SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Sheehy* [2018] QCA 151
PARTIES:	**LEGAL SERVICES COMMISSIONER** (appellant) **v** **RHONDA BERYL SHEEHY** (respondent)
FILE NO/S:	Appeal No 8898 of 2017 QCAT No 125 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2017] QCAT 276
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2018
JUDGES:	Philippides and McMurdo JJA and Douglas J
ORDERS:	**1. Appeal allowed.** **2. The decision of the Queensland Civil and Administrative Tribunal dated 8 August 2017 be set aside.** **3. Declare that the respondent has engaged in unsatisfactory professional conduct as alleged by the appellant.** **4. The respondent be publicly reprimanded for that conduct.** **5. The respondent pay a penalty in the sum of $1,000.** **6. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – GENERALLY – where the respondent is a legal practitioner – where the respondent acted for one of two sellers under a contract for the sale of land – where settlement did not occur on the due date – where the respondent's client agreed to an extension of the date for settlement but the other seller did not – where the solicitor for the other seller wrote to the buyer's solicitor, copied to the respondent, electing to

terminate the contract – whether the contract could be terminated at the election of one, but not both, of the sellers

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the respondent is a legal practitioner – where the respondent acted for one of two sellers under a contract for the sale of land – where the respondent received into her trust account the balance purchase price for the land on behalf of her client and the other seller in circumstances where the other seller had sent correspondence electing to terminate the contract – where the respondent had instructed the buyer's solicitor that her client was agreeable to accepting the balance purchase monies to be paid into the respondent's firm's trust account – where the buyer's solicitor transferred the balance purchase price to the respondent's trust account – where the Queensland Civil and Administrative Tribunal ('Tribunal') dismissed an application that the respondent be disciplined for her conduct of that conveyancing matter – whether the judge constituting the Tribunal referred to the correct test under s 418 of the *Legal Profession Act* 2007 (Qld) – whether the respondent's conduct fell 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

Legal Profession Act 2007 (Qld), s 418, s 456
Property Law Act 1974 (Qld), s 54

Alleyn v Thurecht [1983] 2 Qd R 706, cited
Carringville Pty Ltd v The Gatto Group Pty Ltd [2003] NSWSC 123, considered
Jenkins v Smyth [1973] VR 441; [1973] VicRp 42, cited
Kennedy v Council of the Incorporated Law Institute of New South Wales (1939) 13 ALJ 563, considered
Lion White Lead Ltd v Rogers (1918) 25 CLR 533; [1918] HCA 71, applied
Net Parts International Pty Ltd v Kenoss Pty Ltd & Ors [2008] NSWCA 324, cited

COUNSEL: M Nicolson for the appellant
B T Cohen (*sol*) for the respondent

SOLICITORS: Legal Services Commissioner for the appellant
Bartley Cohen for the respondent

[1] **PHILIPPIDES JA:** I agree with the reasons of McMurdo JA and with the orders proposed by his Honour.

[2] **McMURDO JA:** This is an appeal against a decision of the Queensland Civil and Administrative Tribunal to dismiss an application that the respondent, a legal practitioner, be disciplined for her conduct of a conveyancing matter. The appellant

argues that his application should have been successful, and seeks orders from this Court that the respondent be fined and reprimanded. For the reasons that follow those orders should be made.

The conveyancing transaction

[3] The respondent acted for Mrs Brander, who was one of two sellers under a contract for the sale of land for a price of $130,000. The other seller was Mrs Brander's former husband, who had his own lawyer for this transaction, Mr Welsh. The land was being sold pursuant to an order of the (then) Federal Magistrates Court, in the context of a matrimonial dispute. The order provided that upon settlement of a sale of the land, and after payment of all relevant costs and expenses, the proceeds of sale should be paid in part reduction of the monies owing to the registered mortgagee.

[4] The contract, dated 5 December 2008, was in the standard REIQ form, contained no special conditions and provided that settlement should occur within 14 days, i.e. on 19 December 2008. The respondent's firm and Mr Welsh's firm were each recorded on the contract as acting on the sellers' side.

[5] The buyer's solicitor, Mr Windsor, sent transfer documents to the respondent's firm, asking that they be executed and returned upon the usual undertaking that the documents would be used by him only for stamping purposes pending settlement. The documents were executed by Mrs Brander and then by Mr Brander, before being sent back to Mr Windsor on 8 December 2008 upon that undertaking.

