

CITATION: Legal Services Commission v Petschler [2015] QCAT 284

PARTIES: Legal Services Commission
(Applicant/Appellant)
v
William James Petschler
(Respondent)

APPLICATION NUMBER: OCR206-12 & OCR271-13

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice D Thomas, President**
Assisted by:
Ms Joanne Collins, Practitioner Panel Member
Ms Julie Cork, Lay Panel Member

DELIVERED ON: 22 July 2015

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Respondent's conduct in relation to charges 1 and 2 in OCR206-12 is properly characterised as unsatisfactory professional conduct.**
- 2. The Respondent's conduct in relation to charges 3, 4 and 5 in OCR206-12 is properly characterised as professional misconduct.**
- 3. The Respondent's conduct in relation to all charges in OCR271-13 is properly characterised as professional misconduct.**
- 4. The Respondent is not a fit and proper person to practice law and his name should be removed from the roll of practitioners.**
- 5. The Respondent is to pay the Applicant's costs assessed on the Supreme Court**

scale.**CATCHWORDS:**

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where practitioner failed to honour an undertaking – where practitioner failed to maintain reasonable standards of competence and diligence – where practitioner failed to comply with an order of the Legal Practice Tribunal – where practitioner convicted of a tax offence – where practitioner failed to comply with a notice issued pursuant to section 433 of the Legal Profession Act 2007 – whether conduct amounts to unsatisfactory professional conduct or professional misconduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – TRUST MONEY – where practitioner charged with five charges of disbursing trust money without authority – whether conduct amounts to unsatisfactory professional conduct or professional misconduct

Legal Profession Act 2007 (Qld) ss 418, 419, 420, 443, 456, 462

Legal Profession (Solicitors) Rule 2007 (Qld) r 22.1

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 32, 92

Taxation Administration Act 2001 (Qld)

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

Legal Services Commissioner v Madden [2008] QCA 301

Legal Services Commissioner v Petschler [2009] QLPT 24

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 charge

- [1] These reasons for decision relate to two applications, namely OCR206-12 and OCR271-13, which have been brought by the Legal Services Commissioner against Mr William Petschler.

OCR206-12

- [2] The application in OCR206-12 concerns five charges:

Charge 1 – failure to honour an undertaking

Charge 2 – failure to maintain reasonable standards of competence and diligence

Charge 3 – failure to comply with an order of the Legal Practice Tribunal

Charge 4 – conviction of a tax offence

Charge 5 – failure to comply with a notice issued pursuant to s 433 of the *Legal Profession Act 2007* (Qld) (Legal Profession Act).

OCR271-13

- [3] In this application, five charges are made against Mr Petschler relating to disbursing trust monies without authority.

Background

- [4] Mr Petschler filed a response in relation to each of the claims on 14 April 2014 and participated in a compulsory conference on 17 April 2014.

- [5] Thereafter, Mr Petschler took no active part in the proceedings.

- [6] Mr Brittan, the Director of Investigations at the Legal Services Commission, filed an affidavit which deposed that electronic copies of the affidavits filed on behalf of the Legal Services Commissioner were forwarded to Mr Petschler on 29 September 2014.¹

- [7] Mr Brittan also deposes to the fact that a copy of the order of the Tribunal dated 21 November 2014 was forwarded by email dated 27 November 2014 to Mr Petschler.²

- [8] Pursuant to s 92 of the QCAT Act, the Principal Registrar of the Tribunal forwarded to Mr Petschler notice of the hearing of this matter.

- [9] Section 418 of the Legal Profession Act provides:

¹ Affidavit of Robert Henry Patrick Brittan sworn 11 December 2014, paragraphs 9 and 11.

² Ibid, paragraphs 16 and 18.

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.

[10] Section 419 of the Legal Profession Act provides:

a) Professional misconduct includes:

- i) 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
- ii) 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.

[11] As to categorisation of conduct as professional misconduct, Thomas J formulated the test in *Adamson v Queensland Law Society Incorporated*.³ “the test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional misconduct observed or approved by members of the profession of good repute and competency”.

