

CITATION: *Legal Services Commissioner v Budgen* [2016] QCAT 120

PARTIES: Legal Services Commissioner
(Applicant/Appellant)
V
Rodney Richard 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 AM, Lay Panel Member

DELIVERED ON: 11 March 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Rodney Richard Budgen is to file submissions relating to sanction, by:**
4:00pm on 31 March 2016.
- 2. The Legal Services Commissioner is to file any further submissions he wishes to make concerning sanction, by:**
4:00pm on 21 April 2016.
- 3. The parties are to file submission regarding the appropriate order as to costs which should address, by reference to the relevant legislation and the Rules, the form of order which is sought, by:**
4:00pm on 31 March 2016.
- 4. Rodney Richard Budgen is to make any submissions he wishes to make in response to the Notice of Intention to Seek Compensation Order made on**

behalf of Thomas Burt, William Burt, Margaret Walker Clelland and Mary Robertson on behalf of the estate of Isabella Muir Garrett Robertson Kirby deceased, by:

4:00pm on 31 March 2016.

5. Unless any party requires otherwise, the orders as to sanction, costs and compensation will be determined on the papers after the date upon which the Commissioner files any further submissions, or indicates that no further submissions will be made.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the applicant charged the respondent with four charges – where three of the four charges were admitted – where the disputed charge alleged a failure to maintain competence and diligence in dealing with money in the respondent’s trust account – where the respondent has been disciplined by the Tribunal before – whether the respondent’s conduct constitutes unsatisfactory professional conduct or professional misconduct – whether the nature of the offences warrant a finding that the respondent’s name be removed from the local roll

Legal Profession Act 2007 (Qld) ss 418, 419, 443(1), 443(3), 464

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

Uniform Civil Procedure Rules 1999 (Qld)

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

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Legal Services Commissioner v Budgen [2011] QCAT 223

Legal Services Commissioner v King (No 2) [2013] QCAT 558

Legal Services Commission v Petschler [2015]

QCAT 284
Legal Services Commissioner v Rowell [2013]
 QCAT 397
Legal Services Commissioner v Urban [2013]
 QCAT 521
New South Wales Bar Association v Evatt
 (1968) 117 CLR 177
Southern Law Society v Westbrook (1910) 10
 CLR 609

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

The charges

- [1] This application is for disciplinary orders and costs, specifying four charges.
- [2] The first, second and fourth charges are based on section 443(3) of the *Legal Profession Act 2007* (Qld) ('the Act'). They allege that the respondent failed to comply with requisitions issued by an investigator under section 443(1) of the Act on 22 April 2008, 20 May 2009 and 12 July 2010. The allegations made in these three charges, including the breaches of discipline, are admitted.¹
- [3] The third charge remains in issue. It reads as follows:
- Between 18 June 2008 and 9 August 2010, the respondent failed to maintain a reasonable standard of competence and diligence whilst dealing with money held in his trust account.
- [4] Failure to maintain reasonable standards of professional competence and diligence amounts to unsatisfactory professional conduct,² or, in more serious cases, where it is "substantial and consistent", to professional misconduct.³

Background

- [5] The respondent admits the following particulars of the third charge, namely that:⁴

¹ Affidavit of Rodney Richard Budgen filed 27 September 2013, paragraph 7.

² *Legal Profession Act 2007* (Qld) s 418.

³ *Ibid*, s 419.

⁴ See the details of the Commissioner's Application filed on 22 July 2011 particulars 3.1 to 3.11, and Response on behalf of the respondent filed on 28 June 2013, Annexure "A", paragraphs 1 to 7.

- (a) At all material times he was an Australian legal practitioner, practising as Budgen Lawyers, operating a trust account in that firm name, acting as executor of the estate of the late Isabella Muir Garrett Robertson Kirby (“Mrs Kirby”) and holding money in his trust account for the benefit of that estate;
- (b) On or about 5 October 2009 the Queensland Law Society (“the Society”) produced an audit report in relation to the said trust account, detailing bills of costs to the Kirby estate between 5 June 2008 and 12 March 2009 totalling \$83,159.98;
- (c) The report was sent to the respondent on 11 December 2009 with a request that he comment on the matters reported;
- (d) The Society again sought the respondent’s response to the report on 27 January 2010, 22 February 2010 and 17 May 2010;
- (e) The respondent provided a response to the Society on 20 May 2010;
- (f) On 24 May 2010, the Society informed the respondent that his response of 20 May 2010 did not satisfactorily deal with the Society’s concerns about the Kirby estate;
- (g) The respondent provided further information to the Society on 25 May 2010;
- (h) By letter dated 28 May 2010, the Society notified the Legal Services Commissioner that the respondent had failed to account for \$28,727.01 held on trust for the Kirby estate (“the Kirby matter”);
- (i) The Commissioner sought the respondent’s explanation of the Kirby matter on 7 June 2010 and again on 24 June 2010 and 12 July 2010.

