

CITATION: *Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174

PARTIES: Legal Services Commissioner
(Applicant/Appellant)
v
Mr Michael John Wright t/as Wrightway Legal
(Respondent)

APPLICATION NUMBER: OCR377-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice DG Thomas, President**
Assisted by:
Mrs Joanne Collins
Dr Margaret Steinberg

DELIVERED ON: 20 May 2015

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Respondent is to be publicly reprimanded.**
- 2. The Respondent is to pay a pecuniary penalty of \$5,000.**
- 3. The Respondent is to pay the Applicant's costs fixed in the sum of \$2,500.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where practitioner failed to honour an undertaking given in the course of legal practice – whether that failures constitutes professional misconduct or unsatisfactory professional conduct

Australian Solicitors Conduct Rules r 6.1
Legal Profession Act 2007 (Qld) ss 419, 419
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Adamson v Queensland Law Society Incorporated (1991) 1 Qd R 498
Vincent Cofini [1994] NSWLST 25
Law Society of New South Wales v Waterhouse [2002] NSWADT 204
Attorney-General v Bax [1999] 2 Qd R 9

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

REASONS FOR DECISION

Charges

- [1] The Commissioner alleges that the conduct of Mr Michael Wright constitutes professional misconduct in that, without being released from an undertaking by the recipient or by a court of competent jurisdiction, Mr Wright failed to honour an undertaking that was given in the course of legal practice.¹

Background

- [2] The following facts are not in dispute.
- [3] Mr Wright acted on behalf of Mr Rayward in matrimonial proceedings.
- [4] Property matters were finalised by orders of the Federal Magistrates Court, made by consent between Mr and Mrs Rayward on 6 May 2010.
- [5] The orders included a transfer of a property to Mr Rayward and contemporaneous payment of a sum of \$84,000 by Mr Rayward to Mrs Rayward. Mr Wright gave an undertaking to WP Lawyers, then acting for Mrs Rayward, that Wrightway Legal would '*use the transfer- form 1 and form 24- for stamping purposes only prior to settlement*'.
- [6] The term "settlement" was a reference to the settlement contemplated by the Federal Magistrates Court order, namely that on payment of the sum of \$84,000 the property would be transferred to Mr Rayward (order 2).
- [7] After that order was made, Wrightway Legal ascertained that Mrs Rayward was acting on her own behalf, that WP Lawyers would not be attending settlement and, rather, that a nominated individual would attend on behalf of Mrs Rayward.
- [8] On instruction from Mr Rayward, \$51,000 was remitted and not \$84,000. Mr Rayward instructed Wrightway Lawyers that the property had been damaged and that the sum of \$51,000 was part payment of the property settlement.

¹ Application dated 19 November 2012, page 2.

- [9] Mrs Rayward and WP Lawyers were advised that Wrightway Legal would take instructions regarding the further funds being released (for the benefit of Mrs Rayward) or apply to the Court for further orders. Mrs Rayward did not provide her address for service.
- [10] No response was received from either Mrs Rayward or WP Lawyers disputing the claimed damages or missing goods, the value attributed to them, or the deduction from Mrs Rayward's settlement funds.
- [11] Wrightway Legal wrote to Mrs Rayward detailing the damages but no reply was received. At that time Mrs Rayward was asked to provide an address for service but did not do so.
- [12] In the communication the following was included:
- Given the extent of the damage and the number of items you have removed from the property it is unlikely there will be any further funds paid to you. If the damage exceeds the amount held in trust we intend to serve you at your work with an application to the Federal Magistrates Court to recover further monies from you, damages and legal costs.
- [13] No response was received from either Mrs Rayward or WP Lawyers.
- [14] As at 10 October 2010, some 90 days after the timeframes stipulated in the Federal Magistrates Court orders dated 6 May 2010, Mrs Rayward had received payment of \$51,000 and Mrs Rayward or WP Lawyers had not:
- a) disputed the property damage or missing goods.
 - b) disputed the value attributed to the property damage or missing goods.
 - c) disputed the deduction of funds from Mrs Rayward's settlement funds.
 - d) provided an address for service of further Federal Magistrates Court proceedings.
- [15] On 18 October 2010 the property was transferred on the specific instructions of Mr Rayward, and Mrs Rayward was advised by email that the transfer was to be lodged. No response or objection was received.

Discussion

- [16] The applicant submits that the conduct of Mr Wright should be characterised as professional misconduct.
- [17] Unsatisfactory professional conduct is defined in s 418 of the *Legal Profession Act 2007* (Qld) (Legal Profession Act) as including:

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.

