

CITATION: *Legal Services Commissioner v Jensen* [2017] QCAT 148

PARTIES: Legal Services Commissioner
(Applicant)
v
Craig Graham Selwyn Lee Jensen
(Respondent)

APPLICATION NUMBER: OCR069-14

MATTER TYPE: Occupational Regulation matters

HEARING DATE: 21 August and 6 October 2015

HEARD AT: Brisbane

DECISION OF: **Justice DG Thomas, President**
Assisted by:
Mr Ken Horsley, Legal panel member
Ms Patrice McKay, Lay panel member

DELIVERED ON: 22 May 2017

DELIVERED AT: Brisbane

ORDERS MADE: **The Tribunal orders, that:**

- 1. The Respondent's name is to be removed from the Roll of Solicitors.**

The Tribunal directs, that:

- 1. The Legal Services Commissioner must file in the Tribunal four (4) copies and give to Craig Graham Selwyn Lee Jensen one (1) copy of his submissions as to costs, by:**
4:00pm on 2 June 2017.
- 2. Craig Graham Selwyn Lee Jensen must file in the Tribunal four (4) copies and give to the Legal Services Commissioner one (1) copy of his submissions as to costs, by:**
4:00pm on 9 June 2017.

- 3. Unless either party requests an oral hearing by 9 June 2017, the issue of costs will be decided on the papers after 9 June 2017.**

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the respondent solicitor pursued defamation claim that had no prospects of success – whether respondent ought to have known or have been reasonably aware that his claim was baseless

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – THREATENING LETTERS – where the respondent solicitor sent a letter demanding damages for defamation from opposition client – where letter referred to Legal Services Commission for investigation– whether letters sent by respondent were discourteous and offensive – whether contravention of *Australian Solicitors Conduct Rules 2012* – whether totality of conduct amounts to professional misconduct or unsatisfactory professional conduct

Australian Solicitors Conduct Rules 2012 rr 2, 4, 5, 32, 34

Legal Profession Act 2007 (Qld) ss 418, 419, 487, 649

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Attorney-General v Bax [1999] 2 Qd R 9

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498

Briginshaw v Briginshaw (1938) 60 CLR 336

Clyne v New South Wales Bar Association (1960) 104 CLR 186

Council for Queensland Law Society Incorporated v Whitman [2003] QCA 438

Harvey v The Law Society of New South Wales (1975) 49 ALJR 362

Legal Services Commission v Bradshaw [2009]

LPT 21
Legal Services Commissioner v Kincaid [2008]
 LPT 15
Legal Services Commissioner v Madden (No 2)
 [2008] QCA 301
Legal Services Commissioner v Thomas [2009]
 LPT 13
*Mellifont v The Queensland Law Society
 Incorporated* [1981] Qd R 17
*Minister for Justice and Attorney-General v
 Brown* [1993] QCA 216
New South Wales Bar Association v Evatt
 (1968) 117 CLR 177
*New South Wales v Lepore; Samin v
 Queensland; Rich v Queensland* (2003) 212
 CLR 511
Police Service Board v Morris (1985) 156 CLR
 397
Queensland Law Society Inc v Carberry [2000]
 QCA 450
Southern Law Society v Westbrook (1910) 10
 CLR 609
Watts v Legal Services Commissioner [2016]
 QCA 224

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr James Bell QC instructed by the Legal Services
 Commissioner

RESPONDENT: Dr C.G.S.L Jensen appearing on his own behalf

REASONS FOR DECISION

[1] The Commissioner brought four charges:

1. On or about 11 October 2013, the respondent forwarded a letter to David Millwater ("Millwater") of McNamara & Associates which was discourteous, offensive or provocative and contained false statements.
2. The respondent pursued a claim that had no reasonable prospect of success.
3. On or about 4 December 2013 the respondent made an allegation of unsatisfactory professional conduct or professional misconduct against Millwater in breach of Rules 32 and 34 of the Australian Solicitors Conduct Rules 2012.
4. That by his correspondence to the Legal Services Commission and David Millwater ("Millwater"), the respondent engaged in conduct that

would justify a finding that he is not a fit and proper person to engage in legal practice.