[6] The respondent denies the following:⁵

- (a) He has failed to provide a satisfactory account of his trust account practices;
- (b) His bill rendered on 21 January 2009 included an error in his favour in the amount of \$47,245.00;

⁵ Response on behalf of the respondent filed on 28 June 2013, Annexure “A”, paragraphs 3 and 7.

- (c) He transferred \$64,641.99 from his trust account to his general account in payment of his fees;
- (d) He was entitled only to \$35,914.98 in payment of his fees; and
- (e) He did not refund \$28,727.01 to his trust account pending resolution of the incorrect billing on 21 January 2009.

Discussion

- [7] The focus of the third charge is not that the respondent overcharged his client, and not that he acted dishonestly in so doing, but rather, that unsatisfactory accounting and billing procedures caused him to apply an excessive amount from the Kirby trust fund to his own account, thus failing to maintain reasonable standards of competence and diligence in operating his trust account. The applicant eschews any suggestion of dishonesty.⁶
- [8] The third charge focuses upon trust account incompetence and lack of diligence as a result of those practices.⁷
- [9] The relevant bill is dated 21 January 2009, for a total of \$50,050.00 – the largest of nine bills relating to the Kirby estate. The Commissioner accepts that the respondent was entitled to \$2,805.00 of that amount,⁸ but submits that there is no reasonable basis for the two items, including the sums of \$20,000.00 and \$22,950.00 respectively (“the items in question”).
- [10] While items in eight other bills, and a few items in the disputed bill, are adequately specified, the only explanation of the items in question in the bill itself is “wu”, which, according to the respondent, denotes a “writeup”. On the account itself, itemised charges appear before and after this “writeup” item.
- [11] The respondent’s explanation of “wu” is:

“At this stage of my career I did not keep electronic time entries ... My general billing practice at the time was to examine the physical file and consider the amount of work performed. I would also consider the time taken ... by reference to ... the quantity of documents, letters, conferences etc and I would then make an assessment of the amount to be invoiced to the client. I would then record in the firm’s billing system the amount to be invoiced with a general description such as ‘write up’ or ‘wu’”.⁹

⁶ Supplementary submissions on behalf of the Applicant filed on 24 March 2015, paragraph 6.

⁷ Submissions on behalf of the applicant filed 13 September 2013, paragraph 24.

⁸ Ibid, paragraph 28, referring to the affidavit of Robert Henry Patrick Brittan filed on 19 April 2012, and the report of David Franklin of the Queensland Law Society seeking resolution dated 18 May 2010.

⁹ Affidavit of Rodney Richard Budgen filed 27 September 2013, paragraph 24.

- [12] However, the respondent acknowledges that those estimates are insufficient to support the items in question:

“I accept that this practice was unsatisfactory (in terms of its accuracy in particular) however I made a fair assessment ... I did not dishonestly inflate my costs.”¹⁰

- [13] It follows that the items in question did not warrant the respondent’s self-payment of the subject bill by a withdrawal from the Kirby trust account. The late Mrs Kirby died on 11 May 2008, some eight months before the subject bill was prepared.

- [14] The beneficiaries of the estate, to whom the respondent owed duties as Mrs Kirby’s executor, were not given a timely opportunity to see, or to question, the items in dispute. The respondent treated that account, in effect, as his self-addressed authority to move funds from the estate’s trust fund to his general account. This is undisputed. Nevertheless, the respondent maintains that the items in question were properly charged.

- [15] The relevant files and accounts were reviewed by Mr Hourigan who is a trust account investigator, who reported to the Council of the Queensland Law Society on 11 December 2009.¹¹

- [16] As to the Kirby estate the report concludes:¹²

- (a) The practitioner is requested to refund \$28,727.01 to the trust account immediately pending the resolution of the incorrect billing on 21 January 2009. Details of the refund of \$28,727.01 is as follows:

- Bill of costs issued: \$83,159.98
- Error included in bill of costs dated 21/01/09: \$47,245.00
- Total entitlement due to practitioner: \$35,914.98
- Less amount transfer/paid to practitioner: \$64,641.99
- Amount to be refunded to trust account: \$28,727.01.

- (b) The practitioner is requested to amend previous invoices to reflect the correct value of professional costs owing to the practitioner from the Estate and to provide the beneficiaries with a current trust statement.

- [17] The funds were not refunded into the trust account and invoices were not amended as to the professional costs.

¹⁰ Ibid, paragraph 25.

