QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Legal Services Commissioner v Rowe* [2017] QCAT 85
PARTIES:	Legal Services Commissioner (Applicant) v Chad Everett Rowe (Respondent)
APPLICATION NUMBER:	OCR030-15
MATTER TYPE:	Occupational Regulation Matter
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody** Assisted by: **Dr John de Groot, Legal panel member** **Dr Margaret Steinberg AM, Lay panel member**
DELIVERED ON:	10 March 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**IT IS THE DECISION OF THE TRIBUNAL THAT:** **1. The respondent's name be removed from the local roll of solicitors.** **2. The respondent pay the applicant's costs assessed on a standard basis, on the Supreme Court Scale under the *Uniform Civil Procedure Rules* 1999 (Qld), in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY CONDUCT – where the respondent accepted the charges but argued that his mental illness excused that conduct or was a mitigating factor. PROFESSIONS AND TRADES – LAWYERS –

COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the applicant filed a disciplinary application against the respondent, alleging 28 separate charges of professional misconduct and or unsatisfactory professional conduct – where the respondent was found guilty of professional misconduct by the Tribunal – where the tribunal has been unable to find in the circumstances a reasonable explanation for a persistent pattern of contrary conduct or how long his unfitness would last and remove his name from the roll of legal practitioners and costs ordered assessed on a standard basis

Australian Solicitors Conduct Rules 2012 (Qld), rr 5, 33

Legal Profession Act 2007 (Qld), ss 9, 268, 274, 418, 419, 443, 452, 453, 456, 462

Legal Profession (Solicitors) Rule 2007 (Qld), rr 1, 14, 16, 28

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

Uniform Civil Procedure Rules 1999 (Qld), Schedule 1

BRJ v Council of New South Wales Bar Association [2016] NSWSC 146

Chandra v Queensland Building and Construction Commission [2017] QCA 4

Quinn v Legal Services Commissioner [2016] QCA 354

Re: Maraj (a legal practitioner) (1995) 15 WAR 12

Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers without the attendance of either party in accordance with s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REASONS FOR DECISION

[1] The purpose of this on the papers hearing is to decide a discipline application under s 452 of the *Legal Profession Act* 2007 (Qld) (LPA).

The charges

[2] The commission (or LSC) applies for orders against the practitioner in relation to eight categories of complaints of contrary conduct between 29 August 2011 and 29 May 2015. They are:

- **Charges 1-5** – a complaint of a breach of the *Legal Profession (Solicitors) Rule 2007* in unreasonably making unsubstantiated allegations about the practitioner's former wife in court documents.
- **Charges 6-11** – complaints concerning the practitioner's conveyancing conduct.
- **Charges 12 &13** – allegations that the practitioner threatened to claim unearned legal fees against Clint Anderson and Bruce Whayman.
- **Charge 14** – contravention of s 274(1) LPA in failing to lodge an external examiner's report for the financial period ending 31 March 2013.
- **Charges 15-23** – failing to comply with a notice of contravention contrary to s 443(3) LPA.
- **Charge 24** – communicating with another solicitor's client between 18 March 2013 and 22 May 2013 about Emmanuel College.
- **Charges 25 & 26** – sending discourteous and offensive correspondence.
- **Charges 27 & 28** – engaging in conduct demonstrating unfitness to practice law.

The conduct

[3] **Charge 1** relates to a series of unfounded accusations of contempt the respondent made about his former wife in 2012 as a self-represented party to divorce proceedings. The commission contends that the practitioner could not have reasonably and honestly believed that the allegations were true when he made them in contravention of his

obligations under rule 16.2.1 of the *Legal Profession (Solicitors) Rule* 2007 (solicitors rule).

[4] **Charge 2** asserts that the practitioner had no honest evidence based belief in the truth of wrong doing by his wife (domestic violence) and her father's alleged criminal convictions and therefore acted inconsistently with solicitors rule 16.2.1.

[5] **Charge 3** is based on baseless statements by the practitioner that his former wife's solicitors had "fabricated" court documents.

