

CITATION: Legal Services Commissioner v Fusanobu Hiro Sano [2013] QCAT 448

PARTIES: Legal Services Commissioner
(Applicant)
v
Fusanobu Hiro Sano
(Respondent)

APPLICATION NUMBER: OCR311-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers; the Panel met to consider the matter on 30 August 2013

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Assisted by:
Ms Bronwyn Cushing-Sullivan
Practitioner Panel Member
and
Dr Susan Dann
Lay Panel Member

DELIVERED ON: 30 August 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. That the Respondent be publically reprimanded.**
- 2. That the Respondent pay a pecuniary penalty of \$4,000 to the Applicant within 90 days.**
- 3. That the Respondent pay the Applicant's costs, fixed at \$2,500, within 30 days.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – where the Respondent falsely purported to witness the signatures of two clients as guarantors on a lease document - where the Applicant and Respondent agree that

the conduct amounts to professional misconduct – where the parties disagree about the proper sanction to be imposed upon the Respondent – appropriate penalty

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – COSTS – where the Tribunal must make an order requiring a person whom it has found to have engaged in professional misconduct to pay costs – where the Respondent disputes the costs sought by the Applicant and seeks that costs be assessed, or fixed by agreement – where s 107(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that the Tribunal must fix the costs if possible – whether costs sought by Respondent are appropriate in the circumstances

Legal Profession Act 2007 (Qld), s 418, s 419
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 107(1)

Law Society of New South Wales v Georgas (2008) NSWADT 82, cited
Legal Services Commissioner v Clapin [2011] QCAT 339, cited
Legal Services Commissioner v Kiatos [2013] VCAT 1152, cited
Legal Services Commission v Nguyen [2005] LPT 7, cited
Legal Services Commissioner v Walters [2007] LPT 6, cited
Re: Trevor John Brown (Unreported, Qld Sup Ct/96, 12 May 2005), cited
Xu v Council of The Law Society of NSW (2009) 236 FLR 480, cited

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).

REASONS FOR DECISION

- [1] Mr Sano was admitted to practise as a solicitor in Queensland in 1997. For some years he practised on his own account, but it is unclear if this is still the case. In any event he has never, previously, been the subject of any adverse disciplinary findings.

- [2] What brings him before the Tribunal, however, is a serious matter involving his signing as a witness to two clients' signatures as guarantors on a lease document when that certification was false: he had not, in truth, seen the clients sign, and he had not been present when they did so.
- [3] The offending conduct occurred in April 2008. Mr Sano has accepted from the outset that his conduct was wrong and he has cooperated fully with the Queensland Law Society, and in the Legal Services Commissioner's investigation and the proceedings brought in QCAT. That cooperation has extended to filing a response to the QCAT discipline application fully admitting the charge in it and a consensus, with the Commissioner, that the matter did not require an oral hearing and that the Tribunal panel might deal with the matter on the papers, after each party had filed and exchanged written submissions on the only live question: the proper sanction to be imposed upon him.
- [4] The nature and extent of the appropriate sanction hinges, to a degree, upon the categorisation of Mr Sano's misconduct by reference to what are called two *key concepts* in the *Legal Profession Act 2007* (Qld), which applies. Those key concepts are *unsatisfactory professional conduct* (s 418) and *professional misconduct* (s 419). The latter is more serious and includes, for example, conduct which involves a substantial failure to reach or maintain a reasonable standard of competence or diligence.
- [5] The Commissioner contends and Mr Sano (through his solicitors) agrees that his act of false certifying should properly be placed in the second, more serious category – i.e. *professional misconduct*. Certainly there is abundant authority in the jurisdiction in this State and elsewhere in Australia to show that this particular kind of misconduct – false witnessing, by a lawyer – is viewed as very serious. As Queensland Chief Justice Paul de Jersey AC has said, it involves '*... a serious breach going to the integrity of the legal system ... It is properly regarded as dishonourable and ... is conduct which involves a substantial failure to reach a reasonable standard of competence and diligence*'.¹
- [6] Because Mr Sano's offending did not, however, involve any attempt to obtain a personal benefit and, also, because of his cooperation (and the remorse and insight his cooperation signified) and the absence of any other record of offending, the Commissioner contends that a public reprimand and a fine in the order of \$4,000 – \$6,000, plus payment of the Commissioner's costs (fixed at \$2,500), represents an appropriate sanction. Through his solicitors, Mr Sano contends that a lower fine in the order of \$2,000 - \$3,000 and costs as assessed would be an adequate and sufficient penalty.

¹ *Legal Services Commission v Nguyen* [2005] LPT 7; see, also, *Xu v Council of The Law Society of NSW* (2009) 236 FLR 480; *Re: Trevor John Brown* (unreported, Qld Sup Ct/96, 12 May 2005); *Law Society of New South Wales v Georgas* (2008) NSWADT 82; *Legal Services Commissioner v Kiatos* [2013] VCAT 1152; *Legal Services Commissioner v Walters* [2007] LPT 6; and, *Legal Services Commissioner v Clapin* [2011] QCAT 339.

- [7] One of the cases noted earlier, *Nguyen*², involved a solicitor witnessing a false signature where the client was not known to him, and was not present. He was publically reprimanded, and fined \$4,000. In another, *Clapin*³, the practitioner falsely witnessed signatures on important legal documents on two occasions and was fined \$7,500. In both cases the practitioner had made an early admission of guilt, and cooperated in the investigative and disciplinary process.
- [8] Mr Sano admitted responsibility as soon as the Law Society first wrote to him about the matter in August 2011. He has, throughout, accepted that his conduct was, (to adopt a phrase from the submissions filed on his behalf) '*seriously wrong*' and he has produced a reference from another practitioner certifying to expressions of genuine remorse.
- [9] The Tribunal accepts that, although the offending is serious, it involved an apparently isolated event; and, that there is no evidence to suggest this solitary incident signifies, or should be taken to suggest, actual unfitness to practise. The position might be different had there been other instances of misconduct, or if Mr Sano had not so promptly and fully acknowledged his wrongdoing. Absent those factors, and absent anything else pointing towards unfitness to practise, the Tribunal is persuaded that a public reprimand is sufficient and appropriate.
- [10] As to a pecuniary penalty, the nature and level of offending is not materially different from that which occurred in *Nguyen* and a fine of \$4,000 is appropriate.
- [11] Mr Sano accepts that he must pay the applicant's costs but disputes the figure sought by the Commissioner (\$2,500.00) and asks that costs be assessed, or fixed by agreement.
- [12] Under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 107(1), the Tribunal must fix costs if that is possible.
- [13] While it is true that Mr Sano has cooperated throughout and undoubtedly (and creditably) saved some potential costs for all parties, the Commissioner has necessarily taken action within the relevant statutory parameters. That action involved, at least, the drawing and preparation of the original discipline application; considering Mr Sano's response; attending at a compulsory conference before a Senior Member of the Tribunal in February 2013; attending at a further directions hearing; and, preparing and filing submissions regarding sanction and, also, considering Mr Sano's written submissions.
- [14] In all the circumstances it is highly probable that costs, if assessed, would exceed \$2,500 and fixing them at that sum is plainly justified, and sensible.

² [2005] LPT 007.

³ [2011] QCAT 339.

[15] The Tribunal finds that Mr Sano is guilty of professional misconduct and makes the following orders:

- a) That he be publically reprimanded.
- b) That he pay a pecuniary penalty of \$4,000 to the Commissioner within 90 days.
- c) That he pays the Commissioner's costs, fixed at \$2,500, within 30 days.