LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v Sing* [2007] LPT 004
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **MICHAEL DAVID SING** (respondent)
FILE NO/S:	S1122/07
DELIVERED ON:	19 April 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2007
TRIBUNAL MEMBER:	de Jersey CJ
PANEL MEMBERS:	Ms B Sullivan Ms M Pacheco
ORDER:	**The application is dismissed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS FOR DISCIPLINARY ORDERS – THREATENING LETTERS – where respondent wrote to complainant on respondent's letterhead enclosing a copy of correspondence to police which respondent advised would be sent, should payment of moneys owing not be made by complainant to respondent's client – where enclosed letter asked police to investigate dishonouring of cheques by complainant – where respondent's client was his wife – whether respondent used his position as a solicitor unethically *Ex parte Bain; Re Swanwick* [1883] 1 QLJ 117, distinguished *In re Gent One* and *In re A Barrister* (1920) 21 SR (NSW) 12, considered *New South Wales Bar Association v Maddocks*, unreported, New South Wales Court of Appeal, Kirby P, Samuels and McHugh JJA, 158/1987, 23 August 1988, distinguished *Re Chubb* [1887] 3 QLJ 35, distinguished *Re Coogan* [1914] St R Qd 197, distinguished
COUNSEL:	S A McLean for the applicant JC Bell, with K Howe, for the respondent
SOLICITORS:	Legal Services Commission for the applicant Brian Bartley & Associates for the respondent

[1] The respondent was admitted as a solicitor in 1984. He is 48 years old. He has not been the subject of any previous adverse disciplinary finding. He has rendered commendable community and professional service (see his affidavit filed 17 April 2007).

[2] This case raises an important issue which has not arisen for active judicial consideration in this State for more than a century. The question is how far a solicitor may ethically go in raising the prospect of recourse to criminal process with a view to encouraging the discharge of civil liability.

[3] In February 2006, the respondent and his wife leased their property to the complainant Mr Andrew Haberfield's company. The cheques dated 10 February 2006 for the bond money ($2,800) and the first month's rental in the same amount were dishonoured, as notified on or about 22 February 2006. The amounts were paid only after some follow up enquiries. On another later occasion a rental cheque was dishonoured.

[4] On 4 April 2006, driven by frustration, the respondent wrote to the complainant in these terms:

> "We act for Susan Sing in respect of your tenancy of the above property.
>
> Please find enclosed copy of correspondence to the Officer in Charge of Southport Police Station.
>
> This complaint will be activated should full payment not be made on the due dates for the balance of your lease or should there be any damage to the premises beyond fair wear and tear.
>
> The next rental payment is due on 7 April 2006. The letting agent Ruth Ryan will collect the full payment in cash on 7 April 2006. Please contact Ruth Ryan to arrange collection.
>
> If you feel that you are unable to meet these terms then we suggest that you make arrangements to vacate the premises at the expiration of the current month in the tenancy term."

The letter was written on the respondent's letterhead. In a letter of explanation to the Manager, Complaints, Legal Services Commission dated 20 June 2006, the respondent said this:

> "Although the letter of 4 April 2006 was written on letterhead, it is in fact signed by the registered proprietor, who is my wife, Susan Sing, despite the description of the signatory immediately under the signature."

On the letter the signatory was described as the respondent "Managing Partner, Michael Sing Lawyers – Legal Solutions".

[5] The enclosed draft letter to the Southport police chief read:

> "We act for Susan Sing in respect of the above lease.

> Our client wishes to make a complaint about the conduct of one Andrew Haberfield with respect to the issuance of three cheques by Andrew Haberfield on behalf of Prosport Beverage Company Pty Ltd, which were dishonoured on presentation.
>
> The cheques listed below are in respect of rental of property at 101 Cabana Boulevard, Benowa Waters. The cheques were dishonoured on presentation to the National Australia Bank at Southport…
>
> The cheques were for the sum of $2,800 each and were payments made for rental of the property by Mr Haberfield's company, Prosport Beverage Company Pty Ltd.
>
> We request that Mr Haberfield and his wife be interviewed at 101 Cabana Boulevard, Benowa Waters and such action be taken as is appropriate as we believe that an examination of the account from which these cheques were written will demonstrate that at the time of issuance, the signatory to the cheques could not have held any or any reasonable belief that there were funds in the account to meet payment."

