QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Wrenn* [2020] QCAT 210
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **ANDREW WRENN** (respondent)
APPLICATION NO/S:	OCR038-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	23 June 2020
HEARING DATE:	9 March 2020
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Mr Douglas Murphy QC, Legal Panel Member Dr Margaret Steinberg AM, Lay Panel Member
ORDERS:	**1. There is a finding that the respondent breached r 64 of the *Barristers' Conduct Rules*, and thereby engaged in unsatisfactory professional conduct.** **2. The respondent is publicly reprimanded.** **3. The following conditions shall be imposed on the respondent's practising certificate:** **(a) The respondent shall be mentored by a Queen's or Senior Counsel, appointed by the Council of the Bar Association of Queensland, for a period of 12 months;** **(b) During that 12 month period, the respondent should meet with his mentor at least once every three months (either in person or by telephone or video conference) to discuss any issues he is facing in his practice;** **(c) At the end of the 12 month period, the respondent shall submit a report to the Bar Association of Queensland, countersigned by his mentor, confirming his compliance with**

conditions (a) and (b); and

(d) For 12 months, in addition to the requirements of obtaining 10 CPD points each year, the respondent must obtain an additional two CPD points in respect of the CPD Ethics Stream.

4. The respondent shall pay the applicant's costs of and incidental to this discipline application, such costs to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where a husband commenced divorce proceedings against his wife in the Federal Circuit Court – where the Court found that marriage was proved and granted the divorce – where the husband subsequently commenced matrimonial property proceedings – where the respondent barrister represented the wife in those proceedings – where the wife deposed in support of a costs application that certain documentation did not support the existence of the former marriage – where the respondent prepared and relied upon two sets of written submissions in which he alleged fraud and criminal conduct on the part of the husband – where the applicant Commissioner alleges that the respondent breached r 64 of the *Barristers' Conduct Rules* in making the allegations – whether there were reasonable grounds for the respondent to have any belief that the available material by which the allegations could be supported provided a proper basis for them – whether a breach of r 64 amounts to unsatisfactory professional conduct in the circumstances

Legal Profession Act 2007 (Qld) s 58, s 218, s 227, s 418, s 420, s 456, s 462

Brown v Bennett (No 2) [2002] 2 All ER 273
Legal Services Commissioner v Trost (No 3) [2020] QCAT 86
Murphy v Legal Services Commissioner [2013] QSC 70
NIML Ltd v MAN Financial Australia Ltd (No 2) [2014] VSC 510
Rondel v Worsley [1969] 1 AC 191
Solouki v Nooranbakht [2016] FCCA 1769

APPEARANCES & REPRESENTATION:

Applicant: G Rice QC, instructed by the Legal Services Commission

Respondent: R Perry QC, instructed by Carter Newell Lawyers

REASONS FOR DECISION

[1] In this discipline application under the *Legal Profession Act* 2007 (Qld) ("*LPA*"), the applicant, the Legal Services Commissioner, has brought one charge against the respondent, Andrew Wrenn, who practices as a barrister in Queensland. He has been charged with one count of breaching r 64 of the *Barristers' Conduct Rules* ("the Rules").

[2] Rule 64 provides:

> A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
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> (a) available material by which the allegation could be supported provides a proper basis for it; and
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> (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and to the possible consequences for the client and the case if it is not made out.

[3] The Rules are "legal profession rules" for the purposes of the *LPA*.[1] A failure to comply with the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct under the *LPA*.[2]

Background

[4] The factual background is not in issue. Central to the charge are written submissions submitted by the respondent in proceedings in the Federal Circuit Court in which he made allegations of serious criminality on the part of the opponent client. The respondent has sworn to his belief that the available material by which the allegations of serious criminal conduct could be supported provided a proper basis for the submissions. It was common ground that, for the purposes of r 64, the issue in this case is whether there were reasonable grounds for any such belief by the respondent.

[5] Between 9 March 2015 and 23 March 2016, the respondent, on a direct brief, conducted an application on behalf of Ms Solouki ("the wife") for a costs order against Mr Nooranbakht ("the husband") in respect of matrimonial property proceedings in the Federal Circuit Court at Cairns which had been commenced by the husband in January 2013.

[6] It was a precondition of the orders sought in the property proceedings by the husband that the parties had previously been married. On 12 September 2011, the husband commenced divorce proceedings in the Federal Circuit Court. The divorce was granted by an order dated 24 January 2012. That order recited a marriage between the parties on 1 October 1974 and, *inter alia*, recorded a finding that the "marriage is proved".

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1 See *LPA* s 218.

2 *LPA* s 227(2).

