LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v Douglas John Winning (No. 2)* [2008] LPT 14
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **DOUGLAS JOHN WINNING** (respondent)
FILE NO:	BS5544 of 2006
DELIVERED ON:	5 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions 27 October 2008
TRIBUNAL MEMBER:	White J
PRACTITIONER PANEL PERSON:	Mr P Mullins
LAY PANEL PERSON:	Ms K Keating
ORDER:	**1. The respondent be publicly reprimanded in respect of the conduct in the charges for which he has been found guilty pursuant to s 456(2)(e) of the *Legal Profession Act* 2007.** **2. The respondent seek advice as and when required from Mr John Shaw, solicitor, in relation to the respondent's management of engaging in legal practice pursuant to s 456(4)(i) of the *Legal Profession Act* 2007 for a period of 12 months.** **By consent** **3. No order as to costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY ORDERS – IN GENERAL – the Tribunal had previously made two findings of unprofessional conduct, one finding of unsatisfactory professional conduct and one finding of professional misconduct against the respondent – the respondent is fit to practice – the sanction which should be imposed *Legal Profession Act* 2007 (Qld), s 456(2)(e), s 456(4)(i)

Legal Professional (Solicitors) Rule 2007, r 21

Attorney-General v Bax [1999] 2 Qd R 9; [1998] QCA 089, cited
Baker v Legal Services Commissioner (No. 2) [2006] 2 Qd R 249; [2006] QCA 145, cited
Bolton v Law Society [1994] 1 WLR 519, cited
Clyne v NSW Bar Association (1960) 104 CLR 186; [1960] HCA 40, cited
Law Society of South Australia v Murphy [1999] SASC 83, distinguished

COUNSEL: Mr B Farr SC for the applicant Legal Services Commissioner
Mr P Davis SC for the respondent practitioner

SOLICITORS: Legal Services Commission for the applicant
Michael Cooper Lawyer for the respondent

[1] The Tribunal delivered its findings on 13 October 2008 and, at the request of the parties, gave them time to make written submissions about appropriate orders and costs in light of those findings. These reasons will not canvass again the findings made in the principal judgment but will assume familiarity with those findings and the reasons for them.

Costs

[2] The parties have reached agreement that there should be no order as to costs and that order will be made.

Other Orders

[3] The Legal Services Commissioner (LSC) brought nine charges against the respondent seeking findings of unprofessional conduct or unsatisfactory professional conduct or professional misconduct in respect of each.[1] The Tribunal made five findings of "not guilty",[2] two findings of unprofessional conduct,[3] one finding of unsatisfactory professional conduct[4] and one finding of professional misconduct.[5]

[4] It is well accepted that the predominant consideration when making orders after a finding or findings against a legal practitioner by a discipline body is the protection

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1 Charges were brought under both the *Legal Profession Act* 2004(Qld) and the *Legal Profession Act* 2007(Qld). For charges 1 to 5, brought under the 2004 Act, the standard is of "unprofessional conduct" or "professional misconduct". For charges 6 to 9, brought under the 2007 Act, the standard is of "unsatisfactory professional conduct" and "professional misconduct". See paragraphs [4] to [8] of the decision of 13 October 2008.

2 Charges 1, 2, 3, 6, and 8.

3 Charges 4 and 5.

4 Charge 7.

5 Charge 9.

of the public[6] and the protection of professional standards.[7] In *Baker v Legal Services Commissioner* (No. 2)[8], after discussing the appropriate standard of professional conduct, McPherson JA noted:[9]

> "It is also accepted that the sanction for violation is not intended to punish but is designed for the protection of the public and to maintain confidence in the profession in the estimation of the public and of the profession as a whole."

[5] Many of the observations concerning appropriate sanction in cases about disciplinary proceedings against legal practitioners are directed to examples of dishonesty and incompetence – matters of particular concern to members of the public who might avail themselves of the professional services of the practitioner. Those observations reinforce to the profession the importance of the utmost probity, for example, in matters of charging for services, and of diligence and ability in carrying out professional duties. The respondent's breaches do not relate to dishonesty or incompetence.

