

CITATION: *Legal Services Commissioner v Smith* [2011]
QCAT 126

PARTIES: Legal Services Commissioner
(Applicant)
v
John Charles Smith
(Respondent)

APPLICATION NUMBER: OCR156-10

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Justice Alan Wilson, President
Assisted by:
Mr Geoffrey Sinclair
(Practitioner Panel Member)
Dr Margaret Steinberg AM
(Lay Panel Member)

DELIVERED ON: 6 April 2011

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. That the respondent, John Charles Smith, be publicly reprimanded;**
- 2. That he pay a penalty in the sum of \$2,000; and**
- 3. That he pay the applicant's costs fixed at \$1,000.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS
– COMPLAINTS AND DISCIPLINE –
DISCIPLINARY PROCEEDINGS –
PROFESSIONAL MISCONDUCT OR
UNSATISFACTORY PROFESSIONAL
CONDUCT – where the respondent was
charged with neglect, undue delay and lack of
diligence with regard to the conduct of matters
for three clients – whether the respondent's
conduct constituted unsatisfactory
professional conduct or professional
misconduct

Legal Profession Act 2007, ss 418, 419
Queensland Law Society Act 1952
Queensland Civil and Administrative Tribunal Act 2009

LSC v Slipper [2008] LPT 008, cited
LSC v Williams [2005] LPT 008, cited
Re Nelson (1991) 106 ACTR 1, cited

APPEARANCES and REPRESENTATION (if any):

The matter was heard and determined on the papers pursuant to Section 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

REASONS FOR DECISION

- [1] Mr Smith was admitted as a solicitor in Queensland on 21 November 1988. In 2010 the Legal Services Commissioner brought a discipline application against him containing three separate charges, all involving events which occurred in and after the year 2005 while he was a partner in a Brisbane suburban law firm.
- [2] The matter went to a compulsory conference before QCAT's Deputy President on 2 December 2010, following which the parties jointly filed a Statement of Agreed Facts and joint submissions about orders or sanctions which should be made against or imposed upon Mr Smith; and the matter subsequently proceeded, with all parties' agreement, to a hearing on the papers before the Tribunal.
- [3] All three charges involve a want of diligence, and consequent delay, in the conduct of matters for three of Mr Smith's clients.
- [4] The first concerns a claim for damages for Ms Alissa O'Flaherty, who was injured in a motor car accident on 19 April 2002. Mr Smith first took instructions in April 2002 and actively and competently advanced his client's claim until April 2005. In the ensuing year, between April 2005 and April 2006, he did nothing to take the case forward. After April 2006 he then, again, advanced the matter diligently up to November 2006 but then allowed the matter to lapse until September 2008. He did not, in this latter period, respond to communications from the client despite her attempts to contact him via letter, email and telephone.
- [5] In August 2008 Ms O'Flaherty complained to the Legal Services Commission and in 2009 she retained a new solicitor. Later, her damages case was settled and she does not claim any compensation from Mr Smith. He paid outlays on her behalf of over \$2,000, which he has not sought to recover. Nor has he claimed or recovered any costs.
- [6] The second matter also involves a personal injuries claim for another client, Mr Kade Dunstone who was injured in the same accident as Ms O'Flaherty. The solicitor's conduct – involving intermittent periods of activity and, at other times, allowing the file to, in effect, go to sleep also

occurred here. The solicitor, again, paid outlays on Mr Dunstone's behalf of \$1,575 which he has not sought to recover.