[7] The husband then commenced the property proceedings. The wife was initially represented in that proceeding by solicitors. In the judgment given by Judge Willis on the costs application, in which the respondent made the impugned submissions,[3] her Honour described at length the wife's engagement in the property proceedings. It is not necessary for present purposes to recite the long and lamentable history of those property proceedings before her Honour. Judge Willis summarised her findings about the wife's conduct in the property proceedings as follows:[4]

> The wife's conduct as a litigant has been obstructive, secretive and time wasting. It has resulted in extra expense for the husband in having to issue subpoena for information that ought to have been disclosed and many more mentions than ought to have occurred, which were due to the wife's failures. The wife has refused to comply with her obligations of disclosure. She has not been candid about her real financial situation and has been prepared to swear a financial statement which has concealed her mortgage and all of the transactions that surrounded her borrowings. There are costs reserved throughout the appearances in this matter, and they have clearly been reserved because of the time wasting by the wife.

[8] In any event, the property proceedings were listed for a three-day trial which was to be held in March 2015.

[9] On 10 February 2015, the wife attempted to file in the Federal Circuit Court an application, prepared by the respondent, seeking amongst other things a declaration that the divorce order made in 2012 "be declared void or voidable ab initio". This purported application, which was supported by an affidavit by the wife affirmed on the same day, was not accepted by the registry for filing.

[10] Despite the fact that these documents had not been accepted for filing, they were sent on the wife's behalf to the husband's solicitors later that day. The husband's solicitors responded an hour later by providing the wife with a copy of a Notice of Discontinuance of the husband's property proceedings, saying that the property proceedings were thereby "completed", and also advising that they no longer acted for the husband.

[11] As the trial of the property proceedings had been listed for three days in March 2015, a "compliance check" had been scheduled before Judge Willis for 16 February 2015. On 10 February 2015, the respondent emailed Judge Willis' Associate noting that the registry had rejected the wife's application for filing, and asking for an interim hearing on the application at the time of the "compliance check" on 16 February 2015.

[12] The "compliance check" proceeded before her Honour on 16 February 2015. Judge Willis noted the filing of the Notice of Discontinuance, and delisted the trial of the property proceeding. Her Honour also ordered that:

(a) all outstanding applications were dismissed and removed from the active pending cases list; and

(b) "the Application in a Case submitted on 10 February is to be returned to the registry … noting that there are now no applications on foot and therefore the Application in a Case would need to be filed using an initiating application. If

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3 *Solouki v Nooranbakht* [2016] FCCA 1769 ("*Solouki*").

4 *Solouki*, [124].

the application is relodged, noting the nature of that application being to declare a divorce order void, the matter should be filed in the Family Court of Australia".

[13] No initiating application of the kind referred to in the orders of 16 February 2015 was made. Instead, on 9 March 2015 the wife filed in the Federal Circuit Court an application which, on its face, had been prepared by the respondent. This application sought an order that the husband pay the wife's costs of the property proceedings on an indemnity basis.

[14] That application was supported by an affidavit of the wife affirmed on 9 March 2015. The text of the affidavit incorporated the content of her earlier affidavit of 10 February which, with its exhibits numbered as RS1 – RS5, was also exhibited as RS6. Of particular note are exhibits RS1, said to be a copy of the wife's Birth/Identification Certificate No 2119, and RS3, a copy of a translation of a Declaration of Marriage Registration which had been relied on by the husband to obtain the divorce order.

[15] As to RS1, the wife deposed:

> 20. In November of 2014 I found my Birth/Identification Certificate 'Shenasnameh' No 2119 amongst papers in a suitcase that had been left behind by the [husband] in 1999.
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> 21. On 5 January 2015 I had my Birth/Identification Certificate, 'Shenasnameh' No 2119, translated into English.
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> 22. I humbly say that there is no legal record or certification of any marriage with [the husband] appearing on my Birth/Identification Certificate 'Shenasnameh' No 2119. Annexed 'RS1' are true copies of the translation and a certified copy of my original Birth/Identification Certificate 'Shenasnameh' No 2119.
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> 23. In October 1974, in Tehran, Iran, amongst a small gathering, I took part in a ceremony of what I thought was a Bahai'i marriage with [the husband].

[16] The wife had, in fact, been married and divorced twice previously. Details of those marriages and divorces are set out in RS1. Despite her statement at paragraph 22, the Birth/Identification Certificate No 2119 on its face includes details of a marriage to "Farhad Nooran", whose date of birth is 24 June 1946, and whose birth certificate is numbered 40-898. Although the marriage date box is blank, the marriage registration no 42551 is noted.

