

**CITATION:** *Legal Services Commissioner v Yarwood* [2015] QCAT 208

**PARTIES:** Legal Services Commissioner  
(Applicant/Appellant)  
V  
Michael Dermott Yarwood  
(Respondent)

**APPLICATION NUMBER:** OCR098-11

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** 25 May 2015

**HEARD AT:** Brisbane

**DECISION OF:** **Justice Thomas, President**  
Assisted by:  
**Ms M Mahon (Legal Panel Member)**  
**Dr M Steinberg (Lay Panel Member)**

**DELIVERED ON:** 12 June 2015

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The Respondent's name be removed from the local roll of legal practitioners.**
- 2. The Respondent pay the Applicant's costs, to be assessed on the Supreme Court scale.**

**CATCHWORDS:** PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – CRIMINAL OFFENCES – where legal practitioner engaged in criminal conduct for which he was, on his own plea of guilty, convicted of three serious offences – where legal practitioner collected funds from clients to pay stamp duty, but failed to remit those funds to the Office of State Revenue - where legal practitioner's criminal conduct was a serious offence for the purpose of the Legal Profession Act 2007 - where legal practitioner suffered psychological illness – where legal practitioner submits that conduct was caused by the

psychological illness – where conduct involved deliberate acts of dishonesty including fraud with some element of sophistication - whether conduct constituted professional misconduct or unsatisfactory professional conduct – whether legal practitioner a fit and proper person.

*Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ss 92, 93(2)

*Legal Profession Act 2007 (Qld)* ss 9, 418, 419, 420, 456, 456(2)(a), schedule 2

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

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

*Legal Services Commissioner v Williams* [2005] LPT 6

*R v Yarwood* [2011] QCA 367

#### **APPEARANCES and REPRESENTATION (if any):**

**APPLICANT:** Mellifont, K. SC instructed by the Legal Services Commissioner

**RESPONDENT:** No appearance

#### **REASONS FOR DECISION**

- [1] The Legal Services Commissioner alleges that between 1 January 2004 and 31 January 2007 Mr Michael Yarwood engaged in criminal conduct for which he was convicted of three serious offences, and which constituted professional misconduct.
- [2] Mr Yarwood admits the allegations made except to add the words “on his own plea of guilty”, so that the relevant allegation reads “between 1 January 2004 and 31 January 2007 the respondent engaged in criminal conduct for which he was, on his own plea of guilty, convicted of three serious offences”.<sup>1</sup>

#### **The hearing**

- [3] Mr Yarwood did not attend at the hearing.
- [4] Pursuant to s 92 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act), the Principal Registrar gave notice of the time and place of the hearing to Mr Yarwood.

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<sup>1</sup> Response filed 13 January 2012, Part D.

- [5] Mr Yarwood responded by way of a letter addressed to the President, Queensland Civil and Administrative Tribunal, in which he acknowledged receipt of the Tribunal Directions regarding the hearing scheduled for 25 & 26 May 2015 and writes “I do not propose to litigate or make detailed submissions as to my own circumstances in this correspondence, save the role of the Tribunal is well documented as one of protecting the public and not of punishment”.<sup>2</sup>
- [6] In the letter, Mr Yarwood made a number of submissions focussing around mental health issues.
- [7] Pursuant to s 93(2) of the QCAT Act, the proceeding was heard in the absence of Mr Yarwood.

### **Background**

- [8] Mr Yarwood was admitted as a solicitor of the Supreme Court of Queensland on 29 January 1996 and practised as a sole practitioner under the name “Yarwood Legal Group” at the time of committing the offences.
- [9] The conduct which is the basis of the disciplinary proceedings occurred between 1 January 2004 and 31 January 2007.
- [10] Mr Yarwood acted for purchasers of real estate property and received funds from the purchaser which were to be applied to meet stamp duty liability.
- [11] Mr Yarwood was an authorised agent (a self-assessor) of the Office of State Revenue (OSR) to collect stamp duty and to stamp dutiable documents on behalf of the OSR.
- [12] Mr Yarwood was registered as a self-assessor from 1 August 2006 until 1 December 2006. His registration was cancelled due to anomalies uncovered through investigation.
- [13] From early 2004 Mr Yarwood collected funds from clients to pay stamp duty, but failed to remit those funds to the OSR.
- [14] Count one concerned 72 transactions where Mr Yarwood placed onto a Queensland Land Register transfer form a stamp indicating that stamp duty had been paid. The stamps were forgeries in that they contained identifying numbers of self-assessors other than Mr Yarwood. The self-assessors whose numbers were used had no knowledge and did not authorise the use of their numbers.
- [15] Count two concerned 42 transactions totalling \$412,803.58 where Mr Yarwood deposited money received as stamp duty into his own accounts between August 2004 and July 2006. Sometimes stamp duty was paid to