[6] **Charge 4** is that, in contravention of solicitors rule 28.5, the practitioner made comments in professional correspondence about the character of his former wife were abusive, offensive, insulting, unbecoming of a solicitor and capable of bringing the profession into disrepute.

[7] **Charge 5** charges that the practitioner acted contrary to solicitors rule 14.4 in 2012 when he withheld significant facts from the justice of the peace who considered his application for an examination order that he ought reasonably have believed would support an argument against the granting of his application.

[8] **Charge 6** alleges that, the practitioner failed to maintain reasonable standards of competence and diligence on 23 January 2012 when giving legal advice to a client about easements he had not actually investigated.

[9] **Charge 7** also relates to a lack of competence and diligence for the practitioner's failure to lodge transfer documents (including a Settlement Notice and Land Titles Forms 1, 3 and 24) with the Land Titles registry as soon as practicable after the settlement of a property purchase on 20 February 2012.

[10] **Charges 8** and **9** contend that in failing to define the type of tenancy in which clients were to hold the property and incorrectly stating the dealing number of the mortgage in Land Title forms the practitioner fell short of the standard a member of the public is entitled to expect from an Australian legal practitioner.

[11] **Charge 10** asserts a breach of solicitors rule 1 on the basis that on 10 August 2012 the practitioner attempted to mislead the Queensland Law Society (QLS) in relation to the terms of his retainer and the nature of instructions given to him.

[12] **Charge 11** alleges another breach of solicitors rule 1. This time the LSC alleges that the practitioner falsely represented to clients that he had been contacted by the Titles Registry and advised that there was a registration fee of $265.00 for a transfer and release of a mortgage.

[13] **Charge 12** alleges that, on or about 4 May 2012, the practitioner threatened to impermissibly invoice a client for time spent responding to complaints.

[14] According to **Charge 13** the practitioner allegedly overcharged a client on 20 May 2013 for conveyancing services in reprisal for making a complaint about him to the LSC.

[15] **Charge 14** is that the practitioner failed to lodge an external examiner's report with the QLS for the financial period ending 31 March 2013 by the due date in contravention of s 274(1) LPA.

[16] **Charges 15** through **23** are a raft of allegations of non-compliance by the practitioner with eight (8) complaint notices issued throughout 2013 and 2014 by the QLS. The QLS repeatedly warned the practitioner that he may be prosecuted for professional misconduct if he did not comply with the statutory obligations imposed by s 443(3) LPA.

[17] **Charges 24** complains that between 18 March 2013 and 22 May 2013, the practitioner dealt directly with the client of another practitioner in contravention of rule 33.1 of the *Australian Solicitors Conduct Rules* 2012. The practitioner had been representing himself in proceedings he had instituted against Emmanuel College. Corney and Lind Lawyers advised the practitioner not to send correspondence to their client, but the practitioner continued to do so.

[18] **Charge 25** and **26** allege that on 11 April 2013 and 28 May 2013 the practitioner sent correspondence in the course of acting for himself that was discourteous and offensive.

[19] **Charge 27** claims that the practitioner engaged in conduct said to demonstrate that he is not a fit and proper person to practice law or is likely to bring the profession into disrepute in being found to be in contempt of Supreme Court proceedings in contravention of rule 5 of the *Australian Solicitors Conduct Rules* 2012 and sentenced to 12 months imprisonment wholly suspended for three years.

[20] **Charge 28** likewise asserts that the practitioner engaged in conduct demonstrating he is not a fit and proper person to practice law or is likely to bring the profession into disrepute when he was declared to have frequently conducted and instituted vexatious proceedings by the Supreme Court in May 2015.

Liability

[21] In Queensland, professional conduct is categorised as either 'unsatisfactory professional conduct' within s 418 LPA or 'professional misconduct' under s 419 LPA. Professional misconduct includes substantial or consistently substandard or unsatisfactory professional conduct.

[22] The LSC submits that the affidavit material is sufficient to satisfy the tribunal, to the requisite standard, that the unsatisfactory professional conduct alleged in charges 1-28 amounts at least cumulatively to

professional misconduct. It seeks orders removing the practitioner's name from the roll and for the costs of the proceeding.