Background

[2] Scott Humphreys and his mother, Lynette Humphreys, were parties to a property dispute. Dr Jensen was the mother's solicitor, and Mr Millwater, of McNamara and Associates, acted for the son.

[3] Mr Humphreys became dissatisfied with the progress of the property case. On 10 September 2013, he sent an email to his mother that was critical of her, and of Dr Jensen. The email included the following:

"We have made a generous offer ... and all that you and your gemy solicitor want is more. ... your solicitor sending responses bit for bit is simply his way of ensuring he makes as much money out of the situation as possible."¹

[4] Mrs Humphreys passed this onto Dr Jensen. On 13 September 2013, he wrote to Mr Humphreys' solicitor:

"I require Mr Humphreys to pay me \$20,000 for defamation. ... As the email was sent on behalf of Monsanto ... that company would also be vicariously liable ... I have not sent any demand yet to Monsanto as that could cause difficulties in his employment for Mr Humphreys and I will give him an opportunity to pay me \$20,000 to resolve this matter promptly."²

[5] Mr Millwater was instructed to refer this letter to the Legal Services Commissioner. When doing this he commented that it could be "perceived as threat or otherwise contrary to professional standards".³

[6] On 11 October 2013, Dr Jensen wrote to Mr Millwater again:

"Your conduct in reporting me ... and republishing the defamatory email [to the Commissioner] has been deeply distressing to me and will ultimately increase the damages that will be awarded ... The Statement of Claim will specifically refer to your conduct as a ground to award aggravated damages. In these circumstances there is a conflict of interest between ... your firm and Mr Humphreys' interests. He would be entitled to make a contribution claim against you. Accordingly I require you to pass this matter to another firm."⁴

[7] On 15 November 2013, Dr Jensen made a complaint to the Commissioner alleging that Mr Millwater, contrary to the *Australian Solicitors Conduct Rules 2012* ('ASCR') had made a baseless complaint against him. That conduct is the subject of the third charge.

¹ Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A, page 1; Affidavit of Nicole Grace Ingram, sworn 12 August 2014, Exhibit NGI-1, page 4.

² Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A, page 1; Affidavit of Nicole Grace Ingram, sworn 12 August 2014, Exhibit NGI-1, page 3.

³ Ibid; Letter of Mr Millwater to Commissioner, dated 18 September 2013, page 5.

⁴ Ibid, Exhibit A: Letter of Respondent to Mr Millwater, dated 11 October 2013, page 10.

[8] During this time, the Commissioner’s inquiries into Dr Jensen’s conduct continued. There was correspondence between Dr Jensen and the investigating officer (Ms Ingram) and to the Commissioner.⁵ That correspondence is the subject of the fourth charge.

[9] Neither the alleged threat nor the demand for \$20,000.00, although circumstantially relevant, is the direct subject of a specific charge.

The categorisation of conduct

[10] Unsatisfactory professional conduct includes conduct 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.⁶

[11] Professional misconduct includes unsatisfactory professional conduct if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence.⁷

[12] In relation to professional misconduct, Justice James Thomas in the case of *Adamson v Queensland Law Society Inc*,⁸ said:

“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.”

Charge One

[13] The Commissioner alleges that on or about 11 October 2013, Dr Jensen forwarded a letter to David Millwater of McNamara and Associates which was discourteous, offensive or provocative and contained false statements.

[14] In substance, the Commissioner alleges that the subject letter falsely and unreasonably accused Mr Millwater of defamation, and of a conflict of interest.

[15] The Commissioner asserts, that the use of language such as “*I require you to pass this matter to another firm*”⁹ is abrupt and unnecessary.

[16] The first charge is closely related to the second, in that the claim of aggravated damages and the assertion of a conflict of interest both disregard the provisions of section 487 of the *Legal Profession Act 2007* (Qld) (“LPA”).

Charge Two

⁵ Ibid, Letters of Respondent to Commissioner, dated 15 November 2013; 2 December 2013; and 11 February 2014.

