QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Cruise* [2019] QCAT 182
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **LEO GERARD CRUISE** (respondent)
APPLICATION NO/S:	OCR157-17
MATTER TYPE:	Occupational regulation
DELIVERED ON:	12 July 2019
HEARING DATE:	17 July 2018
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President Assisted by: Mr Michael Meadows Dr Margaret Steinberg AM

ORDERS:

UPON the respondent undertaking to the Tribunal that the respondent will continue to consult with the LawCare-referred psychologist for so long and with such regularity as the psychologist considers therapeutically necessary for the respondent to function appropriately in legal practice,

it is the decision of the Tribunal that:

1. **the respondent be publicly reprimanded;**
2. **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 the discipline application were a proceeding before the Supreme Court of Queensland.**
3. **Martin Aguilar shall advise the Tribunal and the respondent as to whether he wishes to pursue his notice of intention to seek compensation order within 14 days from the date of this decision.**
4. **If Martin Aguilar advises that he wishes to pursue a compensation order, then the matter will be listed for directions on a date to be advised by the Tribunal.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – NEGLECT AND DELAY – where the respondent was charged with failing to maintain reasonable standards of competence and diligence while acting for the same clients in four separate matters – where the respondent failed to respond to notices under r 444 of the *Uniform Civil Procedure Rules* – where the respondent failed to file and serve documents in accordance with client instructions – where the respondent failed to file and serve documents in accordance with court orders – where the respondent is found to have engaged in unsatisfactory professional conduct under s 418 of the *Legal Profession Act* 2007 ('*LPA*') – whether to order that the respondent be publicly reprimanded – whether to order that the respondent pay a fine – whether exceptional circumstances exist such that a costs order should not be made against the respondent – whether the tribunal has the power to limit costs – whether s 107 of the *Queensland Civil and Administrative Tribunal Act* 2009 requires the tribunal to fix costs notwithstanding s 462 of the *LPA*

Australian Solicitors Conduct Rules 2012, r 4.1.1, r 4.1.3
Legal Profession Act 2007, s 418, s 456, s 462,
Queensland Civil and Administrative Tribunal Act 2009, s 107
Uniform Civil Procedure Rules 1999, r, 5(3), r 444, r 445

Council of the New South Wales Bar Association v Lott [2018] NSWCATOD 99
Legal Services Commissioner v Baker (No 2) [2006] 2 Qd R 249; [2006] QCA 145
Legal Services Commissioner v Bradshaw [2009] QCA 126
Legal Services Commissioner v Brown [2018] QCAT 263
Legal Services Commissioner v Madden (No 2) [2009] 1 Qd R 149; [2008] QCA 301
Legal Services Commissioner v McQuaid [2019] QCA 136
Legal Services Commissioner v Meehan [2019] QCAT 17

APPEARANCES & REPRESENTATION:

Applicant: M Nicholson, instructed by Legal Services Commissioner

Respondent: B Cohen, solicitor of Bartley Cohen

REASONS FOR DECISION

[1] At the hearing of this discipline application under the *Legal Profession Act* 2007 ("*LPA*"), the applicant, the Legal Services Commissioner, proceeded with four charges against the respondent, Leo Gerard Cruise.

[2] Each charge was, in essence, that the respondent had failed to maintain reasonable standards of competence and diligence while acting for his clients, Martin and Maria Aguilar ("the clients"), in particular matters.

[3] A further charge listed in the discipline application as filed was withdrawn by the applicant (Charge 2 concerning the so-called "Boulton" matter).

[4] The discipline application proceeded before this Tribunal on a Statement of Agreed Facts, and with the benefit of comprehensive written and oral submissions.

[5] The Tribunal also had regard to an affidavit by the respondent dated 9 July 2018, which the respondent said was filed for the following purpose:

> 3. I make this statement to explain the context in which my conduct occurred. I do not seek to excuse my admitted conduct, which I accept fell short of the required standard.

The impugned conduct

[6] From mid-2015, the respondent, who was then practising as a solicitor on his own account, acted for the clients in a number of pieces of litigation. Each charge brought by the applicant relates to a different case in which the respondent was acting.

[7] The following is derived from the Statement of Agreed Facts (as augmented in oral argument before the Tribunal).