[23] The commission's proof consists of affidavits filed by:

- Darielle Glenna Campbell on 27 May 2016, 11 July 2016 and 12 July 2016;
- Alison Jane Schultz on 8 July 2016;
- Bruce Allen Whayman on 11 July 2016; and
- RAB on 14 August 2016.

[24] The practitioner essentially confesses and avoids. He does not deny any of the alleged conduct or that, overall, it amounts to professional misconduct. He contends, however, that any disciplinary liability is (or should be) excused because his actions were caused by temporary professional incapacity due to medical conditions (including grief-induced major depressive symptoms) related to marital problems dating back to 2011 for which he has been treated by his GP since 28 February 2013 but were not diagnosed by a specialist until 2014.[1]

[25] The practitioner relevantly asserts that:[2]

> "3. These medical conditions and Major Depressive Disorder affect my ability to practice law. I advised the Queensland Law Society and Legal Services Commission of my health conditions.
>
> 4. At no time has the Queensland Law Society or Legal Services Commission, despite knowing of my medical conditions ever questioned my ability to practice as a solicitor in Queensland during this time …
>
> 6. I continue to receive treatment for my medical conditions…"

The findings

[26] Just because they are uncontested does not mean that disciplinary charges are made out. The tribunal is obliged by s 453 LPA to "hear and decide" each stated allegation as a jurisdictional precondition to its discretion to make a disciplinary order[3] mentioned in s 456 LPA.

[27] To the extent appropriate, the suitability matters mentioned in s 9(1) LPA, including the practitioner's disciplinary record and his capacity to satisfactorily carry out the inherent requirements of practice, are relevant considerations in deciding whether a practitioner guilty of professional misconduct is fit and proper to continuing legal practice.

[28] In our opinion, the uncontradicted evidence adduced by the LSC is sufficiently credible and cogent to satisfy us that the alleged conduct in all 28 charges occurred. In each instance, on an objective analysis (and

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1 Report of Dr Alege dated 16 May 2014, p 3.
2 Affidavit of Chad Rowe (19 August 2016) [3]-[6].
3 LPA s 453, 456(1); *Quinn v Legal Services Commissioner* [2016] QCA 354, 19.

excluding consideration of his mental condition), the proven conduct falls markedly short of a reasonable professional standard and, as such, meets the statutory definition of unsatisfactory professional conduct. Overall, the contrary conduct committed over the period between 29 August 2011 and 29 May 2015 involves a consistent and substantial failure to reach and maintain expected standards and, therefore, satisfies the test of professional misconduct.

[29] The medical evidence is not reasonably capable of supporting a conclusion that the nearly four (4) year pattern of conduct complained of was due to the practitioner's psychiatric condition or its effects. Even if it was a causative or contributing factor, mental health is an immaterial consideration where the question to be answered is whether, as a matter of law and objective fact professional conduct involves a substantial or consistent failure to meet and maintain a reasonable standard of competence and diligence.[4]

[30] This is because the character of conduct is not affected or altered by subjective beliefs, lack of fault or moral culpability. If it is relevant at all, mental impairment may, depending on the evidence, mitigate liability or influence the nature and extent any action to be taken or sanction imposed and, possibly, the terms of an order for costs.

[31] While it may have had its origins in the practitioner's marital woes and mental fragility, the tribunal has been unable to find in the circumstances a reasonable explanation for his persistent pattern of contrary conduct.

Sanction

[32] The practitioner is an unemployed undischarged bankrupt. He voluntarily surrendered his practicing certificate in 2013 and disavows any desire (and expressly acknowledges his inability) to practise law any time in the future. He has not provided any specialist medical reports dealing with his prognosis or proposed treatment and rehabilitation regime.

[33] Not only is the practitioner clearly incapacitated from satisfactorily carrying out the inherent requirements of legal practice (either by impaired mental health or something else), but his substantial or consistent failure to meet or maintain a reasonable standard of competence and diligence over a four year period ending in May 2015 demonstrates his ongoing unfitness for engaging in it.

[34] The public is best protected by the removal from practice of those who, for any reason, manifestly cannot meet and maintain acceptable professional standards.