⁶ *Legal Profession Act 2007* (Qld) s 418.

⁷ Ibid, s 419.

⁸ [1990] 1 Qd R 489, 507.

⁹ Emphasis added.

- [17] The second charge is that Dr Jensen pursued a claim that had no reasonable prospect of success.
- [18] The Commissioner submits that Dr Jensen knew, or ought to have known, that his threat of actions against Mr Millwater for defamation, and against Mr Humphreys for aggravated damages, had no reasonable prospect of success, in view of section 487 LPA. That section relevantly provides:
- (1) This section applies if a person makes a complaint or otherwise gives information to the Commissioner ... about conduct that is ...
 - (a) Conduct of an Australian Lawyer.
 - (2) The person is not liable, civilly (including in an action for defamation) ... for making the complaint ... to the Commissioner ... including, for example, giving further information under section 431.
- [19] Dr Jensen says that he was unaware of section 487 LPA, until the Commissioner drew his attention to it.¹⁰ Even after being in contact with the Commissioner, he did not alter his approach, but claimed that the section is unclear, and that an (unspecified) alternative interpretation supported his “aggravated damages” claim.¹¹ His view was that judicial interpretation is needed to explain section 487 LPA, and that none is available. Of course, in *Legal Services Commission v Bradshaw*,¹² the Tribunal observed that “the protection of [section 487(2)] is absolute. There is no exception”.
- [20] The Commissioner’s interpretation of section 487 LPA is correct, and Dr Jensen’s view is insupportable. It follows that Dr Jensen’s allegations against Mr Millwater had no reasonable basis, and should never have been made, or, should have been withdrawn when his attention was drawn to the section.
- [21] Dr Jensen made unsustainable claims on points of law. An example of this is his repeated assertion that Monsanto was vicariously liable for Mr Humphreys’ private letter to his mother,¹³ despite its contents having nothing to do with company business. Cross-examined, he did concede that the letter was not “work stuff”,¹⁴ but still maintained that his vicarious

¹⁰ Transcript of Hearing 21 August 2015, T1-44, ll 31-36. The relevant letter of the Commissioner is contained in Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A: letter dated 4 November 2013, page 12; Affidavit of Nicole Grace Ingram, sworn 12 August 2014, Exhibit NGI-1, page 13.

¹¹ Affidavit of Nicole Grace Ingram, sworn 12 August 2014 Exhibit NGI-1, Letter of Respondent to Commissioner, dated 2 December 2013, page 20; Letter of Respondent to Commissioner dated 12 February 2014, paragraphs 13-15, page 41; Transcript of Hearing 21 August 2015, T1-10, L 33; T1-49, ll 5-36; T1-56, L 38; T1-57, L 35; T1-61, L 15; T1-73, L 24.

¹² [2009] LPT 21 (Fryberg J presiding).

¹³ Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A: Letter of Respondent to Mr Millwater, dated 13 September 2013, page 3.

¹⁴ Transcript of Hearing 21 August 2015, T1-35, L 36.

liability point is not “absolute rubbish”,¹⁵ and is “strongly arguable”.¹⁶ As was obvious, the offending words were not published in the deliberate pursuit of the employer’s interests, or in the performance of Mr Humphreys’ contract of employment, or with Monsanto’s ostensible authority.¹⁷