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<sup>2</sup> Letter from Michael D. Yarwood dated 28 April 2015, page 1, paragraph 2.

the OSR, but in many cases tax was not remitted to the OSR. The outstanding tax collected, but not paid, was \$177,927.24.

- [16] Count three related to funds which Mr Yarwood deposited into accounts of other entities of persons. Of a total of \$97,950.00, \$29,200.00 was not remitted to the OSR.
- [17] The total loss to the State of Queensland was \$236,227.00.
- [18] Mr Yarwood recognised that he should not engage in legal practice. Acting quite appropriately, he voluntarily surrendered his practising certificate to the Queensland Law Society in early 2007 and has not since reapplied. He does not intend to practice as a legal practitioner.<sup>3</sup>
- [19] On 4 March 2011 Mr Yarwood was convicted, on his own plea of guilty, in the District Court in Brisbane of two counts of fraud and one count of uttering (comprising 72 incidences) before O'Brien DCJ. Mr Yarwood was sentenced to 4.5 years imprisonment, suspended after serving a period of 18 months, with an operational period of 5 years (which runs until 4 March 2016).<sup>4</sup>
- [20] Mr Yarwood applied for leave to appeal against the sentence. The Court of Appeal varied the sentence imposed by O'Brien DCJ by ordering that the period of imprisonment be suspended on 13 December 2011; that is, after approximately 9 months. The sentence otherwise remained intact.<sup>5</sup>
- [21] It was accepted that because of the manipulation of stamps, some element of sophistication was involved in the fraud, although not of a substantial magnitude.<sup>6</sup>

### **Respondent's submissions**

- [22] The Respondent makes the following submissions.
- [23] The events that occurred during the time Mr Yarwood suffered a severe mental illness were not just an aberration, but were a consequence of a clinical diagnosis.<sup>7</sup>
- [24] The role of the Tribunal is, amongst other things, to ensure, as at the date of the hearing, that the public is protected from such conduct described by the events, having regard to the assessment of a practitioner's character.<sup>8</sup>

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<sup>3</sup> Letter from Mr Yarwood dated 28 April 2015; Transcript of proceedings of 25 May 2015, page 6 lines 5-27.

<sup>4</sup> Transcript of proceedings – Sentence - dated 4 March 2011, page 3 lines 20-42.

<sup>5</sup> *R v Yarwood* [2011] QCA 367.

<sup>6</sup> Transcript of proceedings dated 4 March 2011 1-15, lines 35 to 41: exhibit RHB1.3 to the Affidavit of Robert Henry Patrick Britton sworn 16 May 2011.

<sup>7</sup> Paragraph 12 of Submissions on behalf of the respondent filed 26 September 2013, paragraph 12.

<sup>8</sup> *Ibid*, paragraph 13.

