the three charges was characterised as professional misconduct in that it involved a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence. The Tribunal noted that the submission "accords with the outcome in several interstate cases involving practitioners acting outside the limitations of their practicing certificates, or without a certificate at all".<sup>8</sup>
- [41] In respect of the sanction, one factor in that case was that the legal practitioner had engaged in the legal practice under the mistaken but genuine belief that his business

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<sup>7</sup> [2012] QCAT 263.

<sup>8</sup> At [19].

relationship with his business partner entitled him to do so.<sup>9</sup> The legal practitioner's conduct showed a lack of understanding about his role and responsibilities as a solicitor.<sup>10</sup>

- [42] The case of *Legal Services Commissioner v Desacola*<sup>11</sup> is referred to by both the LSC and the Respondent. The LSC ultimately seeks to distinguish the decision, but the Respondent seeks to rely on it as the closest comparator to the current conduct.
- [43] In *Desacola* the legal practitioner held an unrestricted employee practising certificate under which the legal practitioner was not to engage in legal practice other than in-house legal services to his employer. The conduct involved the provision of legal services to a fellow employee outside the scope of the practising certificate and payment for that legal work.
- [44] The matter was ultimately dealt with on the papers and the reasons only provide a brief overview of the facts. It appears that the conduct included:
- (a) Taking instructions and lodging a claim and statement of claim in the Supreme Court in proceedings against a financial planner without disclosing that he was acting as solicitor;
  - (b) Preparing a reply to the defence;
  - (c) Establishing an email address for the purpose of sending and receiving correspondence in relation to the proceeding; and
  - (d) Obtaining a scanned signature from the fellow employee for the purpose of using that in email correspondence.<sup>12</sup>
- [45] It also appears that the LSC took a "neutral position" on the characterisation of the conduct. The Tribunal concluded that the misconduct was not fairly described as "substantial or consistent" or as being of such a nature as to warrant a finding that he was not a fit and proper person to engage in legal practice. Further, the Tribunal concluded that the conduct did not qualify as "the more serious" professional misconduct but could fairly be described as unsatisfactory professional conduct.<sup>13</sup>
- [46] In respect of penalty the Tribunal recognised that this was an isolated incident but the legal practitioner knew, or ought to have known, that he was acting in breach of a strict condition imposed on his practising certificate. The acts of receiving instruction and payment were two aspects that attracted condemnation and sanction.<sup>14</sup>
- [47] The Tribunal did recognise that the penalty was required to reflect the need to maintain proper standards in the profession, set an example to other lawyers and, where necessary, deter other practitioners from engaging in similar conduct.<sup>15</sup>

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<sup>9</sup> At [17].

<sup>10</sup> At [21].

<sup>11</sup> [2013] QCAT 432.

<sup>12</sup> At [4].

<sup>13</sup> At [11].

<sup>14</sup> At [12].

<sup>15</sup> At [12].

- [48] The legal practitioner cooperated with the LSC and did not contest the charges. The order was a public reprimand and a penalty of \$1,000.<sup>16</sup> This will be considered further below in respect of the appropriate sanction.
- [49] The LSC seeks to distinguish *Desacola* on the basis that it did not include any false and misleading conduct, such as in Charge 2. The difficulty is that the reasons are ambiguous in respect of some aspects of the facts. It appears that the legal practitioner was acting as solicitor on the record but pretending to be the party herself, although this is not totally clear. Arguably there is some element of falsity or deception, but again, this is not grappled with by the Tribunal.
- [50] If a legal practitioner was impersonating a party, conducting Supreme Court proceedings, and charging for the provision of legal services whilst acting outside a practising certificate, it is difficult to see how that would not amount to professional misconduct. That is conduct falling short, to a substantial degree, of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [51] There is no real assistance provided by the Tribunal's reasons, and it may be in fact that the Tribunal was not assisted by the parties in this regard. However, given the lack of detail and analysis in the reasons, the decision of *Desacola* is of limited use in the current circumstances.
- [52] In *Legal Services Commissioner v De Fraine*,<sup>17</sup> the legal practitioner had acted for two clients in respect of three hearings across two days without a valid practising certificate. The two charges involved court appearances before a Magistrate and there was a risk that the Court was misled. The Tribunal, however, was satisfied that any misleading of the Court was "entirely unintentional".<sup>18</sup>
- [53] In finding that the conduct constituted professional misconduct, the Tribunal stated:
- "[6] As the respondent's conduct substantially falls short of the reasonable standard of competence and diligence expected of an Australian legal practitioner, it constitutes professional misconduct.
- [7] Engaging in legal practice without a legal practising certificate is a serious violation of the legal and ethical responsibilities of an Australian legal practitioner. A practising certificate confirms the suitability, in terms of competence and ethics, of the legal professional to practice law. The process of regular certification of lawyers preserves the integrity, ethics and standards of competence and diligence required of legal practitioners."
- [54] These comments apply equally to legal practice outside the conditions imposed on a practising certificate.
- [55] *Legal Services Commissioner v Dominic*<sup>19</sup> concerned a practitioner failing to bank trust monies into a trust account and also engaging in legal practice as a sole practitioner in contravention of the conditions of her employee practising certificate.