[17] In relation to RS3, the wife said:

> 25. On 20 January 2015 I personally attended at the registry of the Federal Circuit Court of Australia in Cairns and inspected File No. ADC3423/2011.
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> 26. On that inspection I saw the Certificate personally filed by the applicant that was accompanying the Application for Divorce on 12 September 2011, and it is a single A4 page purporting to be a 'Declaration of Marriage Registration' – Republic Islamic of Iran, uncertified translation 7 December 2008 from Persian language. Annexed 'RS3' is a true copy of that document.

> 27. To my knowledge, in 1974 there was no Republic Islamic of Iran, or Islamic Republic of Iran, in Iran.
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> 28. I humbly say the document annexed 'RS3' is not proof of a legal marriage, its authenticity is in doubt, and there is no 'Declaration of Marriage Registration' provided with it to illustrate what has been translated.
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> …
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> 47. On the basis that the [husband] commenced these proceedings by filing a false document purporting to be proof of marriage, I ask that he be ordered to pay the costs of these proceeding on an indemnity basis.

[18] The costs application was mentioned before Judge Willis on 14 April 2015, at which time directions were made, including for the filing of submissions.

[19] In response to the application, the husband swore an affidavit on 10 June 2015, which was filed on 11 June 2015. He deposed that he and the wife had been married in October 1974 as shown on RS3, that they had both signed the certificate, and that RS3 had been issued "by the government of the day on or around 14 October 1981". This would account for the reference in it to the "Republic Islamic of Iran".

[20] The husband exhibited to his affidavit what he said was a true copy of the original marriage certificate with a translation made in 2015 ("FN1"). He asserted that FN1 was a "more complete translation" of RS3. That assertion was clearly mistaken, because the translation contained in FN1 appears to be of a different document, namely a form of "statutory declaration" which was "contained … in a register kept at the Notary Public's office … under registration number 42551 dated 14/10/1981". The translated text appears as a form of declaration by the wife as to participation in marriage with the husband on 1 October 1974. Whilst the husband's description of the document as a more complete translation of RS3 was erroneous, it is nevertheless notable that the details of FN1 are consistent with RS3.

[21] The husband also exhibited to his affidavit a copy of his Birth/Identification Certificate ("FN2"). That document records details of his marriage to "Roofia",[5] having Birth Certificate No 2119, but her date of birth is incorrectly shown as 23 January 1930. The date of marriage was also incorrectly shown as 1 October 1981 and the registration number of the marriage was shown as "4255" (i.e. it was incomplete by one digit). The husband attributed the incorrect marriage date on the form to a clerical error.

[22] On 17 June 2015, the wife filed another affidavit affirmed that day. She deposed:

(a) to her belief that "FN1 is a fraudulent document, it is not my signature, and I have never seen the document before";

(b) that FN1 "is not a marriage certificate"; and

(c) to her belief that FN2 had been "fabricated" (although she acknowledged that the stamp on it appeared to be authentic), and that she had sent both documents to the Iranian Embassy.

[23] The costs application then came back before Judge Willis on 18 June 2015. At that time, the respondent filed and relied on what he described as "Additional

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5 That being the wife's first name.

Submissions" on behalf of the wife.[6] In those "Additional Submissions", the respondent averred:

> It is submitted that examination of the document at annexure RS3 and the evidence relating to the relationship between the parties contained in annexure RS6 demonstrates that the [husband] commenced the [divorce] proceedings by filing the fabricated and/or false document … and it is noteworthy that without a certified declaration of marriage the [husband] could not have commenced these proceedings …
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> …
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> The relevant considerations that are submitted in support of a costs award on a solicitor client basis include:
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> …
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> (b) The conduct of the [husband] in relation to the proceedings amounts to criminal behaviour designed to harass and extort money out of a frail old lady in the last years of her life and can constitute:
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> (i) Contempt;
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> (ii) Perjury;
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> (iii) Attempt to pervert the course of justice; and
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> (iv) Offences provided under Chapter 7 of the *Criminal Code Act* 1995.
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> …
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> The [husband] caused the costs to be incurred by his misconduct [and] improper conduct directed at the [wife].
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> …
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> The [husband] has committed a fraud upon the court, and not just during, but throughout the entire proceeding, the [husband] committed a false claim. It is in the public interest that persons be deterred from such misconduct.
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> …
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> The filing of false documents by the [husband] shows he willingly participated in a fraud on the court, and the court has the power to refer this matter to the Commonwealth Attorney General with a recommendation for investigation, particularly in relation to offences under Chapter 7 of the *Criminal Code Act* 1995.