- [25] For the applicant to succeed, the Tribunal must determine that Mr Yarwood (when not suffering a severe mental illness) is a person who lacks the character and integrity required to engage in legal practice, and is therefore not a fit and proper person to do so.<sup>9</sup>
- [26] A criminal conviction does not give rise to a universal presumption that a person is not a fit and proper person to be admitted to the practice of the law.<sup>10</sup>
- [27] The relevant time to consider fitness for practice is as at the date of the hearing.<sup>11</sup>
- [28] There is a fundamental presumption that a person, having served a period of sentence, has not just paid the due debt to society but is taken to have been rehabilitated and is deterred from such further conduct.<sup>12</sup>
- [29] It was Mr Yarwood who disclosed the relevant information to the OSR, who subsequently sought that his name be removed from the roll of solicitors, and who indicated he would plead guilty to the offences at an early stage.<sup>13</sup>
- [30] Mr Yarwood has suffered a major depressive disorder, Post-Traumatic Stress Disorder (profound) and anxiety since on or about 27 October 2001.<sup>14</sup>
- [31] There was unchallenged medical evidence which pointed to the very significant impact of Mr Yarwood's psychological illness.
- [32] Mr Yarwood's submissions lists some extracts from the medical reports which, it is asserted, lead to the conclusion that the major depressive disorder was the cause of the events leading to the convictions.<sup>15</sup>
- [33] In its decision, the Court of Appeal accepted that Mr Yarwood's mental illness affected all elements of his conduct which was contrary to the applicant's suggestion that the offending conduct was a specific reflection of Mr Yarwood's character.<sup>16</sup>
- [34] The Court of Appeal also concluded that "the illness directly contributed to the chaotic state of the applicant's legal practice".<sup>17</sup>

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<sup>9</sup> Ibid, paragraph 14.

<sup>10</sup> Ibid, paragraph 15.

<sup>11</sup> Ibid, paragraphs 17 and 18.

<sup>12</sup> Ibid, paragraph 19.

<sup>13</sup> Ibid, paragraphs 28 - 32.

<sup>14</sup> Ibid, paragraph 35.

<sup>15</sup> Ibid, paragraph 38.

<sup>16</sup> *R v Yarwood* [2011] QCA 367, [31]; Submissions on behalf of the respondent filed 26 September 2013, paragraph 45.

<sup>17</sup> *R v Yarwood* [2011] QCA 367, [31]; Submissions on behalf of the respondent filed 26 September 2013, paragraph 49.

- [35] It is open to the Tribunal to suspend Mr Yarwood until conclusion of the operational period of sentence,<sup>18</sup> and to include the period from the date of the voluntarily surrendering of the practising certificate as time served under suspension and to impose terms and conditions on Mr Yarwood remaining on the roll after the period of suspension.<sup>19</sup>
- [36] A period of suspension, and conditions upon suspension expiry, is the appropriate order sufficient to protect the public.<sup>20</sup>
- [37] The offences were committed more than 7 years ago, during which time Mr Yarwood has undertaken extensive and continuous psychiatric and psychological therapy.<sup>21</sup>
- [38] The Legal Services Commissioner has not established that Mr Yarwood is not a fit and proper person to engage in legal practice as at the date of hearing. It is not a question of what has been suffered in the past, it is a question of Mr Yarwood's worthiness and reliability in the future from the date of the hearing.<sup>22</sup>
- [39] For practitioner's who are similarly under sufferance of a mental illness or similar stresses, a finding that a practitioner is not a fit and proper person 7 years after voluntary admission of the offending may discourage practitioner's in similar circumstances from seeking assistance. This does not serve the protection of the public. Practitioners who suffer mental illness issues will not be deterred by a perception of penalty as opposed to public protection.<sup>23</sup>
- [40] A lack of judgment during a period where it is established that Mr Yarwood was clouded by a severe mental illness does not go to measuring the individual's integrity.<sup>24</sup>
- [41] The Tribunal must look at Mr Yarwood's prior exceptional character in assessing the application as at the date of the hearing and can be satisfied that the offending conduct was outside of the ordinary character of Mr Yarwood when not suffering a severe mental illness.<sup>25</sup>

### **The Applicant's submissions**

- [42] The Legal Services Commissioner makes the following submissions.

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<sup>18</sup> Submissions on behalf of the respondent filed 26 September 2013, paragraph 51.

<sup>19</sup> Ibid, paragraph 52

<sup>20</sup> Ibid, paragraph 53.

<sup>21</sup> Ibid, paragraph 55.

<sup>22</sup> Ibid, paragraph 56.

<sup>23</sup> Ibid, paragraph 57.

<sup>24</sup> Ibid, paragraph 63.