[6] Observations in other cases abhor certain conduct as inimicable to the proper discharge of professional responsibilities. In some instances condemnation of that conduct has since been abandoned, such as direct access to counsel, incorporation of legal practices, advertising and multidiscipline partnerships. These are rules which govern the conduct of members of the legal profession which the High Court in *Clyne* described as conventional in character[10] and which can change. The charges in respect of which the respondent has been found guilty, except for charge 9, relate to conduct in the form of coarse and abusive language, the tolerance for which may be expected to change with changing community standards. Here, assessed against contemporary community standards, the conduct was so grossly offensive as to bring the legal profession into disrepute.

[7] The reputation of the legal profession is, as was observed in *Bolton v Law Society*,[11] its most valuable asset. Although the reputation to which the court was there referring tends to be generally understood to refer to matters of honesty and integrity, it can also encompass courteous or, at least, civil conduct, to professional colleagues[12] and those who work within the broader rubric of legal services, including police. Coarse and insulting personal conduct by a member of the profession in the course of acting as a legal practitioner will diminish the standing of the profession as a whole.

[8] Charge 9 related to a very different kind of conduct. A finding of professional misconduct was made. It concerned the denigration of the then Director of Public Prosecutions before a Magistrate. The hearing related to the respondent's own

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6 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 202.

7 *Attorney-General v Bax* [1999] 2 Qd R 9 at 22 per Pincus JA; and *Bolton v Law Society* [1994] 1 WLR 519 per Bingham MR at 518.

8 [2006] QCA 145.

9 At para 46.

10 At p 199.

11 [1994] 1 WLR 512 at p 518.

12 *Legal Professional (Solicitors) Rule* 2007 Rule 21.

criminal charge. The stresses under which he was then labouring are discussed in the principal reasons and extensively in Dr Joan Lawrence's report. Although speaking of members of the Bar, the High Court in *Clyne* noted[13] that members of that profession enjoy great privileges both *de jure* and *de facto*. That observation will apply equally to solicitor-advocates. The court said:[14]

> "In particular his privilege in relation to defamatory statements made by him in court is not qualified but absolute....Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and use such strong terms as seen to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But, from the point of view of the profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned."

It is clear that the respondent used the courtroom as a forum to vent his anger in a manner calculated to undermine the reputation of an important legal officer in the State without any attempt at fairness or balance.

[9] The respondent has acknowledged his wrongdoing. The LSC submits that he has not expressed his contrition sufficiently, pointing to correspondence in 2004 with the Legal Services Commission in which the concession of wrongdoing appears begrudging, at least so far as Charge 9 is concerned. That letter was written in August 2004 when charges against him were not concluded. The respondent has expressed his acknowledgment of, embarrassment at, and regret for, his shortcomings in his recent affidavit in October 2008. That was also apparent whilst under cross-examination before the Tribunal. There have been no complaints since 2004 about any aspect of the respondent's conduct.

[10] Both the respondent and the LSC agree that a public reprimand is required. However, the LSC proposes further orders which are opposed by the respondent:

> " *DRAFT ORDER*
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> ... 2. That the respondent is to continue consulting Michael Austin John at the rate of not less than one consultation every 6 months from the date of these orders for a period of 2 years to address anger management, alcohol dependency and stress issues provided that in the event that Mr John is unwilling or unable to continue consultations with the respondent then the respondent is to consult such other practicing psychologist who is willing to provide reports in terms of order 3.

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13 At 200.

14 At 200-201.

3. That the respondent provide authorisation in writing to Mr John and to any psychologist subsequently consulted by the respondent in accordance with these orders to permit the psychologist to provide a report in respect of each consultations with the respondent to the Applicant. Any costs associated with providing these reports are to be borne by the respondent.

4. The respondent is to attend and satisfactorily complete at his own expense the Practice Management course conducted by the Queensland Law Society within the next 12 months.

5. The respondent accept mentoring by a practitioner nominated by the Applicant for a period of not less than 2 years from today's date and to confer at least once every three months and co-operate with that practitioner.

6. That the respondent provide authorisation in writing to the mentoring practitioner in accordance with these orders to permit the practitioner to report on the frequency and nature of the mentoring provided to the Applicant. Any costs associated with providing these reports are to be borne by the respondent.

7. The orders contained in paragraphs 2 - 6 are to be conditions of the respondent's practising certificate for a period of two years from today's date."

[11] The LSC agreed at the Tribunal hearing both orally and in written submissions that the respondent was, at the time of the hearing, fit to practice. The LSC accepts in the written submissions[15] that:

- There is no allegation of dishonesty or lack of competence against the respondent;
- The respondent has sought to address a number of the factors which have been relied onto explain his misconduct;
- The respondent has no previous adverse disciplinary findings;
- The conduct occurred four years ago in which time there have been no further allegation which resulted in disciplinary proceedings.