- [7] The third charge involves another client, Mr Frank Maniccam, and his dispute with an insurance company about motor vehicle repairs. He instructed Mr Smith in August 2005, but nothing was done on the client's behalf until the solicitor wrote to the insurance company in February 2006. Arrangements were made for Mr Maniccam to have his vehicle with the insurer and that occurred in March 2006 but, thereafter, the solicitor did nothing to advance the claim. Mr Maniccam has not made a claim for compensation, and the solicitor did not receive any remuneration for his work in the matter.
- [8] Both the Commissioner and Mr Smith's legal representatives contend that this conduct should be categorised as *unsatisfactory professional conduct*, as that phrase is defined s 418 of the *Legal Profession Act 2007*. Conduct of that kind is defined there as something which '*...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*'.
- [9] Neglect of a client's affairs and associated delay by a legal practitioner is capable of satisfying the definitions of either *unsatisfactory professional conduct* in s 418 or *professional misconduct* in s 419. Under the *Legal Profession (Solicitors) Rule 2007*, rr 1 and 2, a solicitor is required to act with competence and diligence in the service of the client and, indeed, should only accept instructions when the solicitor reasonably expects to service the client with competence and diligence, and attend to the work with reasonable promptness.
- [10] Decisions of the former Legal Practice Tribunal show that the question whether or not conduct in a particular case amounts to unsatisfactory professional conduct, or professional misconduct, is generally a matter of degree and each case will be determined on its own facts. Gross neglect and delay, particularly if it is part of a pattern, can attract a finding of professional misconduct.¹
- [11] It is relevant here that, in the case of the complainants O'Flaherty and Dunstone – the clients – were, also, overseas from 2004 to 2006 and that may have impeded the solicitor's ability to satisfactorily progress their files.
- [12] The delay in all cases does not, otherwise, form a pattern – the longest period was 2 years but, at other times, the solicitor undertook a significant amount of work over a considerably longer period, which had the practical effect of advancing each client's case in an effective way.
- [13] In light of these elements the solicitor's periodic neglect of the files could not, in any of the three matters, be fairly or reasonably categorised as 'gross'. Nor, in the circumstances, should the respondent's conduct be categorised as professional misconduct; rather, it properly satisfies the definition of unsatisfactory professional conduct in s 418.

¹ *Re Nelson* (1991) 106 ACTR 1; *Legal Services Commission v Bussa* [2005] LPT 005 (*Bussa*).

- [14] As to penalty the Tribunal was assisted by submissions from the parties which referred to other, comparable cases.
- [15] In *Bussa* the solicitor had been charged with one count of serious neglect and undue delay while acting for the complainant in a property and personal injuries claim. The delay was alleged to cover 7 years, from 1997 to 2004. The solicitor's conduct meant that the client lost the right to pursue his personal injuries claim in the usual way. The solicitor was also charged with failing to comply with requirements under the *Queensland Law Society Act 1952* and the *Legal Profession Act 2007*, and failing to produce his client's file. The Legal Practice Tribunal held that all of these charges, in total, showed a pattern of neglect which was unacceptable. The solicitor was publicly reprimanded and fined \$6,000, and subjected to other restraints in practice designed to prevent reoffending.
- [16] In *LSC v Williams* [2005] LPT 008 the solicitor had been guilty of neglect in prosecuting a claim for damages for personal injuries, involving an unexplained delay of about 15 months. He was publicly reprimanded but the Tribunal also took into account other disciplinary proceedings in which he had been fined the sum of \$10,000 and concluded that, under the 'totality principle', no further fine was warranted.
- [17] In *LSC v Slipper* [2008] LPT 008 the solicitor had been retained in family court proceedings but, because he failed to lodge a necessary document in the court, the client lost a hearing date and was ordered to pay costs. The Tribunal accepted that the misconduct involved an isolated incident or oversight, and fined the solicitor \$2,000.
- [18] It is accepted that Mr Smith has cooperated with the investigation process and there is nothing to suggest a risk that the offending conduct will re-occur. He has lost about \$3,600 in outlays which he did not attempt to claim from his clients. There is, also, nothing to suggest any loss has been suffered by those three clients.
- [19] Other evidence shows that Mr Smith has a good work record, and has not previously been the subject of any complaints or disciplinary proceedings. His early admission to the allegations, and full cooperation with the LSC, is tangible evidence of insight, and a measure of remorse.
- [20] In these circumstances the Tribunal is satisfied, and the parties accept, that a public reprimand and the payment of a penalty, in the nature of a fine, reflect the seriousness of the events leading to the charges, balanced against the mitigating factors. The reprimand serves to remind practitioners of the importance of not letting matters languish. A fine in the same order as *Slipper* – \$2,000 – reflects the fact these events were isolated, and not part of a pattern of serious dilatoriness or misconduct in respect of a client's affairs.
- [21] Otherwise the parties agree that a public reprimand is an additional, appropriate penalty, and the solicitor has agreed to pay the Commission's costs fixed at \$1,000.