[6] In his complaint to the Legal Services Commission, Mr Haberfield said:

> "Practitioner threatened me with a detriment and menaces – a complaint to police if I did not pay monies to his wife and otherwise comply with the lease – a breach of the criminal law…
>
> Sing's client's rights to terminate the lease are set out in the *Residential Tenancies Act* and it is unprofessional and improper for a solicitor acting for his wife to threaten me with a criminal complaint and prosecution if I fail to pay his wife rent on the house or comply with the lease. His client's rights are set out in the lease. Sing should also be aware that demanding money with a threat of menaces is a breach of the criminal law. He should be disciplined for his unprofessional conduct."

[7] The respondent's contention is in effect that he wrote his letter, which obviously contains a threat, out of distraction over the complainant's non-compliance with the conditions of the complainant's company's lease, in the context of the respondent's knowledge of the complainant's performance elsewhere under leasing arrangements and generally, matters covered in his affidavit filed on 17 April 2007.

[8] The threat by the letter of 4 April 2006 should be carefully defined. It was to ask the police to investigate the dishonouring of the cheques, an investigation which, if followed through, may or may not have led to a prosecution. It was not actually a threat to launch criminal proceedings were civil satisfaction not made (cf. *Coogan* [1914] St R Qd 197), or to institute a prosecution (*Swanwick* [1883] 1 QLJ 117, *Chubb* [1887] 3 QLJ 35). In those cases (as referred to in G N Williams: Harrison's Law and Conduct of the Legal Profession in Queensland, 2nd ed, Lawyers' Bookshop Press, 1984, p 40) there were direct threats to institute criminal proceedings absent satisfaction of a civil claim.

[9] The language this respondent used was much more measured than, by contrast for example, that used in C*hubb*, where the solicitor described the default as "a serious matter" which rendered the defaulter "liable to be punished under the *Insolvency Act*". In this case, the respondent stated matters of fact, not embellished with assertions as to legal conclusion or judgment. There is no basis for concluding that, by what he said, the respondent was invoking his professional status to intimidate the recipient of the letter.

[10] There is no professional rule in Queensland dealing with this issue. The Solicitors' Handbook provides no relevant guidance. My having said that, reference should 'for completeness' be made to para 18.01, dealing with correspondence:

> "Correspondence is one aspect of professional conduct. The use of insulting and annoying language and acrimonious or offensive correspondence to clients, other solicitors, government departments or any other person is capable of being unprofessional conduct. Where it falls short of serious charge of unprofessional conduct, it is unbecoming and discourteous and deserving of censure."

[11] In other jurisdictions, ethical rules proscribe threatening the institution of criminal proceedings against another person in default of that person's satisfying a civil liability. See, for example, cl 34.3 of the New South Wales Solicitors' Rules, cl 28.3 of the Victorian Professional Conduct and Practice Rules, cl 28.1.3 of the South Australian Professional Conduct and Practice Rules, and rule 28.1 of the Law Council of Australia's Model Rules of Professional Conduct in Practice.

[12] In Lewis, Kyrou and Dinelli: Lewis and Kyrou's Handy Hints on Legal Practice (3rd ed, 2004, Law Book Co), the authors observe at p 333:

> "You must be careful about what you say in a letter of demand. For example, it is unethical for you to threaten to report the recipient of the letter to the police or other authorities if civil redress is not obtained."

Apparently as authority for this proposition, they then refer to *Chubb* and *Swanwick*, the Queensland cases mentioned above. But they were, as mentioned, cases of threats to launch criminal proceedings. The threat involved here fell short of that, being of proposed invitation to the police to investigate the dishonouring of the cheques.

[13] This situation falls into a category described by Professor Dal Pont, the author of "Lawyers' Professional Responsibility" (3rd ed, Law Book Co, 2006):

> "… there is arguably no ethical objection to a lawyer, instead of threatening criminal proceedings as an alternative to civil redress, indicating that the possible commission of a crime (such as if goods are not returned) will be referred to the appropriate authorities." (p 492)

[14] In light of the complainant's contentions, reference should be made to s 133(1) of the *Criminal Code*, which is in these terms:

> "(1) Any person who asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person, upon any agreement or understanding that the person will compound or conceal a crime, or will abstain from, discontinue, or delay, a prosecution for a crime, or will withhold any evidence thereof, is guilty of an indictable offence."