<sup>25</sup> Ibid, paragraph 67.

- [43] The conduct was prolonged over a period of 3 years.<sup>26</sup> The conduct was deliberate and involved elements of sophistication, involving manipulation of the stamps of other practitioners.<sup>27</sup>
- [44] The submissions made by the respondent come close to an assertion that, but for the mental illness, the events would not have happened. This is not supported on the evidence.<sup>28</sup>
- [45] The Court of Appeal addressed this issue. As to the question of the psychological and psychiatric conditions the observation was made “that is not to say (as the applicant comes close to submitting in some places in his written submissions) that he was not criminally responsible for his conduct”.<sup>29</sup>
- [46] The medical reports were not sworn evidence, there is no information as to what brief the authors of the reports received, and there was no opportunity to cross examine the authors.<sup>30</sup>
- [47] On that basis, the reports should be given very little weight.<sup>31</sup>
- [48] It is evident from the reports that the authors were not addressing, or perhaps aware of, the significant fraud in which Mr Yarwood was involved.<sup>32</sup>
- [49] As to the report by Dr Whittington dated 5 May 2010, there is no indication as to the nature of the instructions provided to Dr Whittington. Despite the fact that Dr Whittington was treating Mr Yarwood throughout the time of the fraud, there is no mention of fraud and no indication that the doctor was aware of the events which lead to the convictions. Dr Whittington expresses the view that it would be difficult to explain Mr Yarwood’s behaviour exclusively on the basis of depression.<sup>33</sup>
- [50] As to the report by Dr Whittington dated 24 February 2011, the conclusion is that Mr Yarwood had made significant progress in the previous 12 months and his depressive illness was well stabilised. Reference is made to immense pressure from the current proceedings and the process of preparing the case being “psychologically confronting as Mr Yarwood has had to acknowledge the extent of his incompetence and professional negligence”.<sup>34</sup> Again no mention is made of fraud with the descriptors “incompetence” and “professional negligence” having little to do with the

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<sup>26</sup> Submissions on behalf of the Applicant of 12 August 2013, paragraph 4,

<sup>27</sup> Transcript of proceedings of 25 May 2015, page 6 lines 38-43.

<sup>28</sup> Transcript of proceedings of 25 May 2015, page 7 lines 27-30; page 9 lines 1-5.

<sup>29</sup> *R v Yarwood* (2011) QCA 367, [34]; Transcript of proceedings of 25 May 2015, page 7 lines 14-25.

<sup>30</sup> Transcript of proceedings of 25 May 2015, page 3 lines 40-47; page 9 lines 9-17.

<sup>31</sup> *Ibid*, page 3 line 46 to page 4 line 3.

<sup>32</sup> *Ibid*, page 15 lines 39-43.

<sup>33</sup> *Ibid*, page 10 line 24 to page 11 line 19.

<sup>34</sup> Report from Dr Whittington dated 24 February 2011, paragraph 3.

deliberate criminal actions which ultimately culminated in the convictions.<sup>35</sup>

- [51] As to the report of Dr Whittington dated 22 April 2013, the conclusion that Mr Yarwood suffers no current psychiatric limitations on his ability to work, function and exercise good judgment<sup>36</sup> seems at odds with the communication received from Mr Yarwood on 28 April 2015 in which he writes that he continues to suffer the debilitating effects of a major depressive disorder. Dr Whittington's comment that he would not see the major depressive illness as a contra-indication to the ability to function as a lawyer indicates that the doctor may not have received a full briefing.<sup>37</sup>
- [52] In the report from Dr Barling of 10 February 2011, the comment is made that "Mr Yarwood has entered a plea of guilty in respect of the charges and in so doing has acknowledged that his diminished capacity, and apparent professional negligence, were directly related to his mental health issues and consequent addiction to prescription medication and alcohol, rendering him intellectually and behaviourally incompetent". The reference is to "apparent professional negligence", which falls far short of the fraudulent and criminal conduct in which Mr Yarwood was involved.<sup>38</sup>
- [53] Mr Yarwood was not honest with the doctors from who he received treatment. An example is his obtaining drugs from a Canadian online pharmacy,<sup>39</sup> and also that Mr Yarwood may not have answered the questions for the psychometric testing in a completely forthright manner.<sup>40</sup>
- [54] The observations by Dr Barling, under the heading "interpersonal and social environment", that Mr Yarwood is a person "using relationships for his self enhancement" and whose relationships "are likely to be coldly pragmatic and perhaps exploitive",<sup>41</sup> suggest that Mr Yarwood is a person prepared to engage in dishonesty.<sup>42</sup>
- [55] The section of Dr Barling's report relating to "opinion and prognosis"<sup>43</sup> suggests that the author was unaware of the seriousness of the conduct of Mr Yarwood or downplayed the seriousness.<sup>44</sup> For example, comments are variously made to "the depth of his depression would have severely affected his ability to competently cope with a law practice"<sup>45</sup>, "he has managed to overcome his addictions, address his incompetence in his