[6] On 10 December 2008, Mr Windsor asked for an extension of the date for settlement to 24 December 2008, with time to remain of the essence. The respondent replied that her client was not agreeable to that request.

[7] Settlement did not occur on 19 December 2008, but no party then took any immediate step to terminate the contract.

[8] There was a complication on the sellers' side of the transaction, in that the certificate of title could not be located and an application had to be made to the Registrar of Titles for dispensation with its production for the purposes of registering a transfer under the contract.

[9] Subsequently, at least according to the appellant's argument, the three parties agreed that they would settle on 13 February 2009. That is disputed by the respondent's argument, which the Tribunal apparently accepted, in finding that although the buyer and Mr Brander agreed upon that extended date for settlement, Mrs Brander did not.[1]

[10] However, the evidence well proved that all three parties agreed to that extension. On 30 January 2009, Mr Welsh wrote to Mr Windsor, referring to the difficulty with the lost certificate of title, and requesting an extension of time for settlement until 13 February with time to remain of the essence. On 10 February, Mr Windsor wrote to both the respondent and Mr Welsh, agreeing to that request. And on 12 February, the respondent wrote to Mr Windsor, in terms which unequivocally asserted that settlement was to occur on the following day and emphasising the

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1 *Legal Services Commissioner v Sheehy* [2017] QCAT 276 ('the Reasons') at [7].

urgency of the matter because of the demands then being made by the sellers' mortgagee. The respondent's letter included the following:

> "We refer to the above matter and to the adjourned settlement date which is due to occur on 13 February, 2009.
>
> We note that the initial settlement was due on 19 December, 2008 but your client sought an extension due to his funds not being available until 24 December, 2008. Our client, Mrs Brander, was not agreeable to the adjournment. Unfortunately then, Mr Brander who is represented by Messrs Welsh & Welsh could not then find the relevant Certificates of Title which issued and it was necessary for Mr Brander to make an application to the Department of Natural Resources to dispense with production of the Titles. *Settlement was then adjourned to 13 February, 2009.*
>
> …
>
> Your client has to make a concerted effort to put arrangements into place for settlement to occur tomorrow irrespective of his alleged plight … He has had advance notice of the settlement date and there is no rhyme nor reason why settlement cannot occur. There is no excuse as to why this settlement cannot proceed."
>
> (emphasis added)

That letter is not referred to in the Reasons.

[11] Clearly then both sellers together with the buyer agreed that the date for settlement should be 13 February 2009, with time of the essence. Moreover, in the respondent's own affidavit in the Tribunal, she swore that "[t]here were extensions of the date for settlement to 13 February 2009, with time expressly made of the essence." Again, that evidence is not referred to in the Reasons.

[12] On 13 February 2009, Mr Welsh wrote to Mr Windsor saying that his client required that settlement should take place on that day, and that no further extension of time would be granted. In an affidavit originally filed in the Federal Magistrates Court, but apparently read before the Tribunal, Mr Welsh said that his letter was in response to a telephone call from Mr Windsor on the previous day, in which Mr Windsor had said that the buyer would not be in a position to settle on 13 February and had sought an extension for a period of two weeks.

[13] There was no suggestion for the buyer that settlement was not due on 13 February 2009. Instead, Mr Windsor wrote to the respondent and Mr Welsh, saying that the buyer was not in a position to settle on that day and suggesting that settlement be further extended until 17 February 2009. The respondent replied on the same day, saying that her client had no option but to agree to that extension, with time to remain of the essence, and Mr Windsor was asked to contact the respondent's conveyancing clerk, Ms Connie Stevens, on the morning of 17 February "to advise the present position of this matter."

[14] However, Mr Welsh's client did not agree to an extension to 17 February.

[15] On 16 February, Mr Windsor wrote to the respondent and Mr Welsh, offering to vary the terms of the contract. The land being sold consisted of two lots. The offer

was that the buyer would pay the sum of $35,000 on 17 February, in exchange for a conveyance of one lot, and that settlement for the other lot would be postponed for a period of four to six weeks. Neither seller agreed.

[16] On 17 February, Mr Welsh wrote to Mr Windsor, terminating the contract upon the basis that the buyer had not settled on 13 February. Mr Welsh also wrote to the respondent, enclosing a copy of his letter to Mr Windsor and agreeing to the deposit, which was held in the respondent's trust account, being applied towards the respondent's costs on the sale. The respondent's evidence was that the letter was received at 11.36 am on that morning.