- [22] Dr Jensen made it clear he did not regret his letter to Mr Millwater: “[T]here’s no basis for me to have remorse. I was ... the victim”.¹⁸ Dr Jensen believed it was an “extraordinary allegation” that he had no cause of action against Mr Millwater.¹⁹ He says that, in similar circumstances, he would write in similar terms regardless of the existence of section 487 LPA.²⁰ He claims his letter of 11 October 2013, was an ordinary and proper communication of the kind that litigators exchange every day.²¹
- [23] If Dr Jensen did not know that his “aggravated damages” and “conflict” claims were unsound, the Tribunal is satisfied that he made them recklessly not caring whether they were true or false. A practitioner of Dr Jensen’s experience should have been mindful of the possibility that a section like section 487 might be embedded legislation like LPA, and that this issue should be considered.
- [24] Section 487 is not unique to the Act. Legislation governing a regulatory agency that relies on citizens’ reports to perform its duties is likely to contain some equivalent of section 487. See for example section 387(2) of the recently repealed *Health Practitioners (Professional Standards) Act 1999* (Qld), section 203 of the *Crime and Corruption Act 2001* (Qld), section 88L of the *Public Service Act 2008* (Qld), section 197A of the *Child Protection Act 1999* (Qld), section 237 (schedule) of the *Health Practitioner Regulation National Law Act 2009* (Qld) and section 45(3) of the *Ombudsman Act 2001* (Qld). Against that background, an experienced practitioner would reasonably be expected to check the LPA before making the allegations and demands contained in his letter of 11 October 2013.
- [25] His letter to Mr Millwater, the subject of Charge One, affirmed his demand for \$20,000.00 from Mr Humphreys. That was a figure apparently chosen without logic and basis, taking no reasonable or proportionate account of the personal nature of the offending email, and its very limited publication. The same letter threatened proceedings against Mr Millwater, accusing him of defamation and an actual or imminent conflict of interests, regardless of section 487 LPA, and the Commissioner’s letter drawing his intention to that provision. The allegations made against Mr Millwater, if

¹⁵ Ibid, T1-31, L 8.

¹⁶ Ibid, T1-77, L 23.

¹⁷ *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511 at 594 per Gummow and Hayne JJ.

¹⁸ Transcript of Hearing 21 August 2015, T1-52, ll 30-33.

¹⁹ Affidavit of the Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, paragraph 9.

²⁰ Transcript of Hearing 21 August 2015, T1-53, L 23.

²¹ Submissions of Respondent handed up at hearing 21 August 2015, (“Subs at hearing”) paragraph 1; Transcript of Hearing 21 August 2015, T1-15, L 8.

not consciously false, were made without caring whether they were true or false.

- [26] The actions of Dr Jensen fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. They constitute professional misconduct.

Charge Three

- [27] Charge 3 is that on or about 4 December 2013, Dr Jensen made an allegation of unsatisfactory professional conduct or professional misconduct against Mr Millwater in breach of rules 32 and 34 of the ASCR.

- [28] Rule 32.1 provides that a solicitor must not make an allegation of unsatisfactory professional conduct or professional misconduct against another Australian legal practitioner unless the allegation is made bona fide, and the practitioner reasonably believes that there is evidence to support it.

- [29] There are several indications that Dr Jensen's complaint against Mr Millwater was not bona fide and well founded.

- [30] The material that Mr Millwater (for Mr Humphreys) referred to the Commissioner was Dr Jensen's letter to Mr Millwater's firm dated 13 September 2013. That letter demanded that Mr Humphreys pay \$20,000.00 to Dr Jensen personally for Mr Humphreys' private comments to his mother. Mr Humphreys' comments to his mother were, in part, vulgar abuse,²² ("germy solicitor") and a type of remark which did not justify allegations of "vicious defamation" and "appalling slander" of an "innocent victim", with an unjustifiable estimate of damages.

- [31] Dr Jensen said that his demand was not "designed to extort money from Mr Humphreys".²³ Nevertheless, when cross-examined, he had difficulty in defending its quantum.²⁴ When pressed he conceded it was perhaps "somewhat [of] an ambit claim",²⁵ a "ballpark figure",²⁶ or "over the top ... maybe".²⁷

- [32] In the event, repeated threats to sue Mr Humphreys, Mr Millwater and Monsanto came to nothing – which Dr Jensen variously explained as due

²² Language reflecting upon the speaker rather than its object, and unlikely to cause a reasonable person to shun the person insulted: *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at [68]; *Trad v Harbour Radio Pty Ltd* [2011] NSWCA 61 at [112]; *Echo Publications Pty Ltd v. Tucker & Anor*; *Fast Buck\$ v Tucker & Anor* [2007] NSWCA 73 at [130]; *Bennette v Cohen* (2005) 64 NSWLR 81 at [51].