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<sup>35</sup> Transcript of proceedings of 25 May 2015, page 11 lines 19-30; page 12 lines 23-32.

<sup>36</sup> Report of Dr Whittington dated 22 April 2013.

<sup>37</sup> Transcript of proceedings of 25 May 2015, page 12 line 32 to page 13 line 7.

<sup>38</sup> Report of Dr Norman Barling dated 10 February 2011, page 2; Transcript of proceedings of 25 May 2015, page 13 lines 9-18.

<sup>39</sup> Report of Dr Barling dated 10 February 2011, page 4, paragraph 3.

<sup>40</sup> Report of Dr Barling dated 10 February 2011, page 9; Transcript of proceedings of 25 May 2015, page 13 lines 20-34.

<sup>41</sup> Report of Dr Barling dated 10 February 2011, page 12, paragraph 4.

<sup>42</sup> Transcript of proceedings of 25 May 2015, page 14 lines 14-23.

<sup>43</sup> Report of Dr Barling dated 10 February 2011, paragraph 14.

<sup>44</sup> Transcript of proceedings of 25 May 2015, page 14 line 29 to page 15 line 43.

<sup>45</sup> Report of Dr Barling dated 10 February 2011 page 14, paragraph 2.

legal practice...”<sup>46</sup>, “he is remorseful and contrite about his failure to act professionally and competently. He is ashamed of his unprofessional behaviour and has handed in his license to practice. He is contrite for the professional omissions...”<sup>47</sup>

- [56] Comments such as these, by reference to “professional omissions” or acting “professionally and competently” or ability to “cope with a law practice”, downplay and ignore the deliberate acts of dishonesty and fraud which were perpetrated by Mr Yarwood.
- [57] In the circumstances, the Legal Services Commissioner submits that dishonesty was an aspect of Mr Yarwood’s character and not caused by the onset of psychiatric illness.

## Discussion

- [58] Mr Yarwood’s conduct must be assessed by reference to the definitions of unsatisfactory professional conduct and professional misconduct as they appear in ss 418 and 419 of the *Legal Profession Act 2007 (Qld)* (the Act).
- [59] Section 418 of the Act provides:

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law 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.

- [60] Section 419 of the Act provides:

- 1) Professional misconduct includes-
  - a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
  - b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- 2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability factors that would be considered if a practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

- [61] “Suitability matters” are described in s 9 of the Act and they include:

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<sup>46</sup> Report of Dr Barling dated 10 February 2011, page 15, paragraph 5.  
<sup>47</sup> Report of Dr Barling dated 10 February 2011, page 15, paragraph 6.

- a) Whether the person is currently of good fame and character
- ...
- c) Whether the person is or has been convicted of an offence in Australia ... and if so, the nature of the offence, how long ago the offence was committed and the persons age when the offence was committed.<sup>48</sup>

[62] Section 420 provides that certain conduct is capable of constituting either unsatisfactory professional conduct or professional misconduct. Section 420 reads:

- (1) The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—
- ...
- (c) conduct for which there is a conviction for—
  - (i) a serious offence; or
  - (ii) a tax offence; or
  - (iii) an offence involving dishonesty;

[63] “Serious offence” is defined as follows:<sup>49</sup>

“Serious offence means an offence whether committed in or outside this jurisdiction that is:

- (a) an indictable offence against the law of the Commonwealth or any jurisdiction, whether or not the offence is or may be dealt with summarily...”