[17] At 12.28 pm on that day, Mr Windsor emailed Mr Welsh, questioning whether his client had the ability to terminate the contract as he had purported to do, and asserting that the date for settlement had been extended, by the respondent's client, to that day. The respondent's evidence was that it was at about 3.34 pm on that day when she received an email from Mr Windsor, containing a copy of his email to Mr Welsh.

[18] By an email which was recorded as sent at 3.36 pm on 17 February, from the respondent to Mr Windsor and copied to Mr Welsh, the respondent wrote:

> "We refer to our communication to you of 13 February, 2009 and in particular, to the penultimate paragraph when our client agreed to an adjournment to 5.00 p.m. on 17 February, 2009 time to remain of the essence.
>
> We note that Mr Brander via his Solicitors has attempted to erroneously terminate the Contract when time is of the essence until 5.00 p.m. 17 February, 2009.
>
> Accordingly, we note your client is ready, willing and able to settle the Contract today and in that regard, we are agreeable to accepting the balance purchase monies of $129,500 to be paid into this firm's Trust Account today. We confirm that we shall attend to payment of monies due and owing to Suncorp Metway."

[19] The balance purchase price was transferred to the respondent's trust account by Mr Windsor on that afternoon. The payment was made by a deposit of $129,500 to the credit of the respondent's trust account at the Nambour branch of the Commonwealth Bank. The deposit receipt from the bank shows the payment as having been made at 3.35 pm on that day.

[20] The evidence included some notes of telephone messages within Mr Windsor's file. One was a note of the account details of the respondent's trust account. Another was a note as follows:

> "MESSAGE: Connie
>
> Send copy deposit butt
>
> To 5495 7277".

That was the respondent's fax number. Clearly "Connie" was Connie Stevens, the respondent's clerk.

[21] At 4.03 pm on the same day, an executed transfer of both lots was lodged by Mr Windsor in the Nambour branch of the Queensland Land Registry. However, Mr Brander was maintaining that he had terminated the contract, and on his behalf, Mr Welsh lodged a caveat on the lots at 4.20 pm on that day. He asked Mr Windsor to return the transfer documents but was advised on the following day that they had already been lodged for registration.

[22] The transfer was never registered. The respondent did not deal with the monies which had been paid to her trust account until, by the agreement of all three parties, they were repaid to the buyer. The lots were eventually resold, by a contract made in July 2009, at a price of $150,000.

[23] The judge constituting the Tribunal was not satisfied that each of the sellers was ready willing and able to settle on 13 February 2009.[2] The judge said that this fact was not "conclusively established", without saying why that fact was in doubt or discussing any evidence which was relevant to it. The only difficulty for the sellers in settling the contract had come from the unavailability of the certificate of title, but by 13 February the Registrar had dispensed with its production. That was the apparently unchallenged evidence within Mr Welsh's affidavit. And as I have discussed, each of the sellers, through their lawyers, wrote on 13 February to demand settlement on that day.

[24] The judge restated his doubt on that matter at a later point in the Reasons, where he added that he was not persuaded "that time was, at that juncture, of the essence of the contract".[3] But as I have discussed, each of the three parties agreed, by unambiguous correspondence between their lawyers, to extend the date for settlement to 13 February 2009, with time being of the essence of the contract, and indeed that fact was specifically proved by the respondent's own evidence.

[25] The judge went on to say that even if the date for settlement was extended to 13 February 2009, "there [was] no compelling evidence that any breach by [the buyer] on 13 February 2009 was fundamental enough to give rise to enforceable termination rights and serious unresolved waiver issues".[4] The meaning of "serious unresolved waiver issues" is unclear. What is clear is that the judge thought that there was an evidentiary gap which precluded a finding that, after 13 February 2009, the sellers *or either of them* had become entitled to terminate the contract, as Mr Brander purported to do. But the evidence was clear: the buyer failed to settle the contract on the due date of 13 February, a breach which on any view was "fundamental enough" to enable the other party or parties to the contract to terminate it. Further, by clause 9.1 of the conditions of contract, it had been agreed that if the buyer failed to comply with any provision of the contract, "the Seller" could affirm or terminate it.

[26] The question then was whether the contract could be terminated at the election of one, but not both, of the sellers.