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<sup>16</sup> The legal practitioner had undertaken a legal ethics course himself. He was also ordered to pay the LSC's costs in a fixed amount of \$2,000.

<sup>17</sup> [2015] QCAT 292.

<sup>18</sup> At [9].

<sup>19</sup> [2020] QCAT 124.

[56] The Tribunal considered the two charges and concluded that the conduct was sufficiently serious to warrant a finding of professional misconduct in that the conduct involved substantial and consistent failures to keep a reasonable standard of competence and diligence in connection with her practice as a solicitor.<sup>20</sup>

[57] In respect of the conduct of acting outside of the conditions of her practising certificate, the Tribunal commented:

“[14] Whilst of a lesser category, the conduct of this respondent in acting or purporting to act as a sole practitioner at a time when she did not hold the necessary regulatory permission to do so is also a serious matter. The vocational regulation of the profession is necessary in the public interest to ensure that practitioners who engage in practice on their own account demonstrably have the necessary qualifications, learning and experience to do so. That is why the Law Society rules allow for periods of gradation, during which employed solicitors may be given greater levels of responsibility, but always subject to the necessary and appropriate supervision to enable them to attain the necessary standards of experience and competence to allow them to practise in an unrestricted way. For a practitioner to flout the restrictions imposed on their practicing certificate, particularly in relation to dealings in client’s money, is a matter that is and should be regarded as serious.”

[58] In that case, particularly as a consequence of the charge in respect of dealing with a client’s money, the Tribunal recommended that the legal practitioner be struck off.

[59] In *Legal Services Commissioner v Doyle*<sup>21</sup> the Tribunal considered four charges including engaging in legal practice without a valid practising certificate. The legal practitioner had engaged in legal practice when he was not entitled to do so, made dishonest representations, and also falsely represented that he was undertaking legal work.

[60] Mr Doyle had applied for a principal level practising certificate but had failed to pay for the certificate and had also failed to pay the professional indemnity insurance (both of which were conditions of the certificate). Consequently, the practising certificate was not issued and Mr Doyle was not entitled to engage in legal practice from 30 June 2018. The Tribunal found that, by his conduct, Mr Doyle engaged in legal practice and represented that he was entitled to so engage after that date.<sup>22</sup>

[61] In undertaking the characterisation exercise, the Tribunal noted:

“[39] It has long been regarded that to make a finding of professional misconduct there must be proof of conduct which ‘would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency’.<sup>23</sup> In similar terms, in *Adamson v Queensland Law Society Incorporated*, Thomas J formulated the test for professional misconduct as follows:<sup>24</sup>

The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed

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<sup>20</sup> At [15].

<sup>21</sup> [2021] QCAT 347.

<sup>22</sup> At [12] – [18].

<sup>23</sup> *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

<sup>24</sup> [1990] 1 Qd R 498, 507.

or approved by members of the profession of good repute and competency.”

