QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Roati* [2020] QCAT 466
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **JOHN GERARD ROATI** (respondent)
APPLICATION NO/S:	OCR335-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	20 November 2020 (*ex tempore*)
HEARING DATE:	20 November 2020
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Mr Geoffrey Sinclair, Legal Panel Member Mr Keith Revell, Lay Panel Member
ORDERS:	**Upon the respondent, John Gerard Roati, undertaking to the Tribunal that he will, within the next seven days, repay to Robert Clough the sum of $3,600 referred to in paragraph 15(b) of the Statement of Agreed Facts,** **And upon the respondent, John Gerard Roati, undertaking to the Tribunal that he will, over the next 12 months, perform not less than 30 hours pro bono legal work for a community legal centre,** **it is ordered that:** **1. There is a finding that the respondent engaged in unsatisfactory professional conduct.** **2. The respondent is publicly reprimanded.** **3. The respondent shall pay the applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a matter before the Supreme Court of Queensland.** **4. Robert Clough shall advise the Tribunal and the respondent as to whether he wishes to pursue his**

Notice of Intention to Seek Compensation Order by 4:00pm on 19 December 2020.

5. **If Robert Clough advises that he wishes to pursue a compensation order, then the matter will be listed for a directions hearing on a date to be advised by the Tribunal.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the respondent established a "litigation loan facility" pursuant to the terms of a costs agreement with his client – where the respondent advanced a total of $16,017.89 to the client and charged $3,600 for "interest and charges" – where the applicant has brought one charge against the respondent of failing to act in the best interests of his client – where the respondent does not contest the charge, and the parties jointly urge that there be a finding of unsatisfactory professional conduct – whether the conduct underpinning the charge amounts to unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the respondent has cooperated in the expeditious resolution of the matter before the Tribunal – where the respondent has explained the background to the commission of the conduct in question and expressed genuine remorse – where the respondent has proffered two undertakings to the Tribunal, being to repay the sum of $3,600 to the client, and to engage in pro bono legal work for a community legal centre – where the applicant seeks the imposition of a public reprimand and pecuniary penalty – whether this is an appropriate case for the imposition of a public reprimand – whether a pecuniary penalty is necessary or warranted, in light of the undertakings given by the respondent

Legal Profession Act 2007 (Qld) s 418, s 462

Legal Services Commissioner v Bentley [2016] QCAT 185
Legal Services Commissioner v Brown [2018] QCAT 263
Legal Services Commissioner v Greenhalgh [2020] QCAT 349

APPEARANCES & REPRESENTATION:

Applicant: M Nicolson, instructed by the Legal Services Commission

Respondent: A C Braithwaite, instructed by Fisher Dore

REASONS FOR DECISION

[1] By this discipline application brought under the *Legal Profession Act* 2007 (Qld) ("*LPA*") the applicant, the Legal Services Commissioner, has brought one charge against the respondent solicitor, John Gerard Roati. The charge is that between 2011 and November 2013, the respondent failed to act in the best interests of his client.

[2] The factual background to this matter has been agreed between the parties and has been reduced to a signed Statement of Agreed Facts. The parties have asked that the Tribunal proceed to determine the matter on the basis of that Statement. The applicant and the respondent have also both filed written outlines of submissions, which have been of significant assistance to the Tribunal in the determination of this matter. It is convenient to note that the respondent does not contest the charge, and has cooperated in the expeditious resolution of the matter before the Tribunal. The Tribunal also notes that the respondent has filed affidavits by which he explains the background to him committing the conduct in question. He has well and truly expressed his remorse for the conduct and noted the lessons learned from this experience.

[3] In the circumstances, it is convenient to set out the background of this matter simply by reference to the Statement of Agreed Facts. The respondent was admitted to practise in Queensland as a solicitor on 3 February 1993. He has practised continuously since that time. For some years he was an employed solicitor, and from 6 March 2020 he was employed as a managing partner at Roati Legal. Since October 2011, he has been a sole practitioner in that firm. There is no disciplinary history against the respondent.

[4] In 2011, the respondent was retained by a Mr Robert Clough to act for him in a claim for personal injuries. It is agreed that the respondent had the overall control and supervision of Mr Clough's matter, including supervision of the staff in the firm who were involved in the matter. The Statement of Agreed Facts then sets out the offending conduct and important admissions by the respondent concerning the nature of the conduct in which he engaged. It is convenient for present purposes simply to set out those paragraphs of the Statement of Agreed Facts in full:

> 13. The client entered into a costs agreement with the respondent.
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> 14. The costs agreement, *inter alia:*
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> a. provided (in clause 16.1) for the respondent to establish a "litigation loan facility" to pay costs and outlays to advance the claim;
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> b. set a rate for "interest and fees" of "12.25%";
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> c. provided (in clause 16.2) that in "certain circumstances" and "completely at [the respondent's] discretion" the respondent "will agree" to "utilize" the litigation loan facility to assist the client to meet "relevant and necessary expenses of a non-legal nature". These expenses were said to include medical and rehabilitation treatment; and
>
> d. provided (in clause 16.3) that in "certain circumstances" and "completely at [the respondent's] discretion" the respondent "will agree" to "utilize" the litigation loan facility to assist the client to meet mortgage payments and utilities.
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> 15. In the course of the matter, the respondent:

a. advanced $16,017.89 to the client pursuant to the clauses noted in paragraph 14; and

b. charged the client $3,600 for "interest and charges".