[27] This was a case to which the joint judgment of Isaacs and Rich JJ in *Lion White Lead Ltd v Rogers*[5] was applicable. Isaacs and Rich JJ there said:[6]

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2 Reasons at [21].
3 Ibid at [29].
4 Ibid at [32].
5 (1918) 25 CLR 533; [1918] HCA 71 ('*Lion White*').

> "If A and B jointly agree with C, and if C announces, before the normal moment of performance arrives, that he renounces the contract, it is competent for A and B jointly to accept renunciation, and to terminate the contract. But that is a new agreement, and requires the assent of all. A may refuse, and, if so, B and C must abide by the bargain until the time for actual performance arrives. The contract may or may not then be normally performed. But once that time has arrived, if C commits an actual breach going to the root of the bargain, A has a right, by virtue of the contract already made, to say he will not proceed further, and he may refuse notwithstanding B's desire to waive his rights and proceed. The same necessity of a new bargain which in the case first put prevents A from altering the existing position prevents B in the second case from affecting A's accrued rights. It is the second case that arises here."

[28] In that passage, Isaacs and Rich JJ distinguished between two situations: a termination of a contract on the basis of a renunciation and a termination for an actual breach. In a case of the first kind, one of two innocent parties could not terminate the contract without the concurrence of the other. In a case of the second kind, the contract might be terminated by the unilateral act of one innocent party, despite the preparedness of the other to keep the contract on foot. Isaacs and Rich JJ observed that the case before them was of the second kind and it therefore appears that what they said of that category was not, as the judge in the present matter said of it, obiter dictum.[7] In any event, each of the statements in that passage from *Lion White* was a well-considered statement by the High Court which should be applied until the High Court considers the questions further.[8]

[29] The statements in *Lion White* referred to a contract where "A and B *jointly* agree with C". In the present case, the sellers held the subject property as joint tenants. Neither could perform the contract in the absence of performance by the other, because they did not have several interests in the land.

[30] In *Carringville Pty Ltd v The Gatto Group Pty Ltd*,[9] Young CJ in Eq, discussing *Lion White*, distinguished between "several contracts each made by a tenant in common and a contract made by joint tenants."[10] He said that even in a case such as that one, where three owners, each holding a one-third share as tenant in common, had contracted to sell to a purchaser who had failed to attend at settlement of the contract, the contract was to be treated as "one joint contract" with the consequence that, according to *Lion White*, any of the sellers could exercise its accrued right to terminate without the concurrence of the others.[11]

[31] I do not overlook clause 10.8(2)(a) of the conditions of contract, which provided that "[i]f a party consists of more than one person, this contract binds them jointly and each of them individually." Nor do I overlook s 54 of the *Property Law Act*

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6 Ibid at 551.

7 Reasons at [26].

8 *Net Parts International Pty Ltd v Kenoss Pty Ltd* [2008] NSWCA 324 at [28] per Macfarlan JA (Bell JA and Handley AJA agreeing) referring to *Lion White* and citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134]; [2007] 8 HCA 22.

9 [2003] NSWSC 123.

10 Ibid at [42].

11 Ibid at [44] – [45].

1974 (Qld), which provides that a promise made by two or more persons shall, unless a contrary intention appears, be construed as a promise made jointly and severally by each of those persons. Nevertheless, for this contract the reasoning in *Lion White* was applicable: "[t]he time for performance having arrived and an actual fundamental breach having occurred, [Mr Brander was] entitled to say 'I will not proceed further. There is nothing to compel me.'"[12] Put another way, Mr Brander as a joint promisee was not required to refuse to accept something less than the performance which the contract required of the buyer.[13]

[32] Therefore, Mr Brander was able to terminate the contract upon the basis of the buyer's failure to settle on 13 February 2009, regardless of the wishes of Mrs Brander. Mr Brander's termination was valid and effective, before the balance price was paid to the respondent's trust account.

The charge of misconduct

[33] The appellant alleged that the respondent had engaged in professional misconduct and/or unsatisfactory professional conduct on the basis of the following allegations:

> "1. On 17 February 2009, the respondent breached her professional obligations, in that:
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> (i) She completed a contract for sale of land when she knew, or ought to have known, that the joint owner of the property, Mr Leigh Brander, had terminated the contract and had not consented to settlement: and/or
>
> (ii) She received into her trust account on behalf of Mr Leigh Brander the sum of $129,500 in circumstances where she knew or ought to have known that Mr Brander had not agreed to the settlement and had not authorised the transfer."

