

CITATION: Legal Services Commissioner v Francis Ynong Toh Chai [2013] QCAT 335

PARTIES: Legal Services Commissioner
(Applicant)
v
Francis Ynong Toh Chai
(Respondent)

APPLICATION NUMBER: OCR235-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: 14 June 2013

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Assisted by:
Mr Peter Sheehy
Practitioner Panel Member
and
Ms Julie Cork
Lay Panel Member

DELIVERED ON: 1 July 2013

DELIVERED AT: Brisbane

ORDERS MADE:

1. That on each of the five charges contained in the discipline application filed on 11 July 2012 Francis Ynong Toh Chai is found guilty of professional misconduct.
2. That he be publicly reprimanded.
3. That he pay a penalty of \$5,000.00 to the Legal Services Commissioner within 60 days.
4. That he not be granted a local practising certificate until he has complied with the four notices issued under s 443(3) by facsimile dated 8 February 2011, letter dated 11 January 2012, letter dated 9 November 2010, and facsimile dated 6 March 2012; and, the notice issued under s 557(4) by email dated 21 October 2011.
5. That he pays the costs of the Legal Services Commissioner as assessed on

the standard basis under s 462(5).

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – DISCIPLINARY PROCEEDINGS – UNSATISFACTORY PROFESSIONAL CONDUCT OR PROFESSIONAL MISCONDUCT – where respondent failed to respond to four notices given by the applicant and the Queensland Law Society to provide explanations in relation to complaints against the respondent – where s 443(3) of the *Legal Profession Act 2007* provides non-compliance with notice requirement may be dealt with as professional misconduct – where respondent failed to produce for collection the file, information and documents relating to a complaint investigated by applicant – whether respondent’s failure to produce should be characterised as professional misconduct or unsatisfactory professional conduct – where respondent has ceased practice and has not sought to renew practising certificate – where respondent has neither filed a response to the discipline application nor attended any hearings – where applicant contends the respondent should be ordered to pay a penalty – where purpose of a penalty is to ensure the protection of the public – whether penalty is appropriate

Legal Profession Act 2007 (Qld), s 6, s 418, s 419, s 420, s 443(3), s 443(4)(a), s 557(4), Schedule 2

Council of the Law Society of New South Wales v Johnson [2013] NSWADT 19, followed
Council of the Law Society of NSW v Tsalidis (No 2) [2010] NSWADT 297, distinguished
Council of the Law Society of Queensland v Whitman [2003] QCA 438, cited
Legal Services Commissioner v Cochrane [2008] QLPT 18, distinguished
Legal Services Commissioner v Gregory [2009] QLPT 6, followed
Legal Services Commissioner v Rowlands [2010] QCAT 154, cited

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr C Bowman instructed by the Legal Services Commissioner

RESPONDENT: No appearance

REASONS FOR DECISION

- [1] Mr Chai is 54. He was admitted as a solicitor in Queensland on 11 October 1999. At the time of the events to which this disciplinary proceeding refers he was an Australian Legal Practitioner within the meaning of s 6 of the *Legal Profession Act 2007* (Qld) ('LPA') but he ceased practice on 30 June 2012 and had not, since, sought to renew his practising certificate.
- [2] The misconduct alleged against him involves four breaches of s 443(3) of the LPA, and one breach of s 557(4). Those provisions relate to the Commissioner's investigative powers in the face of a complaint about a practitioner.
- [3] Under s 443 the Commissioner can require the practitioner to provide a full written explanation of a complaint being investigated and, also, demand delivery of a client file. Under s 557 an investigator appointed by the Commissioner can require the practitioner to produce, for collection at the practitioner's office, specific files, information or documents.
- [4] Mr Chai's failure to comply with five notices delivered under these provisions is the basis for the five charges contained in a discipline application filed by the Commissioner in the Tribunal on 11 July 2012.
- [5] Each requirement arose out of a complaint by one of Mr Chai's former clients. Affidavits filed on the Commissioner's behalf show that a number of the complaints involve quite serious allegations of misconduct on the solicitor's part. Because he has never, however, responded to the notices those investigations remain incomplete.
- [6] Indeed, Mr Chai has generally adopted an uncooperative attitude towards the Commissioner and, latterly, this Tribunal. Although he had some desultory communications with the Commissioner when investigations into complaints from his former clients commenced, he never responded to any of the notices or requirements. In these proceedings he has never filed a response, and attempts to locate and effect service of the discipline application itself were unsuccessful and, ultimately, an order for substituted service was made. He has never attended any Tribunal directions hearings, the compulsory conference which was ordered, or the hearing of the entire matter set down for 14 June 2013.
- [7] The four failures to comply with s 443 mean that the practitioner is deemed to have committed what the LPA categorises as *professional misconduct* unless he has a reasonable excuse. None has been proffered.