- [62] The Tribunal found professional misconduct in respect of all four charges and recommended that Mr Doyle’s name be removed from the roll.
- [63] The cases which resulted in the recommendation for removal of the legal practitioner from the role are more serious than the present case, however the comments in respect of the seriousness of acting beyond conditions of a practising certificate and false statements are relevant.
- [64] The LSC contends that the conduct in the current case is most similar to that in *Kellahan*, such that the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence amounting to professional misconduct.
- [65] The cases referred to in respect of misleading statements are not of much assistance as they mainly involve misleading the Court, which is not relevant here.
- [66] The case of *Legal Services Commissioner v Gould*<sup>25</sup> involved misleading statements made to a client as well as misleading comments made to the QLS, both of which were found to be professional misconduct.
- [67] The Tribunal commented on the relationship of trust between a solicitor and client and the importance of honest communication. Communications which misled a client amount to conduct which falls substantially short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.<sup>26</sup>
- [68] A further important consideration is public confidence in the legal profession. This confidence is seriously undermined if a legal practitioner is misleading about their very ability to engage in the practice of law and their entitlement to provide legal services.
- [69] In the often cited case of *New South Wales Bar Association v Cummins*,<sup>27</sup> Spigelman CJ (Mason P and Handley JA agreeing) stated:

“[19] Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standard of integrity.

[20] There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice

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<sup>25</sup> [2016] QCAT 533.

<sup>26</sup> At [47].

<sup>27</sup> [2001] NSWCA 284; 52 NSWLR 279.

depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.”

- [70] Even though there is no dishonesty alleged in Charges 1 and 2, the false and misleading aspect of Charge 2 gives rise to concerns about the trust and confidence in the legal profession and what the public would expect from a competent and diligent solicitor.
- [71] The Respondent submits that he made errors of judgment and was well-intentioned. Whilst acknowledging the seriousness of acting outside the condition on his practising certificate, the Respondent submits that the conduct should be characterised as unsatisfactory professional conduct.
- [72] In respect of the cases the Respondent contends that as each case turns on their own facts the cases are not true comparators, except for *Desacola* which supports the characterisation of unsatisfactory conduct.
- [73] As previously identified, there are shortcomings in the usefulness of *Desacola*. The Tribunal considers it more appropriate to consider the characterisation of the current conduct by reference to general principles and the statements of principle in the other identified authorities.
- [74] The conduct of the Respondent involved two components arising from the same conduct. Firstly, acting in breach of the condition on his practising certificate. Secondly, engaging in false and misleading conduct by representing himself as a legal practitioner of [D]. The false and misleading conduct aggravates otherwise serious conduct which goes to the very heart of the regulatory regime which governs engagement in legal practice.
- [75] Even accepting that the Respondent just did not turn his mind to the condition on his practising certificate and set up the email address to keep the emails separate, the underlying conduct is serious.
- [76] Factors relevant to the characterisation of the conduct include:
- (a) the nature of the charges;
  - (b) the factual circumstances of the conduct, including that:
    - (i) it involved a family law matter and parenting responsibilities in relation to [Child 1] and [Child 2]; and
    - (ii) the Respondent had to set up the email address, the Signature Block, and the Disclaimer;
  - (c) the number of emails over a period of approximately 8 months;
  - (d) [Mr B] relied on the emails and was eventually frustrated in not being able to communicate with [Ms C] when the Respondent indicated he could no longer facilitate communications;
  - (e) the conduct is likely to bring the legal profession into disrepute; and
  - (f) the importance of the integrity of the legal profession.
- [77] A competent and diligent legal practitioner would:

- (a) be mindful of the conditions or restrictions on their practising certificate and consider whether a request for the provision of legal services was outside their entitlement to engage in legal practice; and
- (b) be mindful of not making false or misleading representations as to their entitlement to engage in legal practice or their association with an incorporated legal practice, even if unintentional.

[78] Considering the Respondent's conduct globally:

- (a) The Respondent's conduct "strikes at the heart" of the Respondent's entitlement to practice as a solicitor.
- (b) The conduct goes to a legal practitioner's ability to hold themselves out, and to practice, as a lawyer and has the potential to damage the public's trust in the legal profession.
- (c) The conduct involved a significant departure from accepted standards of competence and diligence.