[24] These "Additional Submissions" are particularised in the discipline application as having been made in breach of r 64.

[25] The husband appeared unrepresented at the hearing on 18 June 2015. The respondent applied for an adjournment on that day. He referred to the husband's affidavit annexing FN1 and FN2. The respondent submitted in relation to them that "the [wife] has sworn that she believes that they have been fabricated". The respondent told the court that the documents had been sent to the Iranian Embassy in Canberra "for investigation and subsequent proper translation". He told the court it would take

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6 Those "Additional Submissions" are wrongly dated 18 May 2015.

16 weeks to get a response, hence his adjournment application. The respondent submitted that FN1 and FN2 were "another attempt to put false documents before the court".

[26] In the course of the hearing, Judge Willis indicated, amongst other things, that she was proposing to order in terms that the wife "set out specifically word for word the allegations of fraud and fraudulent behaviour on the part of the [husband]", and that this be provided within 21 days.

[27] For the purposes of providing those particulars of fraud, the wife then made and filed an affidavit on 13 July 2015, in which she said:

> I say the alleged fraud or fraudulent behaviour, that is relied on in support of my costs application, is the actual conduct of the [husband] commencing the proceedings with a false document and continuing a claim against me for my property.

[28] A mediation of the costs dispute was held on 16 July 2015. At that mediation, the respondent relied on written submissions he had prepared dated 7 July 2015, in which he asserted:

(a) In relation to exhibit RS3, that "this was the first (and successful) attempt at deceiving the court to accept that there was a Legal Certified Marriage";

(b) "Examination of the affidavit contained at annexure RS6 [filed by the wife] demonstrates that the [husband] commenced the proceedings by filing the fabricated and/or false Translation";

(c) Annexure FN1 filed by the husband "contains further false evidence that appears as an attempt to convince the court that there was a legal marriage. This new evidence alleging a certified marriage is another fraud upon the court and goes beyond contempt"; and

(d) "The Divorce Order 24 January 2012, whilst obtained by fraudulent documents is void ab initio, as there was no legal marriage … the facts demonstrate a lack of entitlement to make any claim against the [wife]".

[29] These mediation submissions are also particularised in the discipline application as having been made in breach of r 64.

[30] The matter did not settle at the mediation, and came back before Judge Willis on 21 October 2015. At that time, the respondent relied on his mediation submissions of 7 July 2015, and those submissions were tendered and marked as an exhibit.

[31] The final hearing of the wife's costs application came on before Judge Willis on 23 March 2016. On that occasion, the respondent confirmed he was relying on the "Additional Submissions" dated 18 May 2015. Further, in the course of oral submissions the respondent referred to the husband's document (annexed as RS3), saying it was a "false document, and I have instructions to push that issue".

[32] Whilst not binding on this Tribunal, it is nevertheless apposite to note the observations of Judge Willis in her judgment dismissing the wife's costs application.[7] Her Honour observed that "Mr Wrenn's application for costs, and moreover indemnity costs stems from his lengthy submissions that the husband has

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7 See *Solouki*.

committed a fraud in providing what his client believes to be a false marriage certificate to support their divorce in 2012".[8] Her Honour then said:[9]

> I have attempted to explain to Mr Wrenn a few important issues in relation to his strong submissions regarding his hypothesis. First, that the Application in Case prepared by him on behalf of the wife, has never even been filed or listed for a court event. Second and importantly that there has been no hearing of the application and therefore no finding by any court that the husband has falsified documents. I have attempted to explain to Mr Wrenn the seriousness of him making these allegations. Nonetheless Mr Wrenn has maintained his position. I have explained to Mr Wrenn that it is inappropriate for him to make allegations of fraud about matters that have never been tested and that this court was certainly not going to commence a hearing, in the midst of a costs application, based on allegations of Mr Wrenn. I have explained that as Counsel, he should only do so on very solid and convincing evidence, and that it is improper for him to make the allegation based on inferences. These explanations have quelled Mr Wrenn's enthusiasm for his allegations of fraud by the husband only to a minor degree.

[33] Later in her reasons for judgment, Judge Willis made further observations in which she was highly critical of the respondent's conduct in advancing the serious allegations of fraud and criminality.[10]

[34] In addition to dismissing the wife's costs application, Judge Willis ordered that her decision be referred to the Bar Association of Queensland ("BAQ") which, in turn, referred the matter to the present applicant.

Did the respondent breach r 64?