²³ Letter of respondent to Commissioner, 11 October 2013, page 2, paragraph 2; Letter of respondent to Commissioner, 2 December 2013 page 1, paragraph 1; T1-47, L 20.

²⁴ Transcript of Hearing 21 August 2015, T1-45, ll 36-47; T1-46, ll 1-45; T1-47, ll 1-21.

²⁵ *Ibid*, T1-46, L 34.

²⁶ *Ibid*, T1-47, L 26.

²⁷ *Ibid*, T1-48, ll 20-21.

to pressure of the Commissioner inquiry²⁸ and forgiveness: “You don’t have to seek vengeance on everyone who wrongs you”.²⁹

- [33] The gravamen of Mr Humphreys’ complaint to the Commissioner was that Dr Jensen’s letter of 13 September 2013, contained a thinly veiled threat³⁰ to cause difficulties with his employer if the demand for \$20,000.00 was not met. Indeed, when cross-examined, Dr Jensen conceded:

“It was said this way: ‘Your employer is probably also vicariously liable ... By putting [that] claim to your employer, that may cause you in your employment, so I’m writing to you to see if you would like to resolve the matter.’”³¹

- [34] Dr Jensen said that mentioning the employer “would have been a bit of an incentive” for [Mr Humphreys] to negotiate a settlement ... “that’s how it works”.³² But he maintained there was nothing intimidatory about it.³³ On the contrary, he observed “[I] tried to help him save his job”.³⁴
- [35] Furthermore, as Dr Jensen knew by the time of his complaint against Mr Millwater, the Commissioner was taking the original complaint seriously.
- [36] In these circumstances, Dr Jensen’s allegation of misconduct on the part of Mr Millwater was a breach of Rule 32 of the ASCR.
- [37] A breach of the ASCR can amount to unsatisfactory professional conduct or professional misconduct.³⁵
- [38] It is a serious matter to report a solicitor to the Commissioner for professional misconduct, or unsatisfactory professional conduct. Before such a complaint is made by a practitioner, the latter must carefully consider whether there is a reasonable and substantial basis for doing so. The Tribunal finds that there was no such basis for Dr Jensen’s complaint against Mr Millwater.
- [39] Dr Jensen’s conduct fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. Dr Jensen’s conduct amounted to professional misconduct.

Charge Four

²⁸ Ibid, T1-45, ll 12-14.

²⁹ Ibid, T1-45, ll 26-33.

³⁰ Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A: Letter of McNamara & Associates to Commissioner, dated 18 September 2013, page 5.

³¹ Transcript of Hearing 21 August 2015, T1-30, ll 25-29.

³² Transcript of Hearing 21 August 2015, T1-36, ll 17-18.

³³ Ibid, T1-69, L 41.

³⁴ Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A: Letter of Respondent to Commissioner, dated 11 October 2013, page 8.

³⁵ ASCR r 2.3.

- [40] Charge 4 alleges that by his correspondence to the Legal Services Commissioner and David Millwater, Dr Jensen engaged in conduct that would justify a finding that he is not a fit and proper person to engage in legal practice.
- [41] This charge relates to Dr Jensen's letters to the Commissioner and Mr Millwater on 11 October 2013, and his letters to the Commission on 15 November 2013, 2 December 2013 and 12 February 2014. It is submitted that they contravene Rules 4 and 5 of the ASCR.
- [42] Rule 4.1.2 requires practitioners to be honest and courteous in all professional dealings. Rule 5 prohibits conduct which demonstrates that the practitioner is not a fit and proper person to practise law, or which is likely, materially, to diminish public confidence in the administration of justice.
- [43] The Commissioner submits that the letters are in many respects discourteous, intimidatory and abusive, persistently asserting an unsustainable view of section 487 LPA, and manifesting complete unwillingness to cooperate with the Commissioner. They also include a futile threat to seek costs against Ms Ingram, the officer handling the inquiry for the Commissioner.³⁶
- [44] Dr Jensen asserts that none of the correspondence with Mr Millwater was unprofessional.³⁷ In similar circumstances, he said he would write the same again.³⁸ Dr Jensen claims his letters to the Commission were "robust but not offensive".³⁹ He says he was simply responding to "what I saw as an incompetent legal analysis by a fairly junior lawyer".⁴⁰ His evidence included:
- "I'm an elector for the State of Queensland and Commonwealth ... when people sit in [Ms Ingram's] position and purport to pass judgment on a competent and experienced lawyer who happens to be an elector, that person is entitled to defend himself vigorously".⁴¹
- [45] Mr Jensen said that if his "correspondence with the Commissioner had been less robust and blunt, things might have taken a different turn" but Dr Jensen concluded "[t]hat doesn't mean I've acted wrongly".⁴² He continued "Ms Ingram's legal analysis is completely flawed and