- [18] Professional misconduct is defined in s 419 of the Legal Profession Act as including:

Unsatisfactory professional conduct of an Australian legal practitioner if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.²

- [19] Thomas J formulated the test for professional misconduct as 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.³

- [20] The applicant refers to rule 6.1 of the *Australian Solicitors Conduct Rules* which states:

a solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

- [21] The matter of undertakings was referred to in the New South Wales Legal Services Tribunal case of Vincent Cofini in the following terms:

Undertakings are given by legal practitioners for the specific purpose of enabling legal activities to be carried out. Other persons rely upon those undertakings. The undertakings ... bind that practitioner ... as a matter of professional conduct and comity, and will be enforced by the Courts because legal practitioners are officers of the Court and because without enforcement undertakings would be worthless, persons and Courts would be unable to rely upon the word of a legal practitioner and this aspect of legal practice, that demands compliance for legal efficiency, would collapse.⁴

- [22] Because of the serious nature of an undertaking given by legal practitioners, a breach of an undertaking is usually regarded as professional misconduct although, of course, whether conduct amounts to professional misconduct is a matter which must be considered by reference to the facts and circumstances of the particular case.⁵

- [23] In his response, Mr Wright asserts that the undertaking was provided to WP Lawyers solely for the benefit of WP Lawyers and that normal practice in conveyancing is for the recipient of the undertaking to return the transfer specifically acknowledging that the transfer is provided only for stamp duty purposes prior to settlement and that, in the current case, no such reply was received. Instead, Mr Wright was contacted directly by Mrs Rayward saying that she was self-acting and would return the signed transfer.⁶

- [24] In the circumstances of this case, that response has no merit. The undertaking was clearly provided, and was referable to the settlement

² Legal Profession Act s 418(1)(a).

³ *Adamson v Queensland Law Society Incorporated* (1991) 1 Qd R 498.

⁴ *Vincent Cofini* [1994] NSWLST 25, 6.

⁵ *Law Society of NSW v Waterhouse* [2002] NSWADT 204.

⁶ Response filed 29 January 2013, paragraphs [1] – [3].

contemplated by the Federal Magistrates Court orders and the transfer documents provided in response to that undertaking. An undertaking can be given either to other lawyers or to non-lawyers direct – the duty on the practitioner is the same regardless of the person to whom it is given.

- [25] Mr Wright abandoned that defence in the submissions filed on his behalf on 11 June 2013.
- [26] The ability to rely upon a legal practitioner's undertaking is of utmost importance. It is central to dealings with legal practitioners. Because of its importance, noncompliance with the clear terms of an undertaking involves a substantial failure to reach or maintain a reasonable standard of competence and diligence and so amounts to professional misconduct as that term is described in s 419 of the Legal Profession Act.

Penalty

- [27] When considering appropriate sanctions, the object is not to penalise the practitioner. Rather, the primary objective is to protect the public. In terms of the protection of the public, regard can be had to principles of personal and general deterrence.⁷
- [28] The aim is also to maintain and enforce proper standards in the profession and in that context, it is relevant to consider the need to deter other practitioners from engaging in similar conduct. This also is consistent with the objective of protecting the public by enforcing standards upon which the public can rely.
- [29] Mr Wright submits that any penalties should be in the lowest range. His reasons rest upon the communications which took place with Mrs Rayward when Mrs Rayward was warned that, because of the damage to the property, the sum of \$51,000, rather than \$84,000, would be paid in return for the transfer of the property.
- [30] Mr Wright refers to his instructions to commence proceedings to vary the orders made (which would in turn vary the terms of the undertaking). He forwarded communication to Mrs Rayward indicating these instructions and seeking an address for service, to which no reply was received.
- [31] Subsequently, he was instructed to lodge the transfer due to his client's need to refinance the property. Mr Wright submits that he was concerned about whether settlement had occurred and so wrote to Mrs Rayward to allow her to object. When she did not object, the transfer was lodged.
- [32] The facts raised by Mr Wright demonstrate a lack of understanding of his obligations with respect to compliance with the undertaking.
- [33] The correct course would have been for him to have applied to either vary the Federal Magistrates Court Order or, where Mrs Rayward was not responding, to be released from the undertaking by the Court.

⁷ *Attorney-General v Bax* [1999] 2 Qd R 9 at 22 per Pincus JA.

- [34] He did neither of these things, despite having indicated he was concerned about the question of settlement when the client provided instructions to transfer on 1 October 2010. Therefore, the matters raised by Mr Wright are not matters which would suggest that the penalty should be in the lowest range.
- [35] The Legal Services Commissioner suggests that the sanction should include a fine in the range of \$4,000 to \$6,000. Mr Wright suggests a penalty in the range of \$2,000 to \$4,000.
- [36] In view of the importance of honouring undertakings in the practice of the law, the following orders are made:
- (1) That Mr Wright be publicly reprimanded.
 - (2) That a penalty of \$5,000 be imposed.

Costs

- [37] The Legal Services Commissioner seeks an order for costs fixed in the sum of \$2,500 and Mr Wright accepts that such an order in relation to costs should be made. On that basis, it is ordered that Mr Wright pay the Legal Services Commissioner's costs fixed in the sum of \$2,500.