[35] Rule 64 is a codification of the well-established proposition that it is an integer of a legal practitioner's duty to the administration of justice that the practitioner must not lend himself or herself "to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his [or her] possession".[11]

[36] There is no shortage of authority for the proposition that a legal practitioner should not lightly make an allegation of fraud; as Harper J said in *NIML Ltd v MAN Financial Australia Ltd (No 2)*:[12]

> Allegations of fraud should only be made on the basis of evidence, worthy of serious consideration, which points to dishonesty in the subject of the allegation. Loose allegations of fraud are a blot on the adversarial system and may – where, for example, they are made *in terrorem* – amount to an abuse of process.

[37] Apart from, and in addition to, preserving the integrity of the Court's process, there is a good practical reason for requiring this standard of practitioners. Allegations of fraud made against a person in the public forum of a court proceeding may be widely recounted and "cause great harm to a person's reputation before any

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8 *Solouki*, [6].
9 *Solouki*, [9].
10 *Solouki*, [103], [113]–[120].
11 *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid); *Murphy v Legal Services Commissioner* [2013] QSC 70, [86].
12 [2004] VSC 510, [6].

evidence has been offered and submitted to the scrutiny of cross-examination or rebuttal".[13]

[38] Some of the competing considerations in determining whether a legal practitioner may properly advance an allegation of fraud or dishonesty were discussed by Neuberger J (as he then was) in *Brown v Bennett (No 2)*.[14]

[39] His Lordship contrasted the requirements of the then local cognate equivalent of r 64 with the affirmation in the authorities of the need for allegations of fraud to be fully particularised, while recognising that such allegations may be made if it is reasonably possible that further material to support the allegations may become available before trial or there may be reasonable grounds for thinking that the case may be advanced by cross-examination at the trial.[15]

[40] This contrast, according to Neuberger J, illustrated the potential difficulties for a barrister when pleading or maintaining an allegation of dishonesty:[16]

> On the one hand, he cannot plead a claim based on dishonesty unless he can properly give particulars which could, on their face, support the allegation of dishonesty and unless he has 'reasonably credible' material which appears to him to 'establish … a prima facie case' of dishonesty. On the other hand, it is scarcely consistent with the observations of Lord Hope if, when considering whether he can properly plead or advance a claim of dishonesty, a barrister cannot plead fraud if his pleaded particulars of dishonesty, if established as facts, might turn out not to support a claim of dishonesty. Equally, in light of Lord Hutton's observations, a barrister, considering whether to plead fraud, appears to be entitled to take into account that further facts and evidence of dishonesty may turn up before trial or even during trial, at least in some cases. At first sight, the two competing sets of considerations seem almost contradictory, but I do not think they are. A barrister's duty is to ask himself, whether bearing in mind the evidence currently available, but taking into account the possibility (whose value may be nil or significant depending on the particular case) of evidence which might come to light during the course of the proceedings or during trial, there is a strong enough case to justify pleading and maintaining dishonesty in accordance with the Code of Conduct.

[41] Neuberger J then continued:[17]

> A barrister instructed by a client to plead and maintain a claim of dishonesty has to face another judgment call, which will sometimes be of some nicety, arising out of competing duties. The first duty is that laid down by the Code … namely not to plead or maintain a claim of dishonesty unless it is properly warranted. However … a barrister has a more general duty to plead and advance his client's case in accordance with his client's instructions. Of course, in the event of a conflict this latter general duty must yield to the former more specific duty, but that does not alter the fact that a lawyer who is in doubt as to whether he can properly plead a claim of dishonesty is in a position of some nicety. If he cannot properly plead it, then he would be in breach of the duty embodied in [the Code] if he pleads it; on the other hand, if

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13 Gino E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017) 588 [17.230].

14 [2002] 2 All ER 273 ("*Brown (No 2)*").

15 Neuberger J was here citing *Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513, and particularly the reasons of Lord Hutton at [144]–[145].

16 *Brown (No 2)*, [112].

17 *Brown (No 2)*, [113].

> he can properly plead it, then he would be in breach of his general duty to his client if he did not maintain it. To my mind, these factors serve to emphasise that, while there is no doubt as to the duty of counsel not to plead a claim of dishonesty in circumstances which infringe the provisions of the Code … it must nonetheless be accepted that, whether there is sufficient evidence to satisfy the barrister that he can properly plead a claim of dishonesty, or sometimes be a matter of judgment, on which reasonable lawyers could differ. Accordingly, it would only be if the view reached by counsel that he could plead dishonesty was unreasonable or reckless that it could be improper. In other words, as I see it, it would only be if the lawyer's conclusion that he could plead a claim for dishonesty was one which no reasonable lawyer, properly considering matters could have reached, that it can be criticised as being improper.