The Reasons of the tribunal

[34] In the appellant's case before the tribunal, a report by Mr Purcell, a solicitor, was tendered. Mr Purcell gave opinion evidence in two respects. He analysed the transaction, substantially as I have done, and reached the same conclusions as to the status of the contract on 17 February 2009. Further, he gave opinions about the respondent's conduct, measured against the standards of the hypothetical "qualified, competent and careful lawyer", as follows:

- On 13 February 2009, that lawyer would have known or ascertained that a variation of the contract, extending the date for settlement to 17 February 2009, required the assent of the other parties, including Mr Brander.
- Such a lawyer would have known that Mr Brander was entitled to terminate the contract and that Mrs Brander was not entitled to insist that settlement occur without his consent.
- The respondent had no authority to accept the purchase monies or direct that they be paid to her trust account, as that lawyer would have known or ascertained, especially from clause

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12 (1918) 25 CLR 535 at 551.

13 *Jenkins v Smyth* [1973] VR 441 at 446.

> 2.5(1) of the contract which required the buyer to pay the balance of the purchase price "as the Seller directs", which meant both Mr and Mrs Brander.
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> - That lawyer would have advised Mrs Brander that, whether or not the contract had been terminated validly, she could not take it upon herself to vary the contract by extending time.

[35] The judge said that he was "greatly assisted by what Mr Purcell considers was needed to meet the professional standard of competence and the reasonable expectations of the public" but that "in the end, the application of the test [of what constitutes professional misconduct and/or unprofessional conduct] is a facts sensitive question of law and cannot be delegated to an expert."[14] The judge concluded that he was not satisfied that the respondent had acted in breach of any professional obligation or standard.[15]

[36] The judge said that "[t]he sellers owed each other reciprocal duties of good faith and fair dealing not to do anything unreasonable to scuttle a genuine sale transaction" and that "[f]undamental breach or not, the husband cannot unilaterally jeopardise the sale without good cause."[16] The legal basis for those observations was not explained by the judge. More particularly, the judge did not explain why he disagreed with Mr Purcell's analysis based upon *Lion White*, that Mr Brander could terminate the contract, except on the basis that "the Sellers were [not] willing and able to settle on the 13 February 2009."[17] As I have explained, that was incorrect.

[37] The judge said that the respondent had "honestly (and reasonably) believed that her duty was to protect the wife's contract rights and her interest in discharging the mortgage debt."[18] The judge's view that this was the honest opinion of the respondent must be accepted. But dishonesty was not an essential element of the appellant's case. I will return to the question of whether the respondent's conduct was reasonable.

[38] The judge then turned to the terms of the charge. As to paragraph (a) of the charge, the judge rejected the contention that the respondent had "completed" the contract. Because the contract had been duly terminated by Mr Brander, it was not open to the respondent to complete the contract. But that was not what the judge meant. The judge said this:[19]

> "The two acts of completing settlement were the deposit of the sale proceeds to the trust account of the practitioner and dealing with the transfer by lodgement of it with the Titles Office for registration – both acts which were performed by Windsor and not the practitioner."

That reasoning cannot be accepted. The completion or settlement of a contract for the sale of land involves the performance of the contract by each party. In essence, the buyer performs by paying for the land and the seller performs by putting the buyer into a position whereby, without further action by the seller, the buyer can become the registered owner. Those steps were reflected in clause 5 of the

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14 Reasons at [36].
15 Ibid at [38].
16 Ibid at [39].
17 Ibid at [43].
18 Ibid at [40].
19 Ibid at [42].

conditions of this contract, under which the Seller was to deliver to the buyer, amongst other things, transfer documents capable of immediate registration after stamping. Here, as is very often the case, the buyer's solicitor already held the transfer documents. But he held them upon the usual undertaking, that is to say they were held, as Mr Welsh had written to Mr Windsor on 8 December 2008, "to the Seller's order pending settlement." Put another way, until settlement, they were held by Mr Windsor on behalf of Mr Brander and Mrs Brander.[20] It was the (purported) release of Mr Windsor from that undertaking which constituted the (purported) completion of the contract on the Seller's side of the transaction. It was that conduct of the respondent by which she (purportedly) completed the contract.