[12] There are a number of allegations concerning the conduct of Mr Petschler. Each of those allegations must be tested against the definitions of “unsatisfactory professional conduct” and “professional misconduct” as those terms are defined in the Legal Profession Act.

OCR206-12 - Charges 1 & 2

[13] In relation to charges 1 and 2, the Legal Services Commissioner relies upon affidavits by Mhairead MacLeod sworn on 18 September 2014 and David Justin Coco sworn on 26 September 2014.

[14] Ms MacLeod is a Legal Officer and investigator in the employ of the Legal Services Commission. Mr Coco is a Managing Lawyer in the Office of the Official Solicitor to the Public Trustee of Queensland.

[15] Ms MacLeod’s affidavit sets out details of investigations which she undertook in relation to charges 1 & 2 which includes exhibits of letters received from Mr Petschler setting out the steps he took. Mr Coco’s affidavit relates to the dealings between Mr Petschler and the Public Trustee of Queensland.

³ [1990] 1 Qd R 498 at 507.

- [16] Mr Petschler has admitted many of the allegations made in the particulars of charge set out in the application filed by the Legal Services Commissioner.
- [17] From these various sources I find the following to be the position:
- a) Mr Petschler was executor to the estate of Ms Una Buckby who died on 1 February 2008. Acting under the terms of the will, Mr Petschler contracted to sell a piece of land which was an asset of the estate.
 - b) The land was subject to two 1,000 year mining leases in favour of a person who was deceased.
 - c) On 14 July 2008, Mr Petschler provided a written undertaking in these terms “I, William James Petschler, solicitor, hereby give my undertaking to remove from title the two mining leases, which are described below, within a reasonable time from the date of settlement, taking into account that a Court order has to be obtained from the Supreme Court ordering the removal of these mining leases...”
 - d) Settlement occurred on 16 July 2008.
 - e) The mining leases were removed from the title to the land on 30 March 2012.
- [18] In that time, Mr Petschler made a number of enquiries with the Office of the Public Trustee, the Registrar of the Supreme Court, the Department of Environment and Resource Management, and the Titles Office.
- [19] There were periods of unexplained delay by Mr Petschler. For example, Mr Petschler says he drafted an originating application and order on 17 July 2008, but did not brief counsel in respect of the application until 30 September 2009.⁴ In February 2011 Mr Petschler contacted the Public Trustee, but then did not respond to communications from the Public Trustee until 2 April 2012.⁵
- [20] Charge 1 alleges that Mr Petschler breached rule 22.1 of the *Legal Profession (Solicitors) Rule 2007*, in that he failed to honour an undertaking given to the lawyers for the purchaser on 14 July 2008.
- [21] Rule 22.1 of the *Legal Profession (Solicitors) Rule 2007* requires that a solicitor must honour an undertaking strictly in accordance with its terms and within the time promised.
- [22] The issue in relation to the undertaking provided by Mr Petschler is whether the delay from 14 July 2008 until 30 March 2012 (a delay of just

⁴ Letter from Bill Petschler to Legal Services Commission dated 14 January 2011, exhibit MEM 2 to the affidavit of Mhairead Ellen MacLeod affirmed on 18 September 2014.

⁵ Letter from Bill Petschler Lawyers to the Public Trustee of Queensland dated 2 April 2012, exhibit DC 4 to the affidavit of David Justin Coco sworn 26 September 2014.

under 4 years) was a reasonable time within which to remove the leases over the property.