¹¹ Affidavit of Robert Henry Patrick Brittan filed 19 April 2012, exhibit RHPB1 at page 45-51.

¹² Ibid, exhibit RHPB1 at page 50.

- [18] About this time, according to the respondent, he was under financial pressure, and burdened with “poor mental and physical health”, following a marriage breakdown in January 2008.¹³
- [19] The respondent claims that he is unable to challenge criticism of the subject account, because the Kirby estate file was seized by police and has disappeared.¹⁴ However, it was available to the Trust Account Investigator who reported to the Queensland Law Society on 11 December 2009.¹⁵

Characterisation of the Conduct

- [20] The respondent admits that, on three occasions, within a period of six weeks, he failed to provide an explanation of the charges and trust account transactions in question.
- [21] The Act characterises such defaults as professional misconduct,¹⁶ as distinct from the lesser offence of unsatisfactory professional conduct.
- [22] As to the third (disputed) charge, the respondent offers no adequate explanation. The respondent concedes that the practice was unsatisfactory in terms of its accuracy. The respondent has not, as required by the trust account investigator, refunded the required funds into the trust account nor has the practitioner amended invoices to reflect the correct value of professional costs owing. By the way in which the respondent imposed the items in question, amounting to \$42,950.00, and the respondent’s related dealings with the Kirby trust account, the respondent failed to maintain a reasonable standard of competence and diligence whilst dealing with money held in his trust account.
- [23] Mr Budgen has provided evidence from Dr James Freeman which indicates that Mr Budgen was receiving treatment for symptoms associated with a major depressive disorder which arose as a result of the number of interpersonal stressors in his life.¹⁷ Dr Freeman concludes that the symptoms could have had a considerable impact on Mr Budgen’s ability to complete necessary tasks.
- [24] The report does not suggest that the major depressive disorder had any relevance to the way in which Mr Budgen recorded time, rendered accounts to clients or moved funds between the trust account and his general account.
- [25] The report does not provide any explanation for the conduct. It is not relevant to the conduct or whether it is likely to happen again.

¹³ Affidavit of Rodney Richard Budgen sworn 27 September 2013, paragraph 8.

¹⁴ Response on behalf of the respondent filed on 28 June 2013, Annexure “A”, paragraph 4.

¹⁵ Affidavit of Robert Henry Patrick Brittan sworn 19 April 2012, Report of W.T. Hourigan dated 11 December 2009, exhibit RHPB1, pages 41-56.

¹⁶ *Legal Profession Act 2007 (Qld)* s 443(3).

¹⁷ Affidavit of Rodney Richard Budgen sworn 27 September 2013, Medical Report from Dr James Freeman to Mr Glen Cranny dated 7 June 2012, exhibit RRB-1.

- [26] The Tribunal is satisfied, according to the *Briginshaw* standard,¹⁸ that the respondent's conduct, in dealing with professional fees and his trust account, and a fortiori in combination with the admitted breaches of section 443(3) of the Act, falls substantially short of "the standard of professional conduct observed or approved by members of the profession of good repute and competency",¹⁹ and so is professional misconduct.

Sanction

- [27] In the submissions which have been filed by Mr Budgen, as to sanction, Mr Budgen sought further time to prepare submissions on sanction in the event that the charge was substantiated.
- [28] The Tribunal has found that Mr Budgen's conduct amounted to professional misconduct.
- [29] Consistent with Mr Budgen's request, the Tribunal will allow Mr Budgen 21 days to file further submissions relating to sanction. If Mr Budgen requires further time to make the submissions, Mr Budgen should seek a direction.
- [30] The Commissioner will be allowed 21 days to respond to any submissions made by Mr Budgen concerning sanction, if the Commissioner wishes to add to the submissions already made.
- [31] After that time, the Tribunal will, unless either party requires otherwise, make a decision on the papers with respect to sanction.

Costs

- [32] Upon a finding that a practitioner has been engaged in conduct which is either unsatisfactory professional conduct or professional misconduct the Tribunal must make an order requiring the practitioner to pay costs, unless the Tribunal is satisfied that exceptional circumstances exist.
- [33] In this case, a finding has been made that Mr Budgen's conduct amounted to professional misconduct.
- [34] As to costs, an order for costs:
- (a) May be for a stated amount; or
 - (b) May be for an unstated amount but must state the basis on which the amount must be decided.²⁰

¹⁸ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498 at 505, 506; *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183-184.

¹⁹ *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498 at 507 per Thomas J.

²⁰ *Legal Profession Act 2007* (Qld) s 462(5).

- [35] The Tribunal will allow the party's 21 days to make submissions about the appropriate order as to costs. Those submissions should address, by reference to the relevant legislation and the Rules, the form of order which is sought.