Nelson matter

[8] The clients were defendants to a Magistrates Court claim brought by Carmelita Nelson. They were served with the claim and statement of claim on 11 June 2015, and on 28 July 2015 default judgment was entered against them for failing to file a defence. That default judgment was served on the clients on about 5 August 2015.

[9] On about 7 August 2015, the clients attended at the respondent's office and met with a solicitor in his employ, Ms Anu Mohan, to seek advice in relation to the default judgment. The clients gave instructions to make an application to set aside the default judgment.

[10] Between 7 August 2015 and 15 January 2016, the respondent failed to make an application to set aside the default judgment.

[11] On about 15 January 2016, the clients attended on the respondent at his office and instructed him to engage counsel for the purpose of making the application to set aside the default judgment. That application was filed on 29 January 2016. On 1 February 2016, a magistrate heard and determined the application, ordering that the default judgment be set aside and that the clients have leave to defend the claim.

[12] From 13 August 2015 to 4 February 2016 the respondent performed legal services to the value of $8,080 in the Nelson matter. The clients have not been billed for, and therefore have not paid, this amount.

Concha matter

[13] On 1 June 2015, Junellie Concha filed a Magistrates Court claim and a statement of claim against the clients.

[14] The clients consulted the respondent, and in early July 2015 the respondent told the male client that the respondent required money in his trust account to start work on the Concha matter.

[15] Despite not having received any money in trust from the clients, on 2 July 2015 the respondent filed a defence to the Concha claim on behalf of the clients.

[16] On 6 July 2015, Concha's solicitor wrote to the respondent asserting that the defence, as filed, was grossly deficient and requesting that the respondent file an amended defence by 10 July 2015.

[17] No amended defence was filed, and on 10 July 2015, Concha's solicitors wrote to the respondent pursuant to *Uniform Civil Procedure Rules* ("*UCPR*"), r 444, complaining about the deficiencies in the defence and calling for a response under r 445. No such response was given.

[18] Then, on 16 July 2015, Concha's lawyers filed an application to strike out the defence and for summary judgment. That application was listed for hearing on 14 August 2015.

[19] On 28 July 2015, the respondent's employed solicitor asked the male client to deposit into the respondent's trust account $2,000 by 31 July 2015 and $3,000 by 4 August 2015. The clients did not pay the first of these amounts, but on 3 August 2015 the male client paid $3,000 into the respondent's trust account for fees and outlays. Then on 13 August 2015, the male client paid a further $1,000 into the respondent's trust account.

[20] On 13 August 2015, the respondent wrote to Concha's solicitors confirming advice he had given them on 27 July 2015 that he intended to make an application on behalf of his clients for the matter to be struck out on the basis that the statement of claim did not disclose a cause of action. He said that it had been hoped that the application would be filed and served in the previous week to enable it to be heard together with Concha's application "but, for several reasons, this has not been possible". The respondent requested that the application due for hearing the following day be adjourned by consent to a later date.

[21] Concha's solicitors responded in a letter dated 13 August 2015 that their client was not prepared to agree to an adjournment. They noted that their application had been served three weeks previously, but the respondent only now sought an adjournment less than 24 hours before the hearing. It was noted that the clients had had more than ample time to prepare their own application but had not only failed to do so, they had not even provided an explanation for the delay.

[22] At the hearing on 14 August 2015, it was ordered that the clients file an amended defence by 28 August 2015.

[23] The respondent failed to file an amended defence by 28 August 2015. On 29 August 2015, Concha's solicitors wrote pursuant to r 444 requesting a satisfactory response to the failure to comply with the order that an amended defence be filed by 28 August 2015. The respondent did not respond to that r 444 letter.

[24] An amended defence on behalf of the clients was then filed on 2 September 2015.

[25] On 10 September 2015, Concha's solicitors wrote to the respondent stating that they had been forced to proceed with filing an application, given the clients' failure to file an amended defence by 28 August 2015 or provide a response to the r 444 letter.

[26] The respondent did not respond to this letter of 10 September 2015 and the amended defence was not served on Concha's solicitors. The reason for this failure to serve the amended defence was not explained.

[27] On 11 September 2015, the male client paid a further $1,000 into the respondent's trust account for fees and outlays.