16. At all material times, the respondent:

a. by reason of the matters outlined in paragraphs 14 and 15, engaged in "credit activity" within the meaning of the National Consumer Credit Protection Act 2009 (**NCCP Act**);

b. by reason of the matters outlined in paragraphs 14 and 15, held himself out as being entitled to engage in "credit activity" within the meaning of the NCCP Act; and

c. did not hold a licence under the NCCP Act.

17. At all material times a conflict existed between the respondent's duty to serve the best interests of the client and the interests of the respondent (**conflict**), in that:

a. the best interests of the client were in the matter being resolved as expeditiously as possible, since doing so would result in lesser amount of interest being payable by him;

b. by reason of the matters outlined in paragraphs 14 and 15, the respondent had a financial interest in the matter, and in particular, had a financial interest in the matter not being resolved as expeditiously as possible, since any delay in resolving the matter would result in a greater amount of interest being payable to him.

18. The respondent failed to act in the best interests of the client in circumstances where the respondent failed to properly advise the client, prior to signing the costs agreement, in relation to financial and legal matters of the costs agreement.

19. By arranging for the client for a litigation loan facility funded by the respondent (the loan agreement) in the costs agreement, it created a conflict with the respondent's duty to act on behalf of the client and the respondent's personal interests in lending money to the client.

20. The matter settled in or about October 2013, and on or about 22 October 2013 the respondent prepared and had the client sign trust account authorities, including:

a. $18,000 to be "retained" by the respondent "in payment of the monies loaned" to the client; and

b. $86,000 to be "retained" by the respondent "in payment of your professional costs and outlays".

21. The respondent received settlement funds of $278,087.25 into his trust account on 5 November 2013.

22. As at that date:

a. the amount of money loaned by the respondent to the client was no more than $16,017.89. All money loaned by the respondent to the client was repaid at settlement; and

b. the amount of the respondent's proper professional costs and outlays were no more than $47,982.11.

23. The respondent failed to act in the best interests of the client in which the solicitor had represented the client contrary to rule 4.1.1 of the *Australian Solicitors Conduct Rules* 2012.

24. The respondent breached rule 12 of the *Australian Solicitors Conduct Rules* 2012 in providing a loan agreement between himself and the client. The loan agreement created a conflict between the respondent and the client by the respondent and his personal interest in lending money to the client versus the respondent's duty to serve the client and the client's interests.

25. The client recalls signing the costs agreement with the respondent. He does not recall the respondent explaining the costs agreement to him or suggesting he obtained [sic] independent legal or financial advice before signing the cost agreement.

26. The respondent never suggested to the client that he could speak to a bank or other financial institution in relation to obtaining loans to pay his bills. The litigation loan and the cost agreement was never properly explained to the client by the respondent.

27. In breach of his professional obligations as a solicitor, and in breach of Rule 4 and Rule 12 of the *Australian Solicitors Conduct Rules* 2012, at no material time did the respondent:

    a. refer the client to independent financial advice about the "litigation loan facility";

    b. refer the client to independent legal advice about the "litigation loan facility";

    c. inform the client of the likely impact of advances under the "litigation loan facility" on the likely outcome of the matter;

    d. inform the client of how interest would be calculated or charged;

    e. inform the client what "fees" were involved in the "litigation loan facility" or how they were calculated;

    f. inform the client about alternatives to the "litigation loan facility";

    g. inform the client he did not hold a licence under the NCCP Act;

    h. advise the client of his rights as a result of the respondent not holding a licence under the NCCP Act;

    i. disclose the conflict to the client;

    j. refer the client to independent legal advice about the conflict;

    k. obtain the client's informed consent to his acting in the circumstances of the conflict;

    l. properly account to the client for both the "litigation loan facility" and his professional costs and outlays before preparing and presenting trust account authorities to the client for signature;

    m. properly inform the client about the amount actually due for both the "litigation loan facility" and his professional costs and outlays in the trust account authorities;

    n. provide the client with a statement of money loaned showing the amount and date of each advance, the amount of interest charged,

> how such interest was calculated, the amount of fees charged or how those fees were calculated.

[5] It is clear enough that the conduct of the respondent, in acting as a lender to his client, resulted in the patent conflict of interest to which reference is made in that Statement. It is also quite clear that the conduct of the respondent, in effectively inducing his client to enter into a profit-making situation for the respondent without the client being fully apprised of the consequences and legal ramifications of the transaction, amounted to conduct which was less than appropriate. For the reasons which are expressly admitted on the face of the Statement of Agreed Facts, the conduct of the respondent, in acting effectively as a financier to his own client, clearly breached the *Australian Solicitors Conduct Rules* 2012 in each of the respects identified in paragraph 27 of the Statement of Agreed Facts.