Notice of intention to seek Compensation Order

- [36] Thomas Burt, William Burt, Margaret Walker Clelland and Mary Robertson have given notice of the intention to seek a Compensation Order pursuant to section 464 of the Act.
- [37] Those complainants rely upon a statement of Mary Robertson in support of the Compensation Order.
- [38] Mary Robertson deposes to the following:²¹
- (a) Mary Robertson is one of the residuary beneficiaries of the estate of Isabella Muir Garrett Robertson Kirby deceased.
 - (b) Ms Robertson is authorised to make the declaration on behalf of the residuary beneficiaries of the estate.
 - (c) Ms Robertson refers to the report of Mr Horrigan²² and notes that proceedings issued by the Legal Services Commissioner relate to an over payment by Mr Budgen in the sum of \$28,727.01 as set out in that report.
 - (d) Ms Robertson expresses the opinion that the sum of \$28,727.01 is repayable to the estate of Isabella Muir Garrett Robertson Kirby deceased to be distributed to the residuary beneficiaries in accordance with the terms of the Will and on that basis makes a claim for that amount on behalf of the residuary beneficiaries.
- [39] Section 464 of the Act defines a Compensation Order as including "an order that a law practice cannot recover or must repay the whole or a stated part of the amount that the law practice charged a complainant for stated legal services".²³
- [40] A law practice, in this context, means an Australian legal practitioner who is a sole practitioner.²⁴
- [41] Mr Budgen admits that, at all relevant times he was an Australian legal practitioner, engaged in legal practice as a sole practitioner operating the firm known as Budgen Lawyers.²⁵

²¹ Statutory Declaration of Margaret Robertson, sworn 7 August 2013.

²² Statutory Declaration of Margaret Robertson, sworn 7 August 2013, paragraph 8 referring to the Affidavit of Robert Henry Patrick Brittan sworn 19 April 2012, exhibit RHPB1 pages 41-56, report of WT Horrigan dated 11 December 2009.

²³ *Legal Profession Act 2007* (Qld) s 464(a).

²⁴ *Legal Profession Act 2007* (Qld) sch 2, defines "law practice" to include an Australian legal practitioner who is a sole practitioner.

- [42] The *Legal Profession Act 2007* (Qld) does not require that the charges with respect to which a Compensation Order of the type sought by the claimants might be made are shown to be connected with the conduct which is found to be unsatisfactory professional conduct or professional misconduct. In this case, it seems that the charges which are the subject of the application for a Compensation Order are related to the conduct which has been found, by the Tribunal, to be professional misconduct.
- [43] Unlike a claim for Compensation Order relating to pecuniary loss suffered because of conduct that has been found to be unsatisfactory professional conduct or professional misconduct, there is no cap on the amount which might be the subject of a Compensation Order which relates to an amount charged by a law practice.²⁶
- [44] The respondent has not yet provided any response with respect to the Notice of Intention to Claim Compensation Order. The Tribunal will allow the respondent to make submissions in response to the Notice of Intention to Seek Compensation Order, if he so wishes.
- [45] The Tribunal will allow the respondent 21 days to make these submissions. If further time is required, the respondent should seek directions in this regard. After this time the Tribunal will, unless either party requires otherwise, make a decision on the papers with respect to the Notice of Intention to Seek Compensation Order.

Orders

- [46] The Tribunal's orders are as follows:
- (a) Rodney Richard Budgen is to file submissions relating to sanction, by:
4:00pm on 31 March 2016.
- (b) The Legal Services Commissioner is to file any further submissions he wishes to make concerning sanction, by:
4:00pm on 21 April 2016.
- (c) The parties are to file submission regarding the appropriate order as to costs which should address, by reference to the relevant legislation and the Rules, the form of order which is sought, by:
4:00pm on 31 March 2016.

²⁵ Response on behalf of the respondent filed 28 June 2013 Annexure "A", paragraph 2, referring to particulars 3.1(a) and (b).

²⁶ The limit with respect to compensation for pecuniary loss as contemplated by s 646(d) is contained in *Legal Profession Act 2007* (Qld) s 666(3), but on the wording of the Act, does not apply to a Compensation Order of the type contemplated in *Legal Profession Act 2007* (Qld) s 646(a).

- (d) Rodney Richard Budgen is to make any submissions he wishes to make in response to the Notice of Intention to Seek Compensation Order made on behalf of Thomas Burt, William Burt, Margaret Walker Clelland and Mary Robertson on behalf of the estate of Isabella Muir Garrett Robertson Kirby deceased, by:

4:00pm on 31 March 2016.

- (e) Unless any party requires otherwise, the orders as to sanction, costs and compensation will be determined on the papers after the date upon which the Commissioner files any further submissions, or indicates that no further submissions will be made.