[15] That provision relates to the concealment of "a crime" or abstaining from "prosecution for a crime". The offence allegedly committed by the complainant here was a breach of s 427A(1)(b) of the *Code*, obtaining property by passing valueless cheques, which is a misdemeanour not a crime.

[16] It is in any case difficult to say that, in terms of s 133(1), the respondent asked for a benefit upon an understanding he would abstain from a prosecution: other matters aside, he was not the prosecuting authority.

[17] Nevertheless, the *Code* provision, and the ethical provisions in other jurisdictions, together with the Queensland cases earlier referred to, indicate that a practitioner needs to be very careful not to cross a rather finely drawn line in a situation like this.

[18] I have referred to the Code provision principally because the complainant alleged breach of the criminal law. The content of a lawyer's ethical obligation obviously is not defined by avoidance of criminal breach. The criminal law is relevant, but the ethical bar is set at a much higher level.

[19] The present issue is whether the respondent solicitor, who is thereby an officer of the Supreme Court, used his position as a solicitor unethically. Had he not been a solicitor, there would have been nothing wrong in writing the letter he wrote. The issue is whether his being a solicitor rendered that objectionable in an ethical sense. Did he make improper use of his being a solicitor, and thereby exhibit a lack of the probity expected of a solicitor?

[20] One must therefore ask how the respondent's being a solicitor could have rendered what he did objectionable. It was not objectionable because of the involvement of his wife of itself. It was ethically wrong if, for argument's sake, the recipient of the letter would reasonably have perceived that his being a solicitor, the respondent's influence in securing a successful prosecution by the police would or could have prevailed. That prospect would to my mind have been fanciful. Reasonable people would not think members of the legal profession would, as such, enjoy any particular influence or clout with the police service favourable to the launching or advancement of criminal prosecutions. Also, while a lay person would see a legal practitioner as a person familiar with the legal process, that familiarity did not bear on what was proposed here – simply referring the issue to the police, a course open to any aggrieved citizen.

[21] Essentially what the respondent did was to remind the complainant of the course his wife could already have taken – reasonably in her view, and which she was minded to take, absent the payment to which she was in her view plainly entitled.

[22] This case resembles a situation which confronted the New South Wales Court of Appeal in *In re Gent One* and *In re A Barrister* (1920) 21 SR (NSW) 12. In that case, the solicitor forwarded a letter in the following terms:

> "You are doubtless aware that P.'s affairs have recently been before the Judge in Bankruptcy and that while acquitting the official assignee of misconduct, he has intimated that something should be done to obtain the necessary funds to proceed against certain persons, you being one of them, in respect of illegal and, as counsel says, criminal transactions.
>
> Counsel advises that the better course for my client is to put the whole matter before the Crown law officers, who would finance all necessary proceedings, but, at the same time, they would no doubt insist on criminal proceedings under the Real Property Act and under the Crimes Act, as all material facts have been admitted by your son – and –. The penalties, which are severe, leave the civil liability untouched. My client is not vindictive, but wishes reparation, not punishment, but counsel advises that immediate steps should be taken either with the consent of the official assignee or independently of him.
>
> Everything has been prepared for action and counsel advises that he can see no way of escape for the persons implicated. P. has, at the instance of yourself through yourself and your son (1) been put in prison, (2) had his house sold for him, (3) all personal property seized, (4) over £2,000 taken out of Court, (5) been subjected to illegal distraint and involved in several other troubles by means of proceedings which counsel advises are fraudulent and illegal, and which involve you and others in civil and criminal liability.
>
> If you are prepared to make a substantial offer by way of compromise my client will not approach the Crown Law Department, but the offer to be commensurate with the damage and injuries must be very substantial."