[6] In all of the circumstances, the Tribunal agrees with the joint submission by the parties that the conduct in this case 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; accordingly, there will be a finding that the respondent engaged in unsatisfactory professional conduct within the meaning of that term in s 418 of the *LPA*.

[7] In terms of sanction, the Tribunal notes that there is no suggestion that anything about the respondent's conduct impacts on his fitness or propriety to practise. That being said, the Tribunal is of the view that this is an appropriate case for there to be a public reprimand. Public reprimands, as has previously been noted by the Tribunal,[1] serve a number of purposes, remembering that these proceedings before the Tribunal are not punitive but are protective of the public interest. Public reprimands serve the purposes of both general and private deterrence. They are a clear and permanent indication to the individual practitioner, to the profession at large, and to the public served by the profession of the objective disapproval of conduct of this sort and the fact that there will be a permanent black mark on a practitioner's record as a consequence of the finding of having engaged in this sort of conduct.[2] In an honourable profession, the permanent existence of such a stain on one's professional record is not a matter to be taken lightly. This Tribunal is satisfied that this is an appropriate case in which, for reasons of general and private deterrence, there should be a public reprimand.

[8] It is noted that the respondent has offered several undertakings. First, the amount of interest that was purportedly charged to the client, Mr Clough, has not yet been repaid. The respondent's counsel explained that the fact that restitution has not yet occurred was simply a consequence of the respondent's ongoing involvement in the current discipline application and thinking it appropriate to await the processes of this Tribunal before putting into place the mechanics of making restitution. It was apparent in the course of argument today, however, that the respondent is fully accepting of the need for him to make restitution, and he has offered the Tribunal an undertaking that he will repay to the client the sum of $3,600 referred to in paragraph 15(b) of the Statement of Agreed Facts within the next seven days.

[9] Otherwise, the applicant sought in her submissions that the Tribunal impose a pecuniary penalty on the respondent. In the course of argument, the parties' attention was drawn to the decision of the Tribunal in *Legal Services Commissioner v*

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1 See, e.g., *Legal Services Commissioner v Bentley* [2016] QCAT 185.

2 See *Legal Services Commissioner v Brown* [2018] QCAT 263, [42].

Greenhalgh,[3] and the terms of the undertaking which, in the circumstances of that case, were accepted by the Tribunal by way of a practical and meaningful response by the practitioner to the particular charges in that matter. Having had the benefit of considering the outcome in *Greenhalgh*, the respondent gave instructions to his counsel to offer an undertaking in similar terms to this Tribunal; that is, that he will, over the next 12 months, perform not less than 30 hours pro bono legal work for a community legal centre.

[10] In terms of fulfilling the public protective purpose of orders to be made by this Tribunal, it seems that this is an appropriate case in which the Tribunal, rather than simply imposing a pecuniary penalty, would accept the terms of that undertaking. It is a matter of no small inconvenience for the respondent to agree to provide 30 hours of free legal assistance to members of the public. It is certainly much more inconvenient to do that than simply to, metaphorically, write out a cheque and be rid of the matter. Importantly, it is a way in which the respondent can demonstrate rehabilitation by actively contributing to the community through the provision of pro bono legal services.

[11] Finally, the Tribunal notes that no basis has been demonstrated for departure from the mandatory provision with respect to costs provided for under s 462 of the *LPA*.

[12] For those reasons, there will be the following orders:

Upon the respondent, John Gerard Roati, undertaking to the Tribunal that he will, within the next seven days, repay to Robert Clough the sum of $3,600 referred to in paragraph 15(b) of the Statement of Agreed Facts,

And upon the respondent, John Gerard Roati, undertaking to the Tribunal that he will, over the next 12 months, perform not less than 30 hours pro bono legal work for a community legal centre,

it is ordered that:

1. There is a finding that the respondent engaged in unsatisfactory professional conduct.
2. The respondent is publicly reprimanded.
3. The respondent shall pay the applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a matter before the Supreme Court of Queensland.

[13] Given that there is still, notionally at least, a Notice of Intention to Seek Compensation Order pending by Mr Clough, the Tribunal will make further directions for that matter, noting, however, that it may well be completely rendered otiose upon Mr Roati fulfilling the first of the undertakings that he gave to the Tribunal today. For completeness, however, the Tribunal will make the following further directions:

4. Robert Clough shall advise the Tribunal and the respondent as to whether he wishes to pursue his Notice of Intention to Seek Compensation Order by 4:00pm on 19 December 2020.

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3 [2020] QCAT 349.

5. If Robert Clough advises that he wishes to pursue a compensation order, then the matter will be listed for a directions hearing on a date to be advised by the Tribunal.