

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

LPDT 5 OF 2018

BETWEEN:

LAW SOCIETY NORTHERN TERRITORY

Applicant

VANESSA MARIE FARMER

Respondent

DETERMINATION AS TO PENALTY

1. The Legal Practitioners Disciplinary Tribunal has found that the Respondent breached section 247 of the *Legal Profession Act 2006* by disbursing money held in the Withnalls Trust Account otherwise than in accordance with law and/or a direction given by the persons on whose behalf it was received or was being held. She refused to comply with the clear and valid direction of the parties to pay the monies held to the Complainant and her reasons for so doing did not excuse this conduct. The Tribunal was satisfied that the disbursement was reckless.
2. The Tribunal was also satisfied that the Respondent had breached Order 2 of the Orders of the Federal Circuit Court of Australia in the Federal Circuit Court proceeding made by consent at Darwin on 16 July 2013 by failing and refusing to comply with a written direction given pursuant to that Order.
3. Each of the breaches were found to amount to professional misconduct within the meaning of section 465(1)(a) of the *Legal Profession Act 2006*. The Respondent's failure to appreciate the legal effect of the Order of the Federal Circuit Court was found to be a substantial failure to reach a reasonable standard of competence.



4. The Tribunal has now received and considered written submissions from both the Applicant Law Society and the Respondent as to penalty. The parties have proposed an agreed penalty in these terms:

1. The Respondent be reprimanded in respect of each charge.
2. The Respondent pay a fine of \$15,000 to the Funds Management Committee for the Legal Practitioners Fidelity Fund by 31 January 2020 (pursuant to section 389(1)(c) of the Act).
3. The Respondent in addition to her usual CPD requirements, complete within 6 months such further legal education as agreed to by the Society, such further legal education not to exceed a course extending over one day.
4. The Respondent pays the Society's costs of the proceedings, fixed at \$40,000, by 29 February 2020.
5. An order pursuant to s.525(5)(d) of the Act that the Respondent pay the \$16097.74 held in trust to the complainant Craig Chenhall, within 7 days.

5. Although the complaints made against the Respondent were contested and went to hearing, the Respondent now fully accepts the Tribunal's findings and takes full responsibility for her conduct. The Tribunal accepts the submission that the Respondent was not motivated by any improper purpose in pursuing her costs but that her judgement "...was clouded by a belief that the Complainant had used what she thought to be a power imbalance in the relationship to influence Mrs Chenhall, to give her consent to release all of the Trust monies to him, which apart from defeating what she believed at the time was a legitimate expectation of entitlement to have her legal fees paid before those funds were disbursed, would also leave those fees payable by Mrs Chenhall."



6. Section 525 of the *Legal Profession Act 2006* provides for the orders that the Tribunal may make upon finding a Practitioner guilty of professional misconduct. The Tribunal may make one or more of the orders provided.¹ Section 525(5)(a)(ii) provides for a fine to be imposed. The maximum fine for professional misconduct is 1000 penalty units. The applicable value of the penalty unit is that at the time of the misconduct in question, that is, in 2015. At that time a penalty unit was \$153.00 meaning the maximum fine with respect to professional misconduct in this matter is \$153,000.00. The penalty proposed by the parties is therefore very much towards the lower end of the scale for a finding of professional misconduct. The Respondent submits that the matter of *VLSC v Galatas*² bears the closest similarity to this matter. In *Galatas* the Tribunal reprimanded the Practitioner and ordered him to pay a fine of \$7,500.00. The maximum applicable penalty at that time was \$50,000.00. Proportionally then, the proposed penalty is considerably less than that imposed in *Galatas* including that as Mr Galatas had pleaded guilty to the charge he may have received a lesser fine than would otherwise have been imposed. Nevertheless, it is the case that disciplinary penalties are not imposed as punishment but rather in the interests of the protection of the community from unsuitable Practitioners.³ The purpose of a fine is primarily to provide specific deterrence with an element of general deterrence to other Practitioners against that conduct.
7. It is also the case that where parties have agreed a civil penalty it should be accepted provided that the Tribunal is “sufficiently persuaded of the accuracy of the parties agreement as to facts and consequences, and that the penalty the parties propose is *an* appropriate remedy in the circumstances thus revealed”.⁴ It is not a consideration that the Tribunal may have provided a different penalty provided that the penalty imposed is within the range of “appropriate penalties”.