³⁶ Final Submissions of the Commissioner, filed 25 September 2015, paragraphs 82, 88, 92, 93.

³⁷ Transcript of Hearing 21 August 2015, T1-15, ll 16-17.

³⁸ Ibid, ll 7-8.

³⁹ Ibid, T1-26, L 18.

⁴⁰ Ibid, T1-14, L 4.

⁴¹ Ibid, T11-16, L 4.

⁴² Ibid, T1-13, ll 42-43.

defective”.⁴³ He opined “An inability to see another view is usually considered a sign of poor legal ability”.⁴⁴

- [46] Dr Jensen’s letter to Mr Millwater on 11 October 2013 is peremptory and dogmatic:

“Your conduct in reporting me ... and republishing the defamatory email ... will ultimately increase the damages ... The Statement of Claim will specifically refer to your conduct as a ground to award aggravated damages ... there is a conflict of interest between those of your firm and Mr Humphreys’ interests ... I require you to pass this matter to another firm.”

- [47] On the same date he told the Commissioner: “[Mr Humphreys’] complaint should be dismissed. I am disappointed that you are even investigating it.”

- [48] When Ms Ingram drew his attention to section 487 LPA she received this response:

“I am puzzled by your mention of s 487 ... I have no idea why you cite it. You seem to have no sympathy for my position as the victim of a gross defamation ... you seem to be trying to pressure me into not suing him”.⁴⁵

- [49] On 11 February 2014, Dr Jensen communicated with the Commissioner, Mr Briton. Parts of this letter read as follows:

“[Ingram’s] analysis is grossly flawed and unbalanced. ... Anyone who knows a modicum about defamation law would have realised that the email was a serious defamation ... [Ingram’s] finding that my letter asking for \$20,000 damages ‘was clearly a threat to ... cause problems with his employer’ ... is flawed and incompetent.”

“Her willingness to embark on ‘consideration of whether the foreshadowed defamation is flawed at law’ is appalling. ... Any competent lawyer would know that [Mr Humphreys’] email was defamatory ... Her analysis ... is deeply flawed, unreasonable and misguided. It also appears to infect the balance of her report ... Paras 62 to 83 [of Ingram’s final report] are simply misconceived ... Her interpretation of section 487 is likely wrong ... I don’t know if she has ever practised in general litigation but it is standard practice to withdraw ... if it is even arguable that [there is a conflict of interests] ... It is absurd to say that I acted improperly by putting that to him.”

“[Ingram’s] pursuit of me including threatened charges could be interpreted by a court as contempt ... I can certainly tell you that I have felt pressured by [her] not to claim aggravated damages. ... [A] Judge will take a dim view of your conduct if an allegation of contempt were made. ... Continued pursuit of me may have adverse consequences for

⁴³ Transcript of Hearing 21 August 2015, T1-18, ll 1-2.

⁴⁴ Affidavit of Nicole Grace Ingram, sworn 12 August 2014, Exhibit NGI-1: Letter of Respondent to Commissioner, dated 12 February 2014, paragraph 17, page 41.

