

CITATION: *Legal Services Commissioner v Johnston* [2015] QCAT 480

PARTIES: Legal Services Commissioner
(Applicant/Appellant)
v
Suzanne Machel Johnstone
(Respondent)

APPLICATION NUMBER: OCR156-14

MATTER TYPE: Occupational Regulation matters

HEARING DATE: 8 December 2015

HEARD AT: Brisbane

DECISION OF: **Justice DG Thomas, President**
Assisted by:
Mr Scott Anderson, Legal panel member
Dr Margaret Steinberg AM, Lay panel member

DELIVERED ON: 15 December 2015

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The name of the respondent, Suzanne Machel Johnstone, be removed from the roll of practitioners kept by the Supreme Court of Queensland.**
- 2. The respondent pay the applicant's costs, to be assessed on the Supreme Court scale.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS OF DISCIPLINARY ORDERS – In general – where eleven charges for determination in discipline application including failing to maintain competence and diligence, trust account breaches and failing to respond to s 443 notices under the *Legal Profession Act* 2007 (Qld) – where no appearance for respondent solicitor – where respondent found guilty of all charges – where respondent found guilty of unsatisfactory professional conduct in relation to charges regarding competence and

diligence – where respondent found guilty of professional misconduct in relation to eight charges regarding failure to comply with s 433 notices – where respondent found guilty of professional misconduct in relation to the trust account breaches - whether respondent had demonstrated unfitness to practice by her conduct and should be removed from the local roll – whether respondent should pay applicant's costs of the application

Legal Profession Act 2007 (Qld) ss 7(4), 244, 250, 259(1), 265, 268, 420(1)(a), 443, 462, 701, 712.

Legal Profession Regulation 2007 (Qld) rr 33(2)(c), 37(2).

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 92, 93.

Legal Services Commissioner v Thomas [2009] LPT 13 at [61].

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Scott, A. of Counsel.

RESPONDENT: No appearance.

REASONS FOR DECISION

[1] The Legal Services Commissioner brought charges against Ms Johnston alleging:

- a failure to exercise competence and diligence;
- the making of false representations;
- failures to comply with s 443 notices under the *Legal Profession Act 2007 (Qld)* (the Act); and
- various breaches of the *Legal Profession Regulations 2007 (Qld)* (the Regulations) relating to trust accounts maintained by Ms Johnston.

Background

Kilham matter

[2] Ms Johnston acted for Mr Kilham and his wife, Ms Phillips, with respect to a conveyancing transaction in which they were vendors. Settlement took place on 30 October 2009 and a settlement statement provided by Ms Johnston to her clients indicated that a deposit in the sum of \$2,000.00 had been paid.

[3] Mr Kilham made enquiries concerning that deposit. By way of an email dated 27 May 2010 he informed Ms Johnston that, whilst the settlement statement suggested a deposit of \$2,000.00 was paid on the exchange of contracts, the agent had advised him that no deposit had in fact been paid.

[4] Ms Johnston responded on 3 September 2010 saying:

Ms Overvest, the Buyer, attended settlement personally on 30 October 2010 with the funds in the amount of \$2,455.33. The details that were provided regarding the cheque details in your original settlement statement were the cheques that had been requested directly from Ms Overvest's bank. The details of the funds that Ms Overvest provided personally at settlement were not available at the time.

We therefore attach a copy of the amended settlement statement for your records indicating the funds provided by the Buyer personally at settlement on 30 October 2009.¹

[5] The settlement statement which was attached to that email indicated "funds provided by personally" of \$2,455.33.

[6] According to enquiries with the bank, these funds were never in fact paid.

[7] The Legal Services Commissioner asserted that Ms Johnston failed to exercise competence and diligence in failing to ensure the required monies were paid and in failing to account to Mr Kilham and Ms Phillips in relation to those monies.

[8] It was also asserted that, in forwarding the email dated on 3 September 2010 and the amended settlement statement, Ms Johnston falsely represented that the deposit and adjustment amount had been paid when in fact it had not.

Section 443 charges

[9] Notices pursuant to s 443 of the Act were given to Ms Johnston in relation to the following complaints:

a) Gary Sean Cahill;²

¹ Affidavit of Laurence John Kilham sworn 19 June 2015, Attachment 5: email from Sue@sjlaw.com.au to Kilphil@optusnet.com.au transmitted Friday, 3 September 2010 at 2:29pm.