¹ Section 525(2) *Legal Profession Act 2006*

² [2016] VCAT 395

³ *Legal Services Commissioner v Madden* (No 2) [2008] QCA 301 at [122]

⁴ *Commonwealth v Director Fair Work Building Industry Inspectorate & CMFEU* (2015) 258 CLR 482



8. In assessing the amount of the fine to be paid, the Tribunal must also take into consideration any other penalties proposed, in other words to look to the sanctions as a whole. In this case additional sanctions have been agreed by the parties so that the fine forms only part of the overall penalty. The Tribunal notes the substantial legal costs that the Respondent has agreed to pay to the Applicant Law Society and notes that she will no doubt incur a similar quantum of costs for her own representation. Each of these imposts will no doubt be ones that will encourage greater diligence on the part of the Practitioner for future conduct.

9. Section 525(b) provides that an order may be made for a Practitioner to undertake and complete a **specified** course of further legal education. The form of the order that the parties propose is in the view of the Tribunal not sufficient to satisfy that provision in that they propose only a “course to be agreed to by the Society”. The view of the Tribunal is that such an order must specify at least the area of further education that is directed. In this case the Tribunal believes that the necessary areas of further legal education required is Ethics and Professional Responsibility and Practice Management. The Tribunal notes that a program that includes these areas of education and is directed at the issue of unconscious bias is one that is available for Northern Territory Practitioners as part of the Continuing Professional Development programs and given what the Practitioner has said in explanation of her conduct may be a course from which she would benefit.

10. The Practitioner has restored the amount of \$16,097.74 to her Trust Account following the decision of the Tribunal. It is proposed by both parties that that sum of money now be paid to the complainant Mr Chenhall. Mr Chenhall upon advice of the initial decision of the Tribunal in the matter had asked to be heard in relation to a compensation order. The Applicant has advised the Tribunal that Mr Chenhall is now content with the order proposed and no longer wishes to be heard in relation to a compensation order.



11. Section 536 of the Act provides the power for the Tribunal to make compensation orders where it has found a Practitioner guilty of unsatisfactory professional conduct or professional misconduct. An order pursuant to that provision would have been appropriate were it not for the fact that the moneys in question have been restored to the Practitioner's trust account. In the circumstances, the order prosoed by the parties, that is one pursuant to s525(5)(d) that the monies held in trust now be paid to Mr Chenhall is an appropriate one. The Tribunal notes that having accepted the Tribunal's findings there is no reason why those monies should not already have been paid to him.
12. The Practitioner has had previous disciplinary matters but notes that these were at the lower end of the spectrum and that since 2015 when these events occurred there have not been any further complaints about her.
13. The Tribunal accepts the Respondent's regret and remorse now expressed in her submissions but notes that it is diametrically opposed to her approach throughout the investigation and hearing.
14. In addition to those submissions, the Tribunal received strong and consistent letters of support from thirteen of her legal colleagues. The letters as a whole uniformly describe her as being extremely hard working and competent in the exercise of her professional practice. Many speak of her commitment to pro bono work and legally aided work and of the consequent benefit of that to the community. Many refer to this conduct being out of character.
15. One of the letters from another Family Law Practitioner provided an appropriate observation.

“Lawyers must be held to the highest standards but we do make mistakes...”



16. This is not a case of dishonest conduct by a Practitioner but one, as submitted by the Respondent of reckless conduct. The Practitioner failed to reconsider the terms of the Family Court Order and/or its legal effect when determining to withhold some of the monies in her Trust Account rather than paying them to Mr Chenhall as directed by him and her former client. She accepts that her professional judgement had become clouded by her view of the Complainant.

17. The Tribunal notes that in addition to the substantial financial penalties the parties have agreed that she is unlikely to now ever recover the fees owing to her from her former client for the considerable amount of legal work involved in that matter.

18. The Tribunal makes the following orders:

1. The Respondent be publicly reprimanded in respect of each charge.
2. The Respondent is to pay a fine of \$15,000 by 31 January 2020 to the Funds Management Committee for payment pursuant to section 389(1)(c) of the Act into the Legal Practitioners Fidelity Fund.
3. The Respondent, in addition to her usual CPD requirements, is to complete within 6 months a course of further legal education in the areas of Ethics and Professional Responsibility and Practice Management, such further legal education not to exceed a course extending over one day or an equivalent online program.
4. The Respondent is to pay the Law Society's costs of the proceedings fixed at \$40,000.00 by 29 February 2020.
5. Pursuant to section 525(5)(d) of the Act that the Respondent cause the payment from Withnall's Trust Account of the sum of \$16097.74 to the complainant, Craig Chenhall, within 7 days.



A/Judge Sue Oliver
Chair



Richard Giles
Member



Heather King
Member

5 December 2019