[35] However, according to the Queensland Court of Appeal in *Chandra v Queensland Building and Construction Commission*,[5] a solicitor should not

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4 *BRJ v Council of New South Wales Bar Association* [2016] NSWSC 146, 101.

5 [2017] QCA 4.

be struck off without a specific finding being made that (a) he or she is probably permanently unfit to practice; and (b) a less severe option will not adequately meet the legislative purposes.

[36] Presumably indefinite as well as lasting unfitness is capable of justifying removal.

[37] The breaches here are too substantial to merit any lesser response than suspension.

[38] A reprimand is not appropriate for achieving the paramount purpose of public protection or the collateral objectives of maintaining community confidence in the profession and preserving its hard-earned reputation for honesty and integrity.

[39] Where the relevant impediment is temporary and, with time, proper treatment and commitment, full fitness is likely to be restored with no unacceptable risk of recurrence, the right to practice may be suspended but preserved until the adverse effects of the problem have been effectively addressed.

[40] While the objective evidence in this case about why or for how long the practitioner is unfit is not cogent enough to entitle the tribunal to reasonably decide those issues, it does support the probable inference that, whatever is incapacitating the practitioner, its future effects are uncertain and its duration indefinite. Thus, a finite period of suspension, even with health, education or other corrective conditions, will not have the desired effect and the practitioner himself has not proposed it.

[41] Suspension for an unspecified time in the hope of resurrecting the practitioner's lost legal career at some future time is technically an option, but in our opinion will not meet the objectives of disciplinary proceedings because the practitioner is not currently fit and proper to practice law[6] and it is hard to reasonably predict whether or when he ever will be again.

[42] In *Re: Maraj (a legal practitioner)*,[7] the disciplinary tribunal considered that various mitigating factors meant that striking off was unnecessary and that the practitioner (who had voluntarily ceased practice with no intention of ever resuming it) should be disqualified indefinitely. Malcom CJ held that in so doing the tribunal misunderstood the significance of the object in relation to the protection of the public. The Chief Justice said:

> "The significance is that in order to protect the public and the reputation of the profession the consequences for the practitioner may need to be more severe than they would be if the only object of the proceedings was one of punishment. As Kennedy, Franklyn and Anderson JJ said in *Re a Legal Practitioner*, unreported; FCt SCt of WA; Library No 930527; 30 September 1993 at 7: "Despite the fact that the practitioner can already be seen to have suffered substantial punishment as a result of

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6 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.

7 (1995) 15 WAR 12, 23-25.

> his conduct, it must be appreciated that the responsibility of this Court is not to impose punishment but to maintain the integrity of the profession.
>
> …
>
> Integrity, reliability and an appropriate level of efficiency in the administration of money held on trust are all qualities which any reasonably experienced practitioner may be expected to demonstrate, in addition to being professionally competent in pursuing his or her clients' interests. In the present case, the findings of guilt made by the Tribunal and the circumstances described in the report indicate a failure of such a degree to demonstrate integrity, reliability and efficiency in the areas I have mentioned that compels the conclusion that the practitioner was unfit to remain a member of the profession. Not to make it clear that such conduct will not be tolerated and demonstrates unfitness would constitute a failure both to protect the public and to protect and maintain the reputation of the profession."

[43] In our opinion, striking off is the least onerous effective penalty. No other available option adequately denounces and deters, as well as adequately protects the public from like conduct in the future. The practitioner can always apply for re-admission if and when he thinks he can demonstrate to the admitting authority that he can actually meet and maintain the exacting professional standards expected of an Australian lawyer.

Costs

[44] Under s 462(1) LPA, the tribunal must make an order for costs against a practitioner found liable to discipline for professional misconduct unless it is satisfied that exceptional circumstances in the conduct of the proceedings would make it inappropriate to do so. No such circumstances exist here. The practitioner put the commission to proof and is to pay its costs of doing so.

ORDERS

1. The respondent's name be removed from the local roll of solicitors.
2. The respondent pay the applicant's costs assessed on a standard basis, on the Supreme Court Scale under the *Uniform Civil Procedure Rules* 1999 (Qld), in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland.[8]

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[8] Schedule 1.