[23] Cullen CJ, with whom the other members of the court agreed, said (pp 14-15):

> "But on the authorities cited to us by Mr Langer Owen, it would appear that nothing has happened here that was not within the rights *of legal advisers acting for a client, who, on the facts before us, would appear to have had good ground of action for recovery of property* which the official assignee had failed to reach in bankruptcy proceedings. On the facts, also, *there appeared to be ample prima facie ground for the laying of criminal charges against the person who was in possession of that property, and possibly against other persons who were associated with him*.
>
> The decisions to which we were referred show that under circumstances like those, *provided there is no agreement between the parties to suppress criminal proceedings in consideration of civil amends being made, the legal adviser, or the individual himself so*

> *complaining of being deprived of his property, is not committing any wrong in pressing his claim for civil redress, even though he may threaten criminal proceedings*. The language in which those decisions are expressed would amply cover a case like the present: some of them, indeed, went further. In *Flower v Sadler* (10 QBD 572), Lord Coleridge said: 'The plaintiff used threats to Maynard, though he did not come to any agreement with him not to prosecute him. A creditor may use strong expressions, even threats, and it was held in *Ward v Lloyd* that strong language is not conclusive evidence of an agreement to compound a felony, or to stifle a prosecution.' Lord Justice Cotton at p 567 said: 'A threat to prosecute is not in itself illegal, and the doctrine contended for … does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor.'" (emphasis added)

When the Chief Justice referred to the legal adviser's "not committing any wrong", he was not speaking just in a context of criminal liability. The Court was dealing with strike off motions for alleged ethical dereliction.

[24] There was in the present case nothing ethically objectionable in this treatment, albeit strong, of a party on the other side of the adversarial ledger. The respondent pursued the matter on his wife's behalf strongly, although not in the end ethically inappropriately. It is important to note that he stopped short at foreshadowing inviting the police service to investigate the possible commission of an offence. He did not go on actually to threaten to launch a prosecution.

[25] Mr McLean, who appeared for the applicant, referred to *New South Wales Bar Association v Maddocks*, an unreported decision of the New South Wales Court of Appeal given on 23 August 1988. A barrister was sued by his former business associate. The barrister threatened to disclose to the police an insurance fraud committed by that former associate, in an attempt to induce the former associate to withdraw his proceeding against the barrister. That was held to amount to professional misconduct, and together with other breaches it led to the barrister's being struck off.

[26] Under then New South Wales law, which embraced misprision of felony, that barrister was obliged to report the insurance fraud to the police. By not doing so, or by delaying in doing so, the barrister committed a breach of law.

[27] The barrister acknowledged that his conduct was "unlawful and disgraceful" (pp 7, 14), and that "it would have been disgraceful for a barrister to have sought to gain an advantage over an adversary in litigation by threatening to report his criminal conduct to the police" (p 40). His misconduct would probably have fallen within the ambit of s 133 of the Queensland Criminal Code: the barrister attempted to obtain a benefit (the cessation of the court proceeding against him) upon an understanding the barrister would conceal a crime (the former business associate's insurance fraud).

[28] That case is, therefore, on a number of grounds, distinguishable from the present.

[29] Pressure is daily brought to bear to encourage people to discharge their legal obligations. There is nothing legally or morally wrong with that, assuming

reasonable restraint. As previously observed, this respondent, while applying pressure, acted in a measured way. The issue is whether the respondent nevertheless unfairly used his professional position to reinforce that application of pressure, so as to overreach or intimidate Mr Haberfield.

[30] There is a continuum applicable to practitioners, with legitimate pressure at the one end, and improper intimidation at the other. It may, in any particular case, be difficult to delineate the precise point at which any application of pressure becomes improper. That is why practitioners must be extremely careful before resorting to any even arguably threatening conduct. They are well advised to err on the side of caution, as in all aspects of their professional approach. With the increasingly intense demands of clients, and the high level of competition which these days characterises the practice of the law, practitioners will inevitably be asked to stretch the limits of their consciences: they must be steadfast not to yield to that temptation.

[31] The Tribunal is not satisfied that the pressure applied by the respondent, after allowing for his professional capacity, was improper or unfair.

[32] I record my gratitude to the panel members for assisting me in making that value judgment.

[33] The application is dismissed.

[34] The applicant was nevertheless reasonable in leaving consideration of this novel issue to the Tribunal. There are no "special circumstances" in terms of s 286(4) of the *Legal Profession Act* 2004 warranting an order that the applicant pay the respondent's costs. In all the circumstances there should be no order as to costs.