- b) Laurence Kilham and Sandra Phillips;³
 - c) Michael William Jennings;⁴
 - d) Jocelyn Drew;⁵
 - e) Adele Douglas;⁶
 - f) Amanda Christine Rayner;⁷
 - g) Ian John Gordon;⁸ and
 - h) Laura Robinson.⁹
- [10] Pursuant to s 443(3) of the Act if a practitioner fails to comply with a requirement contained in a s 443 notice, and the failure continues for a period of 14 days after the notice is given, the practitioner may be dealt with for professional misconduct.
- [11] It is submitted by the Legal Services Commissioner that, in respect of each complaint, there was a notice given under s 443 of the Act and Ms Johnston failed to comply with that notice within the required time. On that basis it is submitted that the conduct of Ms Johnston amounts to professional misconduct.

Trust breaches

- [12] Ms Johnston was the sole shareholder and director of an incorporated legal practice SJ Law Pty Ltd.
- [13] There were two trust account investigations undertaken by the Queensland Law Society with respect to the incorporated legal practice, each investigation having been completed by Mr Drinkall.¹⁰ The first report was completed on 11 May 2011 and the breaches found in that report are outlined in the document which is Annexure A to these reasons.
- [14] Pursuant to s 265 of the Act, the Queensland Law Society required Ms Johnston to pay costs of the investigation. Ms Johnston failed to do so.
- [15] A second investigation report was completed by Mr Drinkall on 8 December 2011.¹¹
- [16] The conclusions from the second investigation are outlined in Annexure B to these reasons.

² Affidavit of Darielle Glenna Campbell sworn 22 June 2015 paragraphs 3 – 18.

³ Ibid paragraphs 19 – 33.

⁴ Ibid paragraphs 34 – 49.

⁵ Ibid paragraphs 56 – 63.

⁶ Ibid paragraphs 50 – 55.

⁷ Ibid paragraphs 72 – 82.

⁸ Ibid paragraphs 90 – 95.

⁹ Ibid paragraphs 83 – 89.

¹⁰ The reports are annexed to the affidavit of Michael Craig Drinkall sworn 22 June 2015. As a document made under the Act, they are evidence in these proceedings of the matters contained in them pursuant s 712 of the Act.

¹¹ This report is annexed to the affidavit of Michael Craig Drinkall sworn 22 June 2015.

- [17] The Queensland Law Society required Ms Johnston to pay the costs of that investigation. Ms Johnston failed to do so.
- [18] As a sole director of the law practice, Ms Johnston is the principal of that practice pursuant to s 7(4) of the Act.
- [19] As the principal of the practice, Ms Johnston is liable for the breaches committed by the practice.¹² By virtue of s 420(1)(a) of the Act, conduct which is in contravention of a relevant law is capable of constituting unsatisfactory professional conduct or professional misconduct.

Discussion

- [20] The disciplinary application was filed on 16 July 2014 and served upon Ms Johnston on 10 November 2014.
- [21] Ms Johnston has not filed any response to the discipline application but has filed a notice of address for service and an email with the Tribunal Registry.
- [22] There have been various directions hearings at which orders were made to progress the discipline application.
- [23] Each of those directions were provided by the Registry to Ms Johnston at the postal address for service and email nominated by Ms Johnston.
- [24] In addition, pursuant to s 92 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (the QCAT Act), the Principal Registrar gave notice to each party that the hearing in this matter would be taking place at 10:00am on 7 December 2015.
- [25] Ms Johnston did not attend the hearing. The Tribunal is satisfied that Ms Johnston was given notice of the hearing pursuant to s 92 of the QCAT Act. Pursuant to s 93 of the QCAT Act, the Tribunal proceeded with the hearing on 7 December in the absence of Ms Johnston.
- [26] In relation to the allegations concerning the Kilham complaint, the Tribunal finds that Ms Johnston failed to ensure that the required monies were paid and also failed to account to Mr Kilham and Ms Phillips in relation to the settlement monies.
- [27] The Tribunal also finds that Ms Johnston misrepresented the position to Mr Kilham and Ms Phillips on 3 September 2010.
- [28] Ms Johnston's conduct 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 and so constitutes unsatisfactory professional conduct pursuant to s 418 of the Act. If there was evidence that Ms Johnston had retained the funds, the conduct would amount to professional misconduct.

¹² *Legal Profession Act 2007 (Qld)* ss 244 and 701.