- [23] There were, according to the correspondence received from Mr Petschler, some complexities in relation to removal of the 1000 year mining leases. Even so, the delay of just under 4 years is not “a reasonable time” and so Mr Petschler did not comply with his undertaking and so was in breach of the rule.
- [24] If Mr Petschler was experiencing considerable and uncontrolled delays in relation to the matter, the appropriate course for him would have been to communicate with the other solicitor to obtain agreement with respect to the timing.
- [25] Charge 2 arises out of the same facts.
- [26] The assertion by the Legal Services Commissioner is that Mr Petschler failed to maintain reasonable standards of competence and diligence in respect of his appointment as executor and trustee of the estate of Ms Buckby.
- [27] During the time that Mr Petschler was dealing with the removal of the 1,000 year leases, there were four periods that ranged between 5 and 15 months during which, on the information supplied by him, no action with respect to the matter was taken.⁶
- [28] The obvious delays which took place in relation to the matter, without any reasonable excuse being provided, demonstrate conduct which falls short of that which would be expected of a competent and diligent legal practitioner and so amounts to unsatisfactory professional conduct.

Charge 3

- [29] Mr Petschler has admitted charge 3.
- [30] On 30 October 2009 an order of the Legal Practice Tribunal was made that Mr Petschler “report to his nominated mentor/s any correspondence from the Legal Services Commissioner or the Queensland Law Society in relation to a complaint about (Mr Petschler’s) practice”.⁷
- [31] Mr Petschler failed to advise his mentors of the complaint by Mr Peter Murphy (the subject of charges 1 & 2).
- [32] Conduct of a legal practitioner in failing to comply with an order of a disciplinary body is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.⁸

⁶ Application filed 24 September 2012, paragraph 2.12.

⁷ *Legal Services Commissioner v Petschler* [2009] LPT 024.

⁸ *Legal Profession Act 2007* (Qld) s 420(f).

- [33] Mr Petschler's failure occurred only 7 months after the Legal Practice Tribunal order was made. The complaint was in respect of conduct of a similar nature to that which was the subject of Mr Petschler's previous disciplinary order.
- [34] Mr Petschler did not report any of the communications received from the Legal Services Commissioner.
- [35] The conduct was a substantial failure to achieve a reasonable standard of competence and diligence which should be characterised as professional misconduct.⁹

Charge 4

- [36] Mr Petschler admits the contents of charge 4.
- [37] On 21 June 2010, Mr Petschler was convicted of five counts of failing to furnish a Business Activity Statement (BAS) by the due date between 11 November 2008 and 1 November 2009.
- [38] Conduct for which there is a conviction for a tax offence is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct.¹⁰
- [39] The failure to lodge tax returns amounts to neglect of a statutory duty inconsistent with the standards which the public expects of a legal practitioner and which can reflect poorly on the legal profession. Mr Petschler's conduct was unacceptable and unexplained by him. The conviction related to five consecutive breaches of the relevant legislation.
- [40] In the circumstances, where no explanation is provided, Mr Petschler's conduct falls substantially below the standard of conduct which would be expected of a legal practitioner and so is to be regarded as professional misconduct.

Charge 5

- [41] Mr Petschler has admitted the conduct outlined in charge 5.
- [42] Mr Petschler failed to comply with a notice issued by the Legal Services Commissioner under s 443(3) of the Legal Profession Act within the time prescribed.
- [43] Failure to comply with such a notice is professional misconduct unless the practitioner has a reasonable excuse for not complying with the requirement.¹¹

⁹ Ibid s 419.

¹⁰ Ibid s 420(c)(ii).

¹¹ *Legal Profession Act 2007* (Qld) s 443(4)(a).

[44] In admitting the charge, Mr Petschler has not offered any excuse for his failure.

[45] The conduct is properly categorised as professional misconduct.¹²

OCR271-13

[46] The information relating to these charges is set out in the “Report on Trust Account Investigation pursuant to section 264 of the Legal Profession Act 2007: Bill Petschler, Charters Towers” dated 2 November 2012. The report is exhibited to an affidavit by Mr Michael Craig Drinkall sworn on 11 September 2014.¹³ Mr Drinkall is a Senior Trust Account Investigator in the Professional Standards branch of the Queensland Law Society.

[47] Mr Petschler admits many of the allegations of fact made and, in some cases, has made denials.