[12] Dr Lawrence concluded in her report:[16]

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15 Written submissions on orders.

16 Exhibit JML1 to the affidavit of Joan Margaret Lawrence filed 5 September 2008 at para 18.8.

> "Thus, in my opinion, [the respondent's] behaviour and his acknowledged inappropriate use of language is the result of the interaction of the circumstances in which he found himself, the anger/anxiety ("stress") which that engendered in him and his innate and habitual ways of dealing with stress, including the maladaptive mechanism of gambling. There is no evidence that he was using the maladaptive mechanism of alcohol abuse at the time."

[13] The LSC referred to an observation by Doyle CJ in *Law Society of South Australia v Murphy*[17] in support of a number of the proposed orders:

> "A practitioner who is under business or other forms of pressure cannot use the existence of such pressure as an excuse for failure to observe proper professional standards. The Court and, no doubt, the Tribunal, will readily accept that business and other pressures on practitioners may result in occasional minor departures from the required standard of conduct, and when the departure is not great and is an isolated instance, an understanding of the circumstances that led to the departure from the required standard may enable the Court to conclude that the practitioner remains fit to be a legal practitioner, notwithstanding the relevant conduct..."

Murphy was a very different case to the present where a practitioner had engaged in serious dereliction of professional duty to his clients over almost 10 years attributable, at least in some degree, to chronic depression. Furthermore, the practitioner there continued to be ill and incapable of engaging in practice at the time of hearing where the issue was whether his name should be removed from the roll of practitioners or whether he should be permitted to undertake not to practice. Here, there is no evidence that the respondent continues to suffer from any of the conditions which led to the conduct the subject of the charges, or, at least, that he is unable to manage them.

[14] Dr Lawrence concluded, as was noted in the principal reasons:

> "The respondent would benefit from the opportunity to maintain a close and trusting relationship with a mentor or professional person to whom he could relate and who could provide opportunities for discussion, to assist him in maintaining sobriety, and a more measured and thoughtful attitude to anger management and the management of his financial and other affairs."[18]

As was also noted in the principal reasons,[19] Mr John Shaw, a solicitor in Rockhampton, is prepared to fulfil that role for the respondent. As was noted:

> "Mr Shaw is a very highly regarded Senior Counsellor with the Law Society and I express my appreciation to Mr Mullins for his advice as to the appropriateness of Mr Shaw's assistance."

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17 [1999] SASC 83 at para 27.

18 *LSC v Winning* [2008] LPT 13, para 69.

19 At paras 70 and 71.

[15] The respondent had also attended upon Dr Michael John, a clinical and forensic psychologist, who practices in Rockhampton to discuss the matters contained in Dr Lawrence's report. They had a lengthy meeting and the respondent agreed that he would contact Dr John in the future as and when required. The LSC proposes the orders about supervision and reporting in apparent disregard of this evidence. Neither Dr Lawrence, Mr Shaw nor Dr John were required to be cross-examined at the hearing and none suggested in their evidence that the kind of strict supervision and reporting proposed was required.

[16] It is difficult to understand the submission that the respondent should be required to undergo a practice management course conducted by the Queensland Law Society. There is no conduct, whether in the charges for which the respondent has been found guilty, or in the other charges in respect of which he has been found not guilty, which relate to his practice management. The reason for those orders was:

> "[T]o reinforce to the respondent the seriousness of his conduct and also act as a general deterrent to the profession at large."[20]

The predominant purpose of orders made in the discipline of the legal profession is to protect the public and the standards of the profession. The orders proposed by the LSC are not necessary to achieve either of those objects.

[17] I express my appreciation for the significant assistance made on the question of the orders by Ms Keating and Mr Mullins. The orders are:

1. The respondent be publicly reprimanded in respect of the conduct in the charges for which he has been found guilty pursuant to s 456(2)(e) of the *Legal Profession Act* 2007.
2. The respondent seek advice as and when required from Mr John Shaw, solicitor, in relation to the respondent's management of engaging in legal practice pursuant to s 456(4)(i) of the *Legal Profession Act* 2007 for period of 12 months.

By consent

3. No order as to costs.

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[20] Applicant's written submissions on orders, footnote 24.