[39] The judge continued by commenting that Mr Brander's "asserted termination rights were weaker, or, at least, no stronger… than the wife's right to settle".[21] As I have explained, that view was incorrect. From that premise, the judge assessed the respondent's conduct in terms which should be set out in full:

> "[44] The practitioner was faced with a dilemma. She had to quickly choose between imperfect solutions none of which was demonstrably right or manifestly wrong. Instead of acting in the hope that settlement would be effected and the mortgage discharged she could have advised the wife to waive her rights contrary to her interests and legitimate expectations, risked a specific performance suit or inducing breach of contract action or suggested going to yet another court for an urgent (but not a guaranteed final or conclusive) legal ruling.
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> [45] Practitioners are defined by the legality and ethical (not moral) virtue of the choices they reasonably make in the hurly-burly of professional life. They are allowed to make reasonable contestable or contentious even questionable decisions without their conduct being branded unprofessional or substandard. They are accountable for their actions or failures in performing professional roles according to reasonably acceptable and achievable (not arbitrary or impossible) standards of behaviour.
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> [46] Tested objectively and measured against the statutory standard, the practitioner did not act illegally, unprofessionally, unethically, or in breach of any duty to the husband, another practitioner, the profession or the public in sending the email to Windsor at 3:47 pm on 17 February 2009 even though it had the intention or likely effect of facilitating Windsor's disreputable plans to transfer title despite the husband's opposition. She might have breached her professional duty if she failed to protect her client's interests against what was honestly and reasonably believed to be an ineffective attempt by the husband to terminate at the last minute for no apparently good, or even valid, reason.
>
> [47] Accepting that it is open to valid expert criticism and that there were probably more prudent options available to her, what the

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20 *Alleyn v Thurecht* [1983] 2 Qd R 706 at 711 per McPherson J.

21 Reasons at [43].

> practitioner did, in my view, is no more or less than what a member of the public is entitled to expect of a reasonably competent lawyer faced with the same intractable problem; that is, to resolve it in the overall best interests of the client (and the mortgagee) consistently with the intention of the family court order and a reasonable interpretation of the legal position and without causing or risking any likely or practical detriment to another party.
>
> [48] Nothing she did or failed to do is indicative of a misunderstanding or misapplication of "the precepts of honesty and fair dealing"[22] in relation to the public interest or demands of practical justice."

[40] Although the charge alleged professional misconduct or alternatively, unsatisfactory professional conduct, the appellant's case, as argued in the Tribunal, alleged only conduct of the latter kind. The term "unsatisfactory professional conduct" is defined by s 418 of the *Legal Profession Act* 2007 (Qld) ('LPA') as including:

> "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."

[41] The judge did not refer to s 418 and it fairly appears that he did not apply that definition in his analysis of the respondent's conduct. The judge cited *Kennedy v Council of the Incorporated Law Institute of New South Wales*[23] in paragraph [48] of the Reasons, where Rich J described the conduct of a solicitor as sufficiently serious to warrant his name being removed from the roll. That case was not relevant to the assessment of the respondent's conduct against the standards prescribed by s 418.

The appellant's arguments

[42] The matter just mentioned is taken up by the first two grounds of appeal. It is said that the Tribunal failed to identify the relevant test of the respondent's conduct and to consider her conduct against that test. That must be accepted, as I have just explained.

[43] It must be said, however, that some of the appellant's argument was an attempt to define the relevant test by language which does not appear from the definition in s 418. At the hearing before the Tribunal, it was submitted for the respondent that only a *substantial* departure from that standard of competence and diligence could amount to unsatisfactory professional conduct. The appellant's argument was that the correct test to be applied was whether the practitioner's conduct involved a *significant departure from accepted standards* of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. The difference between the two is unlikely to be a real one, at least in most cases. But in any event, it is the definition in s 418 which must be applied.

[44] The third ground of appeal is that the judge reached his decision on his own view of the transaction and of the respondent's conduct, without having regard to the

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22 *Kennedy v Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJ 563.

23 Ibid.

unchallenged expert evidence of Mr Purcell. However the judge was not bound to accept Mr Purcell's opinions. An analysis of the transaction involved legal questions upon which, it is obvious to say, the judge was to reach his own view. An analysis of the standard of the respondent's conduct was, again, something which a judge could undertake without the benefit of expert opinion. The problems were that the judge proceeded upon an incorrect analysis of the transaction and without reference to the question which was effectively defined by s 418.