[48] In relation to the estate of Mr Hugh Milton, Mr Petschler denies the allegations.

[49] The investigation of Mr Drinkall concludes that the file did not contain any bills of costs and outlays in relation to the transfers from the trust account to the general account on account of professional fees and that the transfers were without written authority and in excess of entitlement.¹⁴

[50] As a result, I find that Mr Petschler did not render any bills of costs and outlays and there was no trust authority in place. Mr Petschler was not authorised to disburse the payments from trust.

[51] In relation to the estate of Ms Buckby, Mr Petschler denies that he had “at no time rendered any bill of costs and outlays” and that he was not “authorised to disburse the payments from trust until he had rendered his bill of costs and outlays”.

[52] The investigation by Mr Drinkall reveals that the file did not contain any rendered bills of costs and outlays in relation to any of the transfers, that there was no evidence of a bill having been issued by the law practice, and that the file did not contain a trust authority or costs agreement.¹⁵

[53] As a result, I find that Mr Petschler did not render any bill of costs and outlays and that there was no trust authority or costs agreement in place. Mr Petschler was not authorised to disburse the payments from trust.

[54] Mr Petschler acted for one Mr McGregor. In that matter, Mr Petschler denies that he did not hold any written authority to pay himself for costs and outlays. The investigation by Mr Drinkall indicates that funds were

¹² Ibid.

¹³ Affidavit of Michael Craig Drinkall sworn 11 September 2014, Exhibit MD1 “Report on Trust Account Investigation Pursuant to section 264 Legal Profession Act 2007: Bill Petschler, Charters Towers”.

¹⁴ Ibid, page 10.

¹⁵ Ibid, page 9.

transferred to Mr Petschler's general account on 11 February 2011 and that, whilst a trust authority was on file, it was not signed until 18 February 2011.¹⁶

- [55] In those circumstances I find that, as at 11 February 2011, Mr Petschler did not hold any written authority from his client to pay money to himself for costs and/or outlays.
- [56] Mr Petschler also acted for Mrs Joan Dale in relation to the sale of shares held by a company that subsequently went into liquidation. Mr Petschler denies that he did not render any bill of costs and outlays and that he was not authorised to make payments from trust (as set out in Mr Drinkall's report) as he had not paid the costs assessors invoice himself and he had not rendered his bill of costs. The Legal Services Commissioner also alleges that he did not seek the consent of the liquidator, and Mr Petschler admits this.
- [57] In his report, Mr Drinkall notes that payments from trust funds held were made after the date upon which the law practice was put on notice that the liquidator was claiming ownership of the funds, and so payments were contrary to s 249 of the Legal Profession Act. Mr Drinkall also concludes that Mr Petschler had not issued a bill of costs and had not previously paid the costs assessor.¹⁷
- [58] I find that Mr Petschler had, at no time, rendered any bill of costs and outlays, had not sought the liquidators consent to make any of the transfers, and had not paid the cost assessors invoice himself.
- [59] In those circumstances, Mr Petschler was not authorised to make the payments from trust which he made.
- [60] Mr Petschler's firm also acted for the executors to the estate of Ms Yvonne Jenkins. Mr Petschler denies that, as at 30 August 2012, he did not hold any written authority from the executors to pay money to himself for costs and/or outlays.
- [61] In his report, Mr Drinkall notes that whilst a bill was rendered on 30 August 2012 and monies transferred to the general account on 30 August 2012 in payment of that account, no trust authority was located on the file.¹⁸
- [62] I find that, as at the date the monies were transferred, Mr Petschler did not hold any written authority from the executors to pay money to himself for costs and/or outlays and so was not authorised to disburse the payment from trust until the executors had held the bill for 7 days without making objection to it.

¹⁶ Ibid, page 7.

¹⁷ Ibid.

¹⁸ Ibid, page 6.

[63] Mr Petschler's conduct in relation to the operation of his trust account is repeated conduct and falls substantially short of the standard of conduct which would be expected of a reasonably competent and diligent legal practitioner and so amounts to professional misconduct.