- [29] With respect to the eight separate investigations undertaken by the Legal Services Commissioner following complaints made by clients, Ms Johnston failed to comply with the requirements of notices issued pursuant to s 443 of the Act. Ms Johnston was provided with notices pursuant to s 443(3) and continually failed to respond.
- [30] It is imperative, for the proper conduct of the profession, that legal practitioners comply with the requirements of the relevant professional association and of the Legal Services Commissioner. In recognising the importance of this obligation, s 443(3) of the Act provides that the failure to do so may be regarded as professional misconduct.
- [31] The failure of Ms Johnston to comply with the notices, on the repeated occasions, amounts to professional misconduct.
- [32] The audit by the Queensland Law Society revealed numerous breaches of the Regulations. Those breaches included:
- a) Failure to prepare monthly trust account reconciliation statements.
 - b) Failure to issue trust account receipts within a reasonable time.
 - c) Failure to ensure that chequebooks contained the particulars required by the Regulations.
 - d) Disbursement of funds from the trust account by electronic transfer rather than by cheque, in contravention of s 250 of the Act.
 - e) Failure to include on the firm's trust bank account the expression "law practice trust account" in breach of s 33(2)(c) of the Regulation, and failure to include the expression "law practice trust account" on cheques drawn on the trust account in breach of s 37(2) of the Regulation.
 - f) Allowing there to be deficiencies in trust accounts in breach of s 259(1) of the Act.
 - g) In breach of s 268 of the Act, failing to have the firm's trust records for the year ended 31 March 2010 and the year ended 31 March 2011 externally examined within 60 days of the end of those respective years.
- [33] By operation of ss 244 and 701(1) of the Act, Ms Johnston, as principal of the practice:
- a) had the same obligations imposed upon her as were imposed upon the practice; and
 - b) was taken to have contravened the provisions which were contravened by the practice.

- [34] Conduct constituting contravention of a relevant law (which includes the Regulations) is capable of constituting unsatisfactory professional conduct or professional misconduct.¹³
- [35] Compliance with the Regulations concerning trust monies is fundamental to the duty of a solicitor in the conduct of legal practice.
- [36] The failure of the practitioner in this case was repeated. Ms Johnston's failure amounted to conduct which is categorised as professional misconduct under the Act.

Penalty

- [37] The primary role of these proceedings is to protect the public from persons not fit to be held out as officers of the Court and as a person who should be entrusted with the very important duties and responsibilities of a solicitor.
- [38] The practitioner's approach towards charges can reveal that person's capacity to act professionally, as well as the practitioner's insight into the conduct. By the response, a practitioner's fitness (or otherwise) to practice might be demonstrated.¹⁴
- [39] In this case Ms Johnston failed to respond at all, not only to the s 443 notices but also to the disciplinary proceedings.
- [40] In the circumstances, the Tribunal finds that Ms Johnston's conduct as outlined in the disciplinary proceedings, and in the way in which she did not respond to the disciplinary proceedings, demonstrates a complete disregard for her professional obligations. The Tribunal concludes that Ms Johnston is not a fit and proper person to practice.
- [41] In the circumstances, the Tribunal orders that Ms Johnston's name be removed from the local roll of practitioners.

Costs

- [42] Under s 462 of the Act, following the findings made by this Tribunal, the Legal Services Commissioner is entitled to an order that the Legal Services Commissioner's costs be paid unless the Tribunal is satisfied that exceptional circumstances exist.
- [43] No exceptional circumstances exist in this case and, in the circumstances, the Tribunal orders that Ms Johnston forthwith pay the costs of the Legal Services Commissioner, as assessed on the Supreme Court scale.

¹³ Ibid s 420(1)(a).

¹⁴ *Legal Services Commissioner v Thomas* [2009] LPT 13 at [61].

ANNEXURE A

10.1 As at 17 January 2011, no monthly trust account reconciliation statements had been prepared by the firm in breach of section 44 of the Legal Profession Regulation 2007 [the Regulation].

10.2 The firm failed to issue trust account receipts within a reasonable time in breach of section 34 of the Regulation.

Particulars

Receipt Number	Form of Funds	Amount	Date Received	Date Banked	Date Receipt Issued
127	Cash	\$10.00	21/10/2010	26/10/2010	28/10/2010
117	Cash	\$1,000.00	17/09/2010	21/09/2010	13/10/2010
86	Cash	\$400.00	24/05/2010	26/05/2010	19/08/2010
78	Cheque	\$140,000.00	28/07/2010	28/07/2010	03/08/2010
45	Cash	\$720.00	30/04/2010	04/05/2010	06/05/2010
44	Cash	\$200.00	29/04/2010	04/05/2010	06/05/2010