⁴⁵ Affidavit of Nicole Grace Ingram, sworn 12 August 2014, Letter of Respondent to Commissioner, dated 15 November 2013, page 15.

you and [Ingram] ... Perhaps [Mr Millwater] shares [Ingram's] ignorance of the aggravated damages rule ... Any charges you pursue will be vigorously defended and I will seek costs from you and [Ingram] ... [She] is likely to be severely censured ... for her unbalanced, unfair and legally erroneous report. I intend to make a complaint about [her] handling of this matter to the **State Ombudsman**.⁴⁶ ... I have been treated most unfairly by you. ... Any further pursuit of me is likely to see [Ingram] severely criticised by others."⁴⁷

- [50] Invited to reflect on these accusations, Dr Jensen conceded: "It was probably hurtful but that's not the point".⁴⁸ He then qualified the concession: "I'm entitled to be annoyed by what appears to be a flawed legal analysis by a very junior lawyer".⁴⁹
- [51] The Tribunal considers that substantial parts of the letters in question, particularly those addressed to the Commissioner, may quite properly be described as aggressive, intimidatory, offensive and professionally improper.
- [52] The letters the subject of the fourth charge are inappropriate. The letters are consistently uncooperative with the Commissioner in his duty to conduct an inquiry. A practitioner's professional duty to cooperate with the Commissioner is emphasised in several decisions of the Court of Appeal.⁵⁰ The refusal to cooperate is *per se* misconduct.
- [53] The conduct referred to in charge 4 fell below the standard of professional conduct observed and approved by members of the profession of good repute and competency.

Sanction

- [54] The Commissioner submits that the impugned conduct of Dr Jensen shows that he is not a fit and proper person to practise as a solicitor, and seeks removal of his name from the solicitors' roll.
- [55] The Commissioner submits that one or more of the charges proved warrant Dr Jensen being struck off the Roll.
- [56] That submission should be considered, not by taking each "charge" (or particular) of unfitness in isolation, but cumulatively.
- [57] The sanction of recommendation that the lawyer be removed from the solicitor's roll may be appropriate for cases of intransigent defiance of the Commissioner, repeated professional discourtesy, or repeated and

⁴⁶ Emphasis in original.

⁴⁷ Affidavit of Craig Graham Selwyn Lee Jensen, sworn 26 June 2014, Exhibit A, letter of respondent to Mr Briton dated 11 February 2014, page 55.

⁴⁸ Transcript of Hearing 21 August 2015, T1-79, L13.

⁴⁹ *Ibid*, ll 17-18.

⁵⁰ *Queensland Law Society Inc v Carberry* [2000] QCA 450 at [7]; *Attorney-General v Bax* [1999] 2 Qd R 9 at 22; *Council for Queensland Law Society Incorporated v Whitman* [2003] QCA 438 at [36].

reckless assertions of indefensible legal propositions. The Tribunal is satisfied that those qualities are present in this case.

- [58] Other sanctions might include a reprimand, fine, suspension or order to complete a course of legal ethics or practice management.
- [59] Especially in view of the consistency of the conduct and, the lack of appreciation of the inappropriateness of his conduct and the lack of remorse or wiliness to take steps to correct his conduct, the respondent is not a fit and proper person to practise as a solicitor, in view of these factors it is unlikely that any academic course⁵¹ would be an adequate and assured remedy.
- [60] Aggravated refusal to co-operate with a disciplinary inquiry is a sign of lack of judgment, insight and fitness to practise,⁵² as is the absence of self-awareness, lack of regret for errors, and determination not to repeat them.⁵³
- [61] Dr Jensen's failure to understand the error of itself, demonstrates his unfitness to belong to a profession where, in practice, the client must depend upon the standards as well as the skill of his professional adviser.⁵⁴
- [62] The power of the Tribunal to strike off or suspend is not punishment but rather for the protection of the community from ethically or temperamentally unsuitable practitioners.⁵⁵
- [63] On a finding that the practitioner's conduct demonstrates that the practitioner is not a fit and proper person to practice as a solicitor, the acid test of whether or not to recommend that a practitioner's name be removed from the roll is this: Is there now a reasonable prospect that the practitioner will in future become a fit and proper person to practise?⁵⁶ As was observed recently by Gotterson JA "an order removing a practitioner's name from the roll should only be made when the probability is that the practitioner is permanently unfit to practice".⁵⁷
- [64] An order for suspension or a more limited sanction, such as suspension education or counselling, must be based on a finding that, when the period of suspension ends, the education program is completed or the

⁵¹ As ordered in *Legal Services Commissioner v Kincaid* [2008] LPT 15, *Bradshaw v Bar Association of Queensland* [2010] QSC 306, *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301.