[79] Accordingly:

- (a) The Tribunal is satisfied that the conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner and is a substantial failure within s 419 of the LP Act.
- (b) The Tribunal finds that the Respondent's conduct in relation to Charges 1 and 2 in the discipline application is properly characterised as professional misconduct.

### **What are the appropriate orders pursuant to s 456 of the LP Act?**

[80] Having made the findings as to professional misconduct, the discretion in s 456 of the LP Act arises.

[81] Section 456 of the LP Act states:

#### **"456 Decisions of tribunal about an Australian legal practitioner**

- (1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.
- (2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate—
  - (a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
  - (b) an order that the practitioner's local practising certificate be suspended for a stated period or cancelled;
  - (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period;
  - (d) an order that—

- (i) imposes stated conditions on the practitioner's practising certificate granted or to be issued under this Act; and
  - (ii) imposes the conditions for a stated period; and
  - (iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;
- (e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;
  - (f) an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years—
    - (i) employ or continue to employ the practitioner in a law practice in this jurisdiction; or
    - (ii) employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.
- (3) The tribunal may, under this subsection, make 1 or more of the following—
- (a) an order recommending that the name of the Australian legal practitioner be removed under a corresponding law from an interstate roll;
  - (b) an order recommending that the practitioner's interstate practising certificate be suspended for a stated period or cancelled under a corresponding law;
  - (c) an order recommending that an interstate practising certificate not be, under a corresponding law, granted to the practitioner until the end of a stated period;
  - (d) an order recommending—
    - (i) that stated conditions be imposed on the practitioner's interstate practising certificate; and
    - (ii) that the conditions be imposed for a stated period; and
    - (iii) a stated time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed.
- (4) The tribunal may, under this subsection, make 1 or more of the following—
- (a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than \$100,000;
  - (b) a compensation order;
  - (c) an order that the practitioner undertake and complete a stated course of further legal education;
  - (d) an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;
  - (e) an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;

- (f) an order that the practitioner stop accepting instructions as a public notary in relation to notarial services;
  - (g) an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions;
  - (h) an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period;
  - (i) an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice;
  - (j) an order that the practitioner must not apply for a local practising certificate for a stated period.
- (5) To remove any doubt, it is declared that the tribunal may make any number of orders mentioned in any or all of subsections (2), (3) and (4).
  - (6) Also, the tribunal may make ancillary orders, including an order for payment by the Australian legal practitioner of expenses associated with orders under subsection (4), as assessed in or under the order or as agreed.
  - (7) The tribunal may find a person has engaged in unsatisfactory professional conduct even though the discipline application alleged professional misconduct."

[82] The discretion to make any order the Tribunal thinks fit is a wide discretion and is exercised primarily in the protection of the public.<sup>28</sup> Principles of personal and general deterrence are also relevant.<sup>29</sup>

[83] An order publicly reprimanding the practitioner may be imposed pursuant to s 456(2)(e) of the LP Act. The Respondent concedes that a public reprimand is an appropriate order.

[84] The impact of a public reprimand has been recognised previously by the Tribunal. In *Legal Services Commissioner v Cruise* [2019] QCAT 182, the Tribunal<sup>30</sup> referred to the observations made in *Council of the New South Wales Bar Association v Lott* as follows:

“A reprimand is a serious matter. It marks the disgrace of a member of an honourable profession inherent in the misconduct.”<sup>31</sup>

[85] Further, the Tribunal in *Legal Services Commissioner v Challen*<sup>32</sup> recognised the seriousness of a public reprimand as follows:

“[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.

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<sup>28</sup> *Legal Services Commissioner v Madden (No. 2)* [2009] 1 Qd R 149 at [122].

<sup>29</sup> *Attorney-General v Bax* [1999] 2 Qd R 9, 22.

<sup>30</sup> Constituted by Daubney J (President), Mr Michael Meadows and Dr Margaret Steinberg AM.

<sup>31</sup> [2019] QCAT 182 at [116], citing *Council of the New South Wales Bar Association v Lott* [2018] NSWCATOD 99 at [35].