[64] Mr Yarwood’s conviction was for an indictable offence and so is a serious offence, which means that his conduct is capable of constituting professional misconduct or unsatisfactory professional conduct.

[65] Mr Yarwood currently remains under the operating period of his sentence.

[66] As to the question of conduct which constitutes professional misconduct, reference is often made to the decision of Thomas J in *Adamson v Queensland Law Society Incorporated*<sup>50</sup> which is as follows:

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.

[67] Section 420 does not prescribe whether the conduct should be regarded as unsatisfactory professional conduct or professional misconduct. That question must be determined by reference to the nature of the conduct and the circumstances under which it was committed.

<sup>48</sup> *Legal Profession Act 2007 (Qld)* s 9.

<sup>49</sup> *Legal Profession Act 2007 (Qld)* Schedule 2.

<sup>50</sup> [1990] 1 Qd R 498, 507.

[68] The case of *Legal Services Commissioner v Williams*<sup>51</sup> involved a legal practitioner who pleaded guilty to a count of aggravated fraud and 5 counts of attempted aggravated fraud, being sentenced to 3 years imprisonment suspended after a period of 6 months for an operational period of 4 years. The conduct related to various land transactions.

[69] De Jersey CJ observed:<sup>52</sup>

“The systematic deceit which characterised these transactions was glaringly incompatible with the utter integrity which must mark those held out by the Court to the public as fit to practice as barristers and in the contemporary situation as legal practitioner’s. Deliberate fraud of this order involved an obvious affront to that necessary integrity.

Because that integrity rests at the foot of proper legal practice it must be acknowledged first that the respondents behaviour bespeaks her unfitness to practice and, second, that her fraud in these commercial dealings were so closely connected to the mores of legal practice that it amounted to professional misconduct.”

[70] Even if the existence of a psychiatric disorder goes some way to explaining why conduct might have occurred, it does not excuse conduct which takes on the character of unsatisfactory professional conduct or professional misconduct under the Act.

[71] The conduct in this case involved dishonest and fraudulent conduct over a prolonged period of time, squarely in the context of the legal practice in which Mr Yarwood was involved. Because of his knowledge as a legal practitioner, Mr Yarwood exploited weaknesses in the system and did so in circumstances where the opportunity arose because he was entrusted by the OSR as a self-assessor.

[72] The nature of the offence was a very serious one, in the context of legal practice, and in circumstances involving exploitation of the system and a breach of the duties entrusted on a legal practitioner, both by clients and also the relevant government authority.

[73] I find that the conduct of Mr Yarwood was such that he was not a fit and proper person to engage in legal practice. The conduct clearly falls within s 419 of the Act as being professional misconduct.

### **Disciplinary orders**

[74] Upon a finding that a legal practitioner has engaged in professional misconduct, the Tribunal can make any order it thinks fit, including orders such as those mentioned in s 456 of the Act.

[75] The Legal Services Commissioner seeks an order pursuant to s 456(2)(a) recommending that Mr Yarwood’s name be removed from the local roll. It

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<sup>51</sup> [2005] LPT 6.

<sup>52</sup> *Ibid*, page 4.

is submitted that Mr Yarwood's offending conduct demonstrates that he is not a fit and proper person to engage in legal practice.