Sanction

[64] Mr Petschler has been the subject of previous proceedings in the Legal Practice Tribunal.¹⁹

[65] Those proceedings involved many very similar allegations against Mr Petschler.

[66] The charges involved:

- a) Failure to respond/cooperate with the Legal Services Commission.
- b) Failure to comply with a written notice issued by the Legal Service Commission.
- c) Want of diligence and competence when acting for a client.
- d) Breach of the *Trust Accounts Act 1973*.

[67] In that case, Mr Petschler admitted the allegations of fact and had cooperated in settling an agreed statement of facts.

[68] Mr Petschler's conduct followed a pattern similar to that to which the current proceedings relate.

[69] His explanation for failing to respond to requests from the Legal Services Commissioner was that "he was sticking his head in the sand".²⁰

[70] He explained his lack of attention by reference to isolation, a lack of a senior practitioner in Charters Towers, a lack of a bring-up system, difficulties in finding suitable staff and having too much on his plate.²¹

[71] As to the trust account breaches, Mr Petschler's explanation was that he was ignorant of what he was entitled to do. Mr Petschler believed he was entitled to transfer monies under the terms of the costs agreement and a general authority. The judgment records "he is now better informed".²²

[72] At that time, Mr Petschler was publicly reprimanded, ordered to pay a fine in the amount of \$2,000, ordered to refund an amount to the claimant and ordered to accept mentoring, to confer regularly with mentors in relation to his legal practice for a period of 12 months and to report any complaints to the mentors.

¹⁹ [2009] QLPT 24.

²⁰ *Ibid*, 15.

²¹ *Ibid*, 15.

²² *Ibid*, 17.

- [73] Breach of those orders regarding the mentor reporting is the subject of one of the complaints in the current proceedings.
- [74] The Queensland Law Society cancelled Mr Petschler's practising certificate and appointed receivers to his practice on 11 January 2013 due to trust account irregularities identified in Mr Drinkall's report.²³
- [75] As observed, the previous disciplinary proceedings concern conduct which had similarities to charges 2 & 5 in OCR206-12 and charges 1-5 in OCR271-13.
- [76] Since that time, the respondent no longer resides in Charters Towers and has taken no part in the current proceedings.
- [77] The Legal Services Commissioner submits that Mr Petschler was aware of attempts to serve him personally but appeared to be uncooperative.²⁴
- [78] Upon a finding that a practitioner has engaged in unsatisfactory professional conduct or professional misconduct the Tribunal may make any order it thinks fitting including one or more of the orders set out in s 456 of the *Legal Profession Act 2007* (Qld).
- [79] In determining the appropriate order, the Tribunal must have regard primarily to the protection of the public and the maintenance of proper professional standards.²⁵ Disciplinary penalties are not imposed as a punishment.
- [80] The current proceedings are the second proceedings which have been brought against Mr Petschler and the charges are very similar. Mr Petschler's conduct includes conduct which demonstrates a disregard for requirements placed upon him by the Tribunal and also a disregard for his responsibilities under the *Taxation Administration Act 2001* (Qld). He has mismanaged his trust account, which has led to cancellation of his practising certificate and the placement of his practice in the hands of receivers.
- [81] In the circumstances, it is clear that Mr Petschler is not a fit and proper person to practice law and so his name should be removed from the roll of practitioners.

Costs

- [82] The Legal Services Commissioner seeks an order for costs as assessed to be paid within 30 days of the assessment.
- [83] Under s 462(1) of the *Legal Profession Act*, the Legal Services Commissioner is entitled to an order for costs unless exceptional circumstances exist.

²³ Submissions of the applicant filed 17 December 2014, paragraph 67.

²⁴ *Ibid*, paragraph 14.

²⁵ *Legal Services Commissioner v Madden* [2008] QCA 301.

[84] In this case no exceptional circumstances exist. It is ordered that the respondent pay the applicant's costs assessed on the Supreme Court scale.