<sup>32</sup> [2019] QCAT 273.

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>33</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.”

- [86] The LSC seeks a public reprimand and the Respondent does not oppose an order for a public reprimand.
- [87] In the current case, an order that the Respondent be publicly reprimanded is appropriate.
- [88] Section 456(4)(a) of the LP Act provides that the Tribunal may make “an order that the Australian legal practitioner pay a penalty of a stated amount, not more than \$100,000.” The payment of a pecuniary penalty is directed at general deterrence rather than as a punishment.
- [89] The LSC contends that the Tribunal should order that the respondent pay a penalty in the amount of \$6,000 within 90 days. The Respondent contends that there should be no order for a pecuniary penalty.
- [90] As previously discussed, in *Desacola* a penalty of \$1,000 was ordered in respect of a finding of unsatisfactory professional conduct. The other cases where professional misconduct was found also involved charges that aggravated the seriousness of the conduct, such as dealings with trust monies or misleading the Court. The cases are not particularly helpful in identifying a penalty range.
- [91] Here the conduct is serious enough to be classified as professional misconduct but is not at the more serious end of the range of conduct in that category. General deterrence and denunciation of the type of conduct could be reflected in a penalty, but this needs to be balanced against being a punishment. The protective nature of the orders needs to also be factored into the balancing exercise.
- [92] Balancing the various considerations including totality, the Tribunal is satisfied that it is appropriate to order that the Respondent pay a pecuniary penalty of \$2,500 within 90 days.
- [93] The LSC also seeks the imposition of an order requiring the Respondent to undertake an ethics course pursuant to s 456(4)(c) of the LP Act and this is opposed by the Respondent.
- [94] In the circumstances of this case it is submitted that such an order would be apt to protect the public. While the Respondent has approximately 18 years' experience as a legal practitioner, no history of disciplinary proceedings, and shows insight and remorse, there remains some utility in the Respondent undertaking the QLS Remedial Ethics Course.

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<sup>33</sup> *Legal Services Commissioner v Brown* [2018] QCAT 263 at [42].

- [95] The QLS Remedial Ethics Course can be structured to include focused reflections on specific topics of relevance. Given the Respondent's conduct the subject of Charges 1 and 2, a focus on the importance of the qualities of honesty and integrity and a preparedness to comply with the law as discussed by Spigelman CJ in *New South Wales Bar Association v Cummins*<sup>34</sup> would be directed at both the protection of the public and maintaining professional standards.
- [96] The Tribunal is satisfied that it is appropriate to order that the Respondent undertake the QLS Remedial Ethics Course, with a focus as outlined above.
- [97] The Respondent would be required to bear the cost of undertaking the QLS Remedial Ethics Course, which is currently \$1,500. The Respondent would also have to take a day off work to attend the course. These matters have been considered and taken into account in arriving at the overall sanction to be imposed.

### **What is the appropriate costs order?**

- [98] Section 462(1) of the LP Act states:

“A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.”

- [99] No exceptional circumstances are identified that would justify any departure from an order in accordance with s 462(1) of the LP Act.
- [100] Accordingly, the Tribunal is satisfied that it is appropriate to order that the Respondent pay the LSC's costs of and incidental to the disciplinary application, to be assessed.
- [101] For the purpose of s 462(5)(b) of the LP Act, it is appropriate that costs be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.

### **Orders**

- [102] For the reasons stated above, the Tribunal orders that:
1. The Respondent's conduct identified in respect of each of Charges 1 and 2 in the discipline application is proved and is found to constitute professional misconduct.
  2. The Respondent is publicly reprimanded.
  3. The Respondent pay a pecuniary penalty in the sum of \$2,500 within 90 days of these orders being made.
  4. The Respondent successfully complete the next available QLS Remedial Ethics Course at his own expense and provide to the Applicant, within a month of having completed the course, evidence of his successful completion of the course.

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<sup>34</sup> [2001] NSWCA 284; 52 NSWLR 279 at [19] – [20].

5. The Respondent pay the Applicant's costs of and incidental to the discipline application, to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.