[42] His Lordship then discussed the difficulties which are faced when the allegations of dishonesty are largely, or even exclusively, based on nothing more than the client's instructions:[18]

> Where this information consists of factual evidence of dishonesty, the lawyer could be in a position of some difficulty if that evidence is thoroughly inconsistent with a mass of apparently convincing other evidence. In general … a lawyer is normally entitled to proceed on the basis of his client's factual instructions being correct. However, that does not mean that, when giving his views as to the likely outcome of the case, a lawyer should not express his professional assessment as to the likelihood of the client's case succeeding on the facts. Nonetheless, I think that it would require strong facts before a barrister could be said to be acting contrary to the standards laid down by [the Code] if he maintained a case of dishonesty which could be justified on the basis of the facts put forward by his client, simply because there was credible strong contrary evidence available.
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> The position may, however, be different where the client's instruction and evidence do not consist so much of hard facts, but are more expressions of opinion or inference.

[43] As at 18 June 2015, when the respondent made the allegations of fraud and criminality in the "Additional Submissions", the only material on which he could purport to found those submissions were:

(a) Exhibit RS3 – the translation of the Declaration of Marriage Registration which had been relied on by the husband to obtain the divorce order;

(b) The wife's Birth/Identification Certificate which in fact, as noted above at [16], appears to contain an entry which is at least consistent with her having been married to the husband;

(c) The wife's assertion in her affidavit that RS3 was not authentic;

(d) The husband's affidavit explaining that RS3 was headed "Republic Islamic of Iran" because it was obtained in 1981, when that government existed. It should be noted that the document, on its face, does not purport to be a copy of a marriage certificate, but rather is official confirmation of a marriage having been registered;

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18 *Brown (No 2)*, [114]–[115].

(e) FN1 to the husband's affidavit – a document misdescribed by him as a copy of the original marriage certificate, whereas on its face it is obviously a form of statutory declaration attesting to the registration of the marriage;

(f) The husband's Birth Certificate containing entries (some of which are obviously incomplete) consistent with him having been married to the wife; and

(g) The wife's unsubstantiated depositions in her affidavit of 17 June 2015 that FN1 was a fraudulent document and the husband's Birth Certificate was "fabricated".

[44] There was also, of course, the divorce order made on 24 January 2012, in which there was an express finding, binding on the wife, that the "marriage is proved".

[45] In an affidavit filed for the purposes of this discipline application, the respondent confirmed the material he had in his possession prior to 18 June 2015. The bulk of that consisted of no more than the unsubstantiated assertions of the wife. The respondent then said that he made the "Additional Submissions" because he was satisfied that the available material "by which the allegation of fraudulent and other criminal conduct could be supported, did provide reasonable grounds for belief that there was a proper basis for making the allegation".

[46] In fact, there was scant basis for making allegations of impropriety against the husband, and no independent evidence to support the serious charges of criminality advanced against the husband in the "Additional Submissions".

[47] Beyond the unsubstantiated assertions of the wife, there was simply no evidence held by the respondent to found the allegation that RS3 was a fraudulent document. The suspicion that it might be fraudulent because of the "Republic Islamic of Iran" heading was met by the husband's explanation of the timing of the document being obtained. At its highest, there might have been some scope for further investigation of the provenance and authenticity of the document. But there was no proper basis for the respondent to aver, as he did, that the husband had in fact filed a false document, committed a fraud on the Court, and engaged in a raft of criminal conduct.

[48] This patent lack of judgment by the respondent was compounded by the fact that he made these submissions in the face of a previous finding by the Court that the marriage had been proved. Despite the clear orders made by Judge Willis on 16 February 2015, the respondent made and persisted with these assertions in the costs application. The respondent appears to have lacked any appreciation of the fact that there was a finding about the marriage which was binding on his client.

[49] The same observations apply to the respondent's mediation submissions. There was no independent evidence to support the allegations of fraudulent conduct made against the husband. The assertion by the respondent that the divorce order "whilst obtained by fraudulent documents is void ab initio" was unsubstantiated, improper, and ignored the fact that there was an extant and binding finding of the Court with respect to the marriage.

[50] In short, this was a case in which the respondent advanced serious allegations of fraudulent conduct and criminality against the husband based on nothing more than expressions of opinion or inference by the wife.

[51] In the circumstances, this Tribunal finds that the material available to the respondent at the time he made the "Additional Submissions" and the mediation submissions was insufficient to provide reasonable grounds for him to form a belief that the material sufficiently supported the allegations of fraud and criminality which he advanced against the husband. The Tribunal therefore finds that the respondent acted in breach of r 64.