⁵² *Legal Services commission v Thomas* [2009] LPT 13 at [61].

⁵³ *Attorney-General v Bax* [1999] 2 Qd R 9; *Minister for Justice and Attorney-General v Brown* [1993] QCA 216.

⁵⁴ *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 184 *per curiam*.

⁵⁵ *Harvey v The Law Society of New South Wales* (1975) 49 ALJR 362 at 364; *New South Wales Bar Association v Evatt* (1968) 117 CLR 177; *Police Service Board v Morris* (1985) 156 CLR 397 at 412; *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498 at 504.

⁵⁶ *Southern Law Society v Westbrook* (1910) 10 CLR 609 at 612, 619.

⁵⁷ *Watts v Legal Services Commissioner* [2016] QCA 224 at [46].

counselling has taken place (depending on the sanction imposed) the practitioner *will no longer be unfit to practise*.⁵⁸ This, for example, was evident in the case of *Watts*⁵⁹ where medical evidence suggested that the risk of conduct being repeated was very low and Gotterson JA concluded “I’m not prepared to conclude that the appellant is now permanently unfit to practice.” Gotterson JA went on to say “I am fortified in this approach by his subsequent conduct in admitting his guilt, repaying monies when it was appropriate to do so, and withdrawing from legal practice since 2010. These are all matters relevant for consideration”.⁶⁰

- [65] In the current case, Dr Jensen showed no remorse and did not admit or understand that his conduct was not acceptable. Dr Jensen said he regrets nothing, and would do the same again.⁶¹ Absence of “remorse”, or self-awareness, is an important consideration in assessing fitness for legal practice.⁶² None of the features identified by Gotterson JA were present. Even as the Tribunal adjourned to consider its decision and suggested that Dr Jensen take the opportunity to consider the evidence and to make additional submissions if he wished to do so Dr Jensen said, “I was hoping that the Tribunal would at least announce today that the four charges are dismissed”.⁶³ Dr Jensen demonstrated a total lack of appreciation of the nature of his conduct. In view of Dr Jensen’s attitudes and declarations, the question whether Dr Jensen will in the future become a fit and proper person to practice cannot be answered in the affirmative. If Dr Jensen continues to practise, other members of the public will likely be subjected to similar conduct.
- [66] Therefore, in the circumstances, the Tribunal orders that the respondent’s name is to be removed from the Roll of Solicitors.

Costs

- [67] The Tribunal notes that the parties intend to provide further submissions on the issue of costs.
- [68] To facilitate the filing of those submissions, the Tribunal directs that:
1. The Legal Services Commissioner must file in the Tribunal four (4) copies and give to Craig Graham Selwyn Lee Jensen one (1) copy of his submissions as to costs, by:

4:00pm on 2 June 2017.

⁵⁸ *Mellifont v The Queensland Law Society Incorporated* [1981] Qd R 17 at 31.

⁵⁹ *Watts v Legal Services Commissioner* [2016] QCA 224.

⁶⁰ *Ibid* at [48].

⁶¹ Transcript of Hearing 21 August 2015, T1-52, ll 30-33.

⁶² *Attorney-General v Bax* [1999] 2 Qd R 9; *Minister for Justice and Attorney-General Brown* [1993] QCA 216 (“elaborate explanations” rejected).

⁶³ Transcript of Hearing 21 August 2015, T1-83, ll 32-33.

2. Craig Graham Selwyn Lee Jensen must file in the Tribunal four (4) copies and give to the Legal Services Commissioner one (1) copy of his submissions as to costs, by:

4:00pm on 9 June 2017.

3. Unless either party requests an oral hearing by 9 June 2017, the issue of costs will be decided on the papers after 9 June 2017.