- [76] It is well established that the aim of disciplinary orders is primarily to protect the public rather than punish the legal practitioner and the appropriate penalty is to be determined with that aim in mind.<sup>53</sup>
- [77] In cases where the consideration is whether the practitioner is a fit and proper person to be held out as a legal practitioner, the relevant time at which that question is considered is the date of the hearing, not the date of the conduct.
- [78] Relevant to this question are the submissions made by Mr Yarwood in relation to whether the conduct was caused by his psychiatric condition.
- [79] The existence of a psychiatric disorder which causes the conduct may be relevant if:
- a) The conduct would not have occurred had it not been for the cause.
  - b) The conduct was an aberration, uncharacteristic of the way in which the legal practitioner would otherwise have acted.
  - c) The cause has subsequently been removed.
- [80] The circumstance could occur where the conduct is professional misconduct at the time it is committed but, at the time of the hearing, the cause has been removed and the person might not be described as not a fit and proper person to engage in legal practice.
- [81] Based upon the contents of the letter from Mr Yarwood dated 28 April 2015, it does not seem that this is the case, even if his submission were to be accepted that his conduct was caused by a major depressive disorder.
- [82] In the letter dated 28 April 2015 he writes, "I continue to suffer the debilitating effects of a Major Depressive Disorder".<sup>54</sup> Mr Yarwood refers to being in a "medically encouraged transition to remediate from the relays of major depressive disorder and with the physical location, extensive drug regime and fortnightly psychiatrist and psychologist sessions the slow path of recovery continues. That said, relapses are in fact often."<sup>55</sup>
- [83] On that basis, the cause of the conduct asserted by Mr Yarwood has not been removed and so Mr Yarwood remains a person who, because of his conduct and current condition, is not a fit and proper person to engage in legal practice.

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<sup>53</sup> *Attorney General v Bax* ([999] 2 Qd R 9, 12 per Pincus J; *LSC v Williams* [2005] LPT 6.

<sup>54</sup> Letter from Mr Michael D. Yarwood dated 28 April 2015.

<sup>55</sup> Letter from Mr Michael D. Yarwood dated 28 April 2015.

- [84] For the sake of completeness, I will also deal with the submissions regarding the impact of the major depressive disorder on the conduct which lead to the convictions.
- [85] As to this issue, I am persuaded by the submissions made by the Legal Services Commissioner.
- [86] The medical reports refer to the psychiatric condition which lead to substance abuse as explaining the extent of Mr Yarwood's disorganisation and mismanagement following his fluctuating moods.<sup>56</sup> Reference is made to a diminished capacity, and apparent professional negligence, being directly related to the medical health issues.<sup>57</sup> Dr Barling refers to seeking help to sort out "his shambles of a practice"<sup>58</sup> which suggests a disorganised practice arising through the disorientation associated with the depression and substance abuse. Dr Barling suggests that the depth of the depression would severely have affected Mr Yarwood's "ability to competently cope with a law practice".<sup>59</sup> Again, Dr Barling refers to addressing "his incompetence in his legal practice",<sup>60</sup> and also his failure to act professionally and competently and his commission of professional omissions.<sup>61</sup>
- [87] The conduct which lead to the conviction was not conduct which arose through professional negligence, incompetence, lack of concentration, lack of energy, irritability, distractibility, disorganisation, mismanagement or having a shambles of a legal practice.<sup>62</sup>
- [88] Rather, the conduct involved deliberate acts of dishonesty including fraud with some element of sophistication, over a period of three years.
- [89] In those circumstances, I find that the relevant conduct was not caused by the psychiatric illness.
- [90] I find that Mr Yarwood is not a fit and proper person to engage in legal practice and so order that his name be removed from the local roll.

### **Costs**

- [91] The Legal Services Commissioner has sought an order that its costs be paid by Mr Yarwood.
- [92] Under s 462(1) of the *Legal Profession Act 2007* (Qld), the Commissioner is entitled to an order for costs unless the Tribunal is satisfied that exceptional circumstances exist.
- [93] No such exceptional circumstances exist in this case.

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<sup>56</sup> For example, see Report of Dr Whittington dated 5 May 2010, page 3 paragraph 2.

<sup>57</sup> Report Dr Barling dated 10 February 2011, page 2, paragraph 2.

<sup>58</sup> Ibid, page 6, paragraph 3.

<sup>59</sup> Ibid, page 14, paragraph 2.

<sup>60</sup> Ibid, page 15, paragraph 5.

<sup>61</sup> Ibid, page 15, paragraph 6.

<sup>62</sup> Report from Dr Whittington dated 5 May 2010, page 1.

[94] On that basis, I order that Mr Yarwood pay the costs of the Legal Services Commissioner assessed on the Supreme Court scale.