[52] It was common ground between the parties that, if this Tribunal found that the respondent had breached r 64, then in the circumstances of this case there should be a finding that he engaged in unsatisfactory professional conduct. The Tribunal agrees with that assessment. The barrister's conduct in this case represented a lapse or shortfall in professional judgment. By his breaching conduct, he 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".[19]

[53] Accordingly, the Tribunal finds that the respondent engaged in unsatisfactory professional conduct.

Sanction

[54] The applicant argued that the circumstances of this case warrant a public reprimand.

[55] Mr Perry QC, who appeared for the respondent, submitted that, whilst a reprimand would be appropriate, such a reprimand should be private and not public. Counsel argued that there were two special circumstances to consider.

[56] First, it was argued that there was no need for the sort of general deterrence which would flow from the making of a public reprimand in a case such as this because of the fact that the Tribunal would make a public finding that the respondent engaged in unsatisfactory professional conduct. That public finding of the nature of the respondent's conduct, it was argued, of itself would give rise to sufficient general deterrence.

[57] Secondly, counsel for the respondent pointed to the trenchant criticisms levelled by Judge Willis at the respondent in the course of her judgment, which was also a public document. It was argued that the depth of her Honour's criticisms of the respondent, and the repetition of those criticisms in the public judgment, were similarly sufficient to satisfy the needs of general deterrence.

[58] Counsel for the respondent argued that the combination of this Tribunal's public finding of unsatisfactory professional conduct and Judge Willis' public observations about the respondent's conduct would satisfy the public interest in general deterrence, and in those special circumstances it would be appropriate for this Tribunal to limit itself to issuing a private reprimand.

[59] In *Legal Services Commissioner v Trost (No 3)*,[20] this Tribunal recently observed:

> [18] In this disciplinary jurisdiction, orders are shaped in the interests of the protection of the community from unsuitable practitioners, and in determining what orders should be made 'regard should primarily be had to the protection of the public under the maintenance of proper professional standards'.

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19 *LPA* s 418.

20 [2020] QCAT 86, and omitting citations.

[19] In the circumstances of the present case, the following observations by Thomas J in *LSC v Bentley* are apposite:

> [48] Another aspect of protection of the public is the maintenance of standards within the legal profession. If conduct is identified as being unsatisfactory professional conduct or professional misconduct, one of the aims of any sanction is to dissuade other practitioners from such conduct – essentially to warn practitioners that such conduct is not acceptable.
>
> [49] That aim is best achieved by a public reprimand.

[20] In *NSW Bar Association v Sahade (No 3)*, the New South Wales Tribunal addressed the use of public and private reprimands:

> [128] A difference between a 'public reprimand' and a 'private reprimand' is that the former, being published, can act as a warning to others not to offend in a similar way. A reprimand that remains private can really act only as a personal deterrent. Therefore, in the case of a legal practitioner who himself requires no deterrence, one factor that might determine whether a reprimand should be public would be whether there is any reasonable possibility that one or more other legal practitioners might act in the same way as the legal practitioner under consideration. If there is no such likelihood, one reason for imposing a public reprimand would be absent.

[60] It will be clear from the reasons above that, even despite the criticisms levelled against the respondent in the judgment of Judge Willis, the respondent in this disciplinary application maintained the position that he had not acted in breach of r 64. He was, of course, entitled to maintain that position, but the necessary corollary is that in adopting that course he necessarily demonstrated a lack of insight into his breaching conduct and a lack of remorse for having engaged in the unsatisfactory professional conduct. That is a matter of concern in a case such as the present, which involves a manifest shortfall in the application of appropriate professional judgment.

[61] It is true that there will now be a public finding that the respondent engaged in unsatisfactory professional conduct, just as there was public criticism of the respondent by Judge Willis in her judgment. But the imposition of a sanction is not just about the respondent. As the authorities referred to earlier make clear, counsel's duty not to allege fraud or criminality without a proper basis is part of that practitioner's duty to the administration of justice. A failure to appreciate the proper observance of that duty is a serious matter, breach of which is not merely a technical default but goes to a fundamental professional obligation. There is a clear public interest in members of the profession, and the public generally, understanding that a breach such as that which occurred in this case will be treated seriously, and carry serious consequences.

[62] Accordingly, this Tribunal is of the view that it is appropriate to order that the respondent be publicly reprimanded.

