

CITATION: *Legal Services Commissioner v Budgen (No 3)*
[2016] QCAT 485

PARTIES: Legal Services Commissioner
(Applicant/Appellant)
v
Rodney Budgen
(Respondent)

APPLICATION NUMBER: OCR153-11

MATTER TYPE: Occupational Regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice DG Thomas, President**
Assisted by:
Ms Megan Mahon, Legal panel member
Dr Margaret Steinberg, Lay panel member

DELIVERED ON: 22 December 2016

DELIVERED AT: Brisbane

ORDERS MADE: **1. The respondent repay to the claimants the sum of \$28,727.01.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – OTHER MATTERS – where the respondent was found to have engaged in professional misconduct for failing to maintain reasonable standards of competence and diligence in dealing with money held in his trust account – where his clients filed a Notice of Intention to seek Compensation Order pursuant to s 464(a) of the *Legal Profession Act 2007* (Qld) – where a report of the Queensland Law Society revealed an overpayment by the respondent – whether the respondent should be ordered to pay compensation to the claimants

Legal Profession Act 2007 (Qld) s 464, 464(a), 464(d)(i)
Queensland Civil and Administrative Tribunal

Act 2009 (Qld) s 32

Legal Services Commissioner v Budgen [2016]
QCAT 120

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

- [1] As mentioned in the reasons delivered on 11 March 2016, Thomas Burt, William Burt, Margaret Walker Clelland and Mary Robertson have given Notice of the Intention to Seek a Compensation Order pursuant to s 464 of the *Legal Profession Act 2007* (Qld) ('The Act').
- [2] The basis of the claim is that the Queensland Law Society's report of the trusts account investigation of Budgen Lawyers identifies an overpayment by Mr Budgen in the sum of \$28,727.01.¹
- [3] The Tribunal has found that Mr Budgen's conduct in dealing with professional fees and his trust account, falls substantially short of the standard of professional conduct observed or approved by members of the profession of good repute and competency, and so amounts to professional misconduct.²
- [4] Mr Budgen was allowed the opportunity to make submissions as to the Notice of Intention to Seek Compensation Order. Mr Budgen refers to the statutory framework. He notes that it is not specified whether the claimants are seeking an order dealing with the repayment of the whole, or a stated part, of the amount charged³ or if they are seeking an order that the law practice pay to the complainant the amount by way of compensation for pecuniary loss suffered because of the conduct that has been found to be professional misconduct.⁴
- [5] The submissions by Mr Budgen deal with each of those possibilities.
- [6] Essentially, in relation to the orders sought pursuant to s 464(a) of the Act, Mr Budgen submits that it is not possible to establish the quantum of such compensation on the basis that he was never able to challenge the

¹ Statutory declaration of Mary Robertson sworn 7 August 2013 paragraph 8, referring to the affidavit of Robert Henry Patrick Brittan sworn 19 April 2012, exhibit RHPB1, report of David Franklin dated 11 December 2009, pages 41-56.

² See *Legal Services Commissioner v Budgen* [2016] QCAT 120.

³ *Legal Profession Act 2007* (Qld) s 464(a).

⁴ *Ibid*, s 464(d)(i).

investigators assessment, due to the fact that he did not have access to the file.⁵

- [7] The respondent hypothesises that “indeed it may be that on a further review of the file, the respondent was in fact entitled to more than the amount assessed by the investigator”.⁶
- [8] On this basis, the respondent submits that it is not in the interests of justice that the full amount of costs be refunded.⁷
- [9] Even if the Compensation Order was sought pursuant to section 464(d)(i) of the Act, the respondent remains concerned as to the inability to challenge the investigators findings and notes that the total amount found to have been excessively applied to the respondent’s account may have been less than \$28,727.01.⁸
- [10] The respondent also notes that, in any event, as to compensation pursuant to section 464(d)(i) of the Act, payment of an amount of more than \$7,500.00 by way of monetary compensation cannot be ordered unless both the complainants and the law practice consent to the order.⁹

Discussion

- [11] It is clear from the notice which has been filed that the basis of the claim for Compensation Order is pursuant to s 464(a) of the Act.
- [12] The evidence relating to the sum of \$28,727.01 is the report of David Franklin conducted by the Queensland Law Society and dated 11 December 2009.
- [13] Mr Franklin concludes:
- “The total amount received by the practitioner for the administration of the Estate is \$64,641.99. Accordingly, he has been over paid \$28,727.01.”¹⁰
- [14] In his submissions, Mr Budgen does not refer to any positive evidence which refutes that which is contained in Mr Franklin’s report.
- [15] Rather, Mr Budgen speculates what might have been the case without providing any evidence to support his conclusion.

⁵ Submissions on behalf of the respondent in relation to a Notice of Intention to Seek Compensation Order filed 26 April 2016, paragraph 17.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid, paragraph 20.

⁹ Submissions on behalf of the respondent in relation to a Notice of Intention to Seek Compensation Order filed 26 April 2016, paragraph 8.

¹⁰ Statutory declaration of Mary Robertson sworn 7 August 2013 paragraph 8, referring to the affidavit of Robert Henry Patrick Brittan sworn 19 April 2012, exhibit RHPB1, report of David Franklin dated 11 December 2009, page 44.

- [16] In the circumstances, the Tribunal finds that the amount which Mr Budgen retained was an amount which was overpaid and to which he had no entitlement. That sum amounted to \$28,727.01.
- [17] It is noted that in other submissions filed by Mr Budgen concerning the appropriate sanction which should flow from the findings of professional misconduct, Mr Budgen said the appropriate order would be “that the respondent be publicly reprimanded and that he not be issued with a Practising Certificate until he pays in full \$28,727.01 to the beneficiaries of the Kirby estate”.¹¹
- [18] In the circumstances, it is ordered that the respondent must repay to the claimants the sum of \$28,727.01 being an amount charged by the law practice with respect to legal services.

¹¹ Submissions on behalf of the respondent in relation to sanction filed 27 April 2016, paragraph 18.