The respondent's arguments

[45] For the respondent, it is argued that the appellant's case was confined to one which had as its premise that Mr Brander was lawfully entitled to unilaterally terminate the contract and had done so. That submission may be accepted. But as I have discussed, the premise was established.

[46] The respondent submitted that the reasoning at paragraph [42] of the Reasons, in which the judge said that the respondent had done nothing to complete the contract, was correct. Therefore, it was argued, the allegation in paragraph (a) of the charge was not made out. As I have explained, the judge's reasoning was incorrect. The respondent did purport to complete the contract, knowing that Mr Brander had purported to terminate it and that he would object to anything done by her on his behalf to complete it.

[47] It is argued, in respect of paragraph (b) of the charge, that the respondent did nothing to cause the balance purchase price to be paid to her trust account. It is said that the evidence showed that her trust account details were given to Mr Windsor by someone other than the respondent. The argument refers to the respondent's oral evidence before the tribunal. In one of those passages, the respondent was asked whether she had provided her trust account details to Mr Windsor and she answered "I *personally* have not" (emphasis added). She was asked whether she had an expectation that "Connie" would provide those details. She answered "I didn't take it any further". But she then said that she was "agreeable to the monies being placed into my trust account".

[48] It is quite possible, on the evidence, that Mr Windsor had been provided with the trust account details well before the date in question. There was evidence from the respondent suggesting that he may have been given those details in order to pay the deposit. Be that as it may, it cannot be thought that the money was paid to her account on the day in question without any request or concurrence by her or at her discretion. The plainest evidence of that is her email sent on the afternoon of 17 February, where she said her firm was agreeable to accepting the balance purchase monies into her trust account that day. She had consistently urged the buyer to settle the contract. In her affidavit, the respondent recalled that immediately before writing to Mr Windsor on the afternoon of 17 February, she had considered that the contract remained on foot and that "the better course was proceed to settle the transaction in accordance with the contract".

[49] There is a further submission which, at least on one view of it, suggests that there was no unsatisfactory professional conduct in not knowing of the principles from *Lion White*. But that misunderstands the appellant's case. Based upon Mr Purcell's evidence, the case was that the respondent went ahead without a consideration of the legal position between the parties which would be expected of a reasonably competent legal practitioner. The respondent may have thought that Mr Brander's

termination was of no effect; but it is clear that she did nothing which involved a proper assessment of that question. She conducted no research, had apparently not encountered the problem previously and sought no advice from another practitioner. Instead, she simply went ahead in the belief that the interests of her own client would be best served by doing so.

[50] Moreover, knowing of the strong stance taken by Mr Brander, she went ahead with an intended settlement of the contract without first warning Mr Welsh that she would do so. She did copy to Mr Welsh her email of the afternoon of 17 February. But as I have discussed, that email was sent no earlier than the time at which the money was deposited to her trust account.

[51] In my view, a reasonably competent legal practitioner would have known or ascertained that she was not entitled to take steps to complete the contract over the objection of Mr Brander, which she did by calling upon the buyer to settle by paying the price to her trust account and by necessary implication from that conduct (if not expressly) releasing the buyer's solicitor from his undertaking which had been given for the benefit of both Mr and Mrs Brander. By her conduct, she effectively induced the buyer's solicitor to act in breach of his undertaking to hold the transfer documents on behalf of both sellers. Her conduct fell short of the standard of competence and diligence to be expected of a reasonably competent legal practitioner.

Conclusion and Orders

I accept the appellant's submission that the appropriate orders in this case are for the respondent to be publicly reprimanded,[24] and that she pay a penalty in an amount of $1,000.[25] There was no submission on her behalf that, in the event that the appeal was allowed, those orders would be inappropriate.

[52] I would propose orders as follows:

(1) Appeal allowed.

(2) The decision of the Queensland Civil and Administrative Tribunal dated 8 August 2017 be set aside.

(3) Declare that the respondent has engaged in unsatisfactory professional conduct as alleged by the appellant.

(4) The respondent be publicly reprimanded for that conduct.

(5) The respondent pay a penalty in the sum of $1,000.

(6) The respondent pay the appellant's costs of the appeal.

[53] **DOUGLAS J:** I agree with the reasons of McMurdo JA and the orders proposed by his Honour.

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24 s 456(2)(e) of the LPA.

25 s 456(4)(a) of the LPA.