[63] The applicant also submitted that it would be appropriate for this Tribunal to order that certain conditions be placed on the respondent's practising certificate.[21]

[64] In a report into the respondent's conduct prepared by the BAQ at the request of the applicant, the BAQ concluded that what was required in the present case in the public interest was for the respondent to be educated as to his professional obligations so that his errors would not be repeated, and recommended that the following conditions be placed on the respondent's practising certificate:

(a) The respondent be mentored by a Queen's or Senior Counsel, appointed by the Bar Council, for a period of two years;[22]

(b) During that two-year period, the respondent should meet with his mentor at least once every three months (either in person or by phone, Skype or equivalent) to discuss any issues he is facing in his practice;

(c) Within two months of the beginning of the first year of such a mentoring period, the respondent must prepare a written paper of no less than 1,200 words dealing with the obligations imposed upon a barrister when making allegations of fraud or other serious misconduct, with that paper to be provided to the mentor (and copied to the BAQ) for the purposes of discussion with the mentor during the first meeting between the respondent and mentor;

(d) At the end of each year of that two-year period, the respondent should submit a report to the BAQ, countersigned by his mentor, confirming his compliance with (a), (b) and (c); and

(e) For a period of two years, the respondent, in addition to the requirement of obtaining 10 CPD points each year, must obtain an additional two CPD points each year in respect of the CPD Ethics Stream.

[65] Counsel for the respondent argued against the imposition of such conditions on the respondent's practising certificate. He affirmed, on his client's instructions, that the respondent was prepared to give an undertaking to abide by each of those conditions. Counsel argued that, in circumstances where the respondent was prepared to offer such an undertaking, it was unnecessary and inappropriate for such conditions to appear on the respondent's practising certificate because the fact of his practising certificate being so conditioned would also be a matter of public record.

[66] This Tribunal would be disinclined to finalise this matter on the basis of such undertakings being given to the Tribunal. Such a course of action would unnecessarily, and inappropriately, involve the Tribunal in an ongoing supervisory role with respect to the conduct of the respondent's practice.

[67] The Tribunal also does not consider it appropriate for the respondent's conduct in this regard merely to be regulated by undertakings offered to the BAQ. The practising certificate scheme promulgated under the *LPA*[23] specifically provides for the imposition of conditions, and also contains a statutory prohibition on contravention of any such condition.[24] Such a contravention is itself conduct which

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21 As permitted by *LPA* s 456(2)(d).

22 The BAQ recommended that the mentor be based in Cairns, which is the closest major business centre to the respondent's practice.

23 See *LPA* Chapter 2, Part 2.4, Division 5.

24 *LPA* s 58.

is capable of constituting unsatisfactory professional conduct or professional misconduct.[25] Moreover, the power to make orders imposing stated conditions on practising certificates is specifically conferred on this Tribunal.[26]

[68] The next question is what conditions ought be imposed on the respondent's practising certificate. One of the relevant considerations in this regard is the fact that a considerable period of time has now elapsed since the impugned conduct.

[69] The respondent was first called to the Bar on 25 October 1999, and there are no previous adverse findings against him by a disciplinary body.

[70] The Tribunal is not persuaded that there is any rehabilitative merit in requiring him to write an essay about the obligations he regrettably breached in this case. The Tribunal does, however, consider that there is obvious merit in providing for the respondent to have the benefit of counselling by a mentor, and also for him to undertake some additional education in the field of professional ethics. Having regard to the respondent's lack of disciplinary history, the Tribunal considers that the imposition of such conditions for one year is appropriate.

[71] In relation to the costs of this discipline application, the respondent has not identified any exceptional circumstances which would warrant a departure from the costs order mandated by s 462(1) of the *LPA*.

[72] Accordingly, there will be the following orders:

1. There is a finding that the respondent breached r 64 of the *Barristers' Conduct Rules*, and thereby engaged in unsatisfactory professional conduct.
2. The respondent is publicly reprimanded.
3. The following conditions shall be imposed on the respondent's practising certificate:
   (a) The respondent shall be mentored by a Queen's or Senior Counsel, appointed by the Council of the Bar Association of Queensland, for a period of 12 months;
   (b) During that 12 month period, the respondent should meet with his mentor at least once every three months (either in person or by telephone or video conference) to discuss any issues he is facing in his practice;
   (c) At the end of the 12 month period, the respondent shall submit a report to the Bar Association of Queensland, countersigned by his mentor, confirming his compliance with conditions (a) and (b); and
   (d) For 12 months, in addition to the requirements of obtaining 10 CPD points each year, the respondent must obtain an additional two CPD points in respect of the CPD Ethics Stream.
4. The respondent shall pay the applicant's costs of and incidental to this discipline application, such costs to be assessed on the standard basis as if this were a proceeding before the Supreme Court of Queensland.

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25 See *LPA* ss 58, 420(1)(a).
26 *LPA* s 456(2)(d)(i).