10.3 The Firm failed to ensure that cheque butts contained particulars required by section 37 of the Regulation.

Particulars

Cheque Number	Amount	Date	Payee	Matter	Missing Particulars
78	\$880.00	20/07/2010	SJ Law General Account	Campbell – Criminal (7905)	Details of the client, matter and purpose of payment
79	\$550.00	20/07/2010	CJ Law General Account	Hall – Children (7819)	Details of the client, matter and purpose of payment
91	\$1,999.82	Undated	Hede Byrne & Hall	Griffin – Probate (7852)	Details of the client, matter, purpose of payment and the date of the cheque

176	Unknown	09/12/2010	SJ Law	Duty Lawyer – Miscellaneous (8001)	Details of the client, matter, purpose of payment and the amount paid under the cheque
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10.4 The firm disbursed funds from the trust account by electronic transfer rather than by cheque contrary to section 250 of the Act on 29 April 2010 in the amount of \$131.00 and on 4 May 2010 in the amount of \$4,206.88.

10.5 As at 9 May 2011, the firm's trust bank account (which was opened on 8 February 2010) did not have expression "law practice trust account" in breach of section 33(2)(c) of the Regulation and cheques drawn from that account did not contain the expression "law practice trust account" in breach of section 37(2) of the Regulation.

10.6 In breach of section 259(1) of the Act, the law practice caused there to be deficiencies in trust accounts.

Particulars

Name of Account	Amount	Date Overdrawn	Date Restored
Brown & Jackson – Purchase (7857)	\$131.00	11/05/2010	Outstanding as at 11 May 2011
Chapman – Property & Children	\$249.90	02/11/2010	Outstanding as at 11 May 2011
Pettigrove & Pirrie – Purchase (7924)	\$83.30	08/10/2010	Outstanding as at 11 May 2011
Plant Heritage – Purchase (7834)	\$11,795.00	12/02/2010	24/02/2010

10.7 In breach of section 268 of the Act, the Firm failed to have its trust records for the year ended 31 March 2010 externally examined within 60 days of the end of that year.

ANNEXURE B

10.10 As at 23 November 2011, no monthly trust account reconciliation statements had been prepared by the firm in breach of section 44 of the Regulation.

10.11 The firm disbursed funds from the trust account by electronic transfer rather than by cheque contrary to section 250 of the Act.

Particulars

<i>Date</i>	<i>Details</i>	<i>Amount</i>
1/05/2011	Netbank Transfer	\$3,923.62
16/06/2011	Societe Generale	\$1,737.00
20/06/2011	Societe Generale	\$1,687.00
20/07/2011	Societe Generale	\$1,687.00
03/08/2011	Societe Generale	\$1,687.00
22/08/2011	Societe Generale	\$1,687.00
20/09/2011	Societe Generale	\$1,687.00

10.12 As at 23 November 2011, the firm's trust bank account (which was opened on 8 February 2010) did not have expression "law practice trust account" in breach of section 33(2)(c) of the Regulation and cheques drawn from that account did not contain the expression "law practice trust account" in breach of section 37(2) of the Regulation.

10.13 In breach of section 259(1) of the Act, the law practice caused there to be deficiencies in trust accounts.

Particulars

<i>Name of Account</i>	<i>Amount</i>	<i>Date Overdrawn</i>	<i>Date Restored</i>
Abberton	\$948.67	16/02/2011	Outstanding as at 23 November 2011
Brown & Jackson	\$131.00	11/05/2011	Outstanding as at 23 November 2011
Chapman	\$249.90	02/11/2010	Outstanding as at 23 November 2011
Neill	\$534.25	16/02/2011	Outstanding as at 23 November 2011
Parker	\$4.02	21/01/2011	Outstanding as at 23 November 2011

<i>Pettigrove & Pirrie</i>	<i>\$83.30</i>	<i>08/10/2011</i>	<i>Outstanding as at 23 November 2011</i>
<i>Sinclair</i>	<i>\$870.55</i>	<i>16/02/2011</i>	<i>Outstanding as at 23 November 2011</i>
<i>SJ Law</i>	<i>\$11,507.23</i>	<i>01/02/2011</i>	<i>Outstanding as at 23 November 2011</i>
<i>Wilson</i>	<i>\$409.53</i>	<i>16/02/2011</i>	<i>Outstanding as at 23 November 2011</i>
<i>Hall</i>	<i>\$500.00</i>	<i>18/04/2011</i>	<i>18/10/2011</i>

10.14 In breach of section 268 of the Act, the Firm failed to have its trust records for the year ended 31 March 2011 externally examined within 60 days of the end of that year.