- [8] *Professional misconduct* is the more serious of the two categories of offending set up as ‘*key concepts*’ in s 418 and s 419 of the LPA. It includes unsatisfactory professional conduct which itself involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and, conduct happening in connection with the practice of law (or otherwise) which, if established, would justify a finding that the practitioner is not a fit and proper person to engage in legal practice and, for that purpose, regard may be had to what are called ‘*suitability matters*’ in the legislation.
- [9] Section 420 of the LPA provides guidance in relation to both of these key concepts and records that conduct consisting of a contravention of a relevant law is capable of constituting either unsatisfactory professional conduct, or professional misconduct. For the purposes of that section ‘*relevant law*’ is defined in Schedule 2 as the LPA itself.
- [10] Section 443(4)(a) is in quite unequivocal terms: in the event of a failure to respond to a notice under it, ‘*the Australian legal practitioner is taken to have committed professional misconduct, unless the practitioner has a reasonable excuse for not complying with the requirement within the period*’.
- [11] The evidence presented by the Commissioner convincingly establishes that Mr Chai has committed four breaches of the provision which, in light of that subsection, must be categorised as professional misconduct. He has not attempted, of course, to proffer an excuse, reasonable or otherwise.
- [12] Charge 4 relates to s 557. It does not, however, contain a similar provision to s 443(4)(a), automatically deeming non-compliance to be professional misconduct. The evidence establishes that Mr Chai was provided with a written notice under that section which required that he produce, for collection from his office, all the files, information and documents relating to a complaint by a Mr Chen. He failed to comply. Under s 557(4) he must do so, unless he has a reasonable excuse.
- [13] The Commissioner submits that his failure to comply with that provision also constitutes professional misconduct. It is a breach of a relevant law in the context of s 420 and Schedule 2, discussed above. It is analogous to misconduct under s 443.
- [14] The failure of practitioners to cooperate with professional regulatory bodies is a serious matter.¹ Like non-compliance with s 443, a failure to comply with a notice under s 557 has the propensity to frustrate a statutory process set up by the legislature to ensure the protection of legal consumers, to ensure that their complaints are properly investigated, and to facilitate the process of investigation. In that light, I am persuaded that

¹ *Legal Services Commissioner v Rowlands* [2010] QCAT 154 at [15]; *Council of the Law Society of Queensland v Whitman* [2003] QCA 438 at [36] per de Jersey CJ.

Mr Chai's failure to comply with the notice under s 557 should, like non-compliance with s 443, be categorised as professional misconduct.

- [15] As to sanction, the Commissioner seeks a public reprimand, a fine, and an order that a local practising certificate should not be granted to Mr Chai unless and until he has complied with each of the five notices. It is to be remembered that the charges do not arise from or relate to actual professional misconduct *vis a vis* the practitioner's clients, as alleged in the complaints which lay behind each of the statutory notices.
- [16] As the Commissioner properly asserts, the primary purpose of any penalty is to ensure the protection of the public. In the face of what are, in a sense, statutory technical breaches of LPA requirements, that protection can be secured by ensuring Mr Chai cannot legally practise unless and until he complies with them. What would flow after compliance, and a proper investigation of each client's complaint, is a matter for another day. That was the course adopted in *Council of the Law Society of New South Wales v Johnson*², and is appropriate here.
- [17] The Commissioner contends for a fine in the range \$5,000.00 - \$7,500.00. In *Legal Services Commissioner v Gregory*³ the Tribunal ordered that the practitioner pay a fine of \$5,000.00 in relation to ten separate failures to respond to written requirements of the Queensland Law Society. In *Legal Services Commissioner v Cochrane*⁴ the Tribunal ordered that the respondent pay a \$7,500.00 fine in relation to misconduct including 11 failures to respond to notices. More recently, in *Council of the Law Society of NSW v Tsalidis (No 2)*⁵ the practitioner failed to provide a response to two notices and was fined \$4,000.00. In the circumstances arising here, the Tribunal considers that a fine of \$5,000.00 properly reflects the number, and nature, of the incidents of offending.
- [18] It will be ordered that the practitioner be publically reprimanded; that he pay a penalty of \$5,000.00 to the Commissioner within 60 days; and, that a local practising certificate may not be granted to him until he has complied with the four notices issued under s 443(3) by facsimile dated 8 February 2011, letter dated 11 January 2012, letter dated 9 November 2010, and facsimile dated 6 March 2012; and, the notice issued under s 557(4) by email dated 21 October 2011.
- [19] The Commissioner also seeks costs. In light of the findings and conclusions set out above it is appropriate to order that the respondent pay the Commissioner's costs as assessed on the standard basis under s 462(5) of the LPA.

² [2013] NSWADT 19.

³ [2009] QLPT 6.

⁴ [2008] QLPT 18.

⁵ [2010] NSWADT 297.