[28] On 21 September 2015, Concha's solicitors served an application to strike out the clients' defence and for summary judgment on the respondent. That application had been filed on 7 September 2015.

[29] The respondent did not respond to the letter of 21 September 2015 under cover of which that application was served.

[30] Then, on 8 October 2015, Concha's solicitors sent an email to the respondent again serving a copy of the application which had been filed on 7 September 2015.

[31] The respondent did not respond to that email.

[32] On 23 October 2015, a magistrate struck out the clients' defence as filed by the respondent and entered summary judgment against the clients in the sum of $6,353 for their claim and $1,208 for costs. This was despite the amended defence having been filed on 2 September 2015. The respondent did not appear on behalf of the clients at this hearing.

[33] The entirety of the moneys paid into trust by the clients for the Concha matter was applied to court fees and counsel's fees and for the payment of the plaintiff's costs pursuant to an order dated 14 August 2015.

[34] From 29 June 2015 to 4 February 2016, the respondent performed legal services to the value of $6,171.65 in the Concha matter. The clients have not been billed, and therefore have not paid, this amount.

Prothero matter

[35] On 13 July 2015, Rosynthia Prothero filed a Magistrates Court claim and statement of claim against the clients.

[36] On 10 August 2015, the respondent filed a notice of intention to defend and defence on behalf of the clients.

[37] On 10 August 2015, Prothero's solicitors wrote to the respondent asserting that the defence did not comply with the relevant requirements of the *UCPR* and requested that the respondent file an amended defence. Under cover of that same letter, Prothero's solicitors served a r 444 notice calling on the clients to provide a satisfactory response to the complaints about the defective defence.

[38] The respondent did not provide a response to that r 444 notice. Nor did the respondent file an amended defence, as requested by the solicitors for Prothero.

[39] On 20 August 2015, Prothero's solicitors filed an application seeking, *inter alia*, that the clients' defence be struck out. That application was served under cover of a letter to the respondent dated 3 September 2015, and the respondent was advised that the application was listed for hearing on 2 October 2015.

[40] On 2 October 2015, a magistrate struck out the clients' defence and ordered that a properly pleaded defence be filed within 28 days of being served with an amended statement of claim.

[41] Under cover of a letter dated 8 October 2015, Prothero's solicitors served an amended statement of claim on the respondent.

[42] On 23 October 2015, Prothero's solicitors wrote to the respondent asking when they could expect to receive the amended defence. They noted that the defence was due to be filed and served by 6 November 2015.

[43] The respondent did not respond to that letter of 23 October 2015, nor did he file a defence on behalf of the clients by 6 November 2015.

[44] Under cover of a letter dated 11 November 2015, Prothero's solicitors served a further r 444 notice on the respondent regarding the failure to comply with the order for the filing of a defence. The respondent did not respond to that notice.

[45] Then, on 17 November 2015, Prothero's solicitors wrote to the respondent enclosing an unsealed copy of an application for summary judgment against the clients. The respondent did not respond to that letter.

[46] On 18 November 2015, Prothero's solicitors filed the application for summary judgment. That application was served on the respondent under cover of a letter dated 24 November 2015, and the respondent was advised that the application was listed for hearing on 14 December 2015.

[47] The respondent did not respond to that letter of 24 November 2015.

[48] On 3 February 2016, the male client paid $2,400 into the respondent's trust account in respect of the Prothero matter.

[49] From 7 August 2015 to 4 February 2016, the respondent performed legal services to the value of $5,420 for the Prothero matter. The clients were not billed for, and therefore have not paid, this amount.

Egnalig matter

[50] As at mid-2015, the clients were defendants to a Magistrates Court claim brought against them by Anacelia Egnalig. The claim had been commenced on 13 November

2014, and the clients' previous solicitors had filed a Notice of Intention to Defend and defence on 17 December 2014.

[51] On 7 August 2015, the clients engaged the respondent to act on their behalf in defending the Egnalig claim.

[52] In June 2015, the solicitors for Egnalig had filed an interlocutory application for, *inter alia*, disclosure and the delivery of further and better particulars.[1]

[53] On 23 August 2015, Egnalig's solicitors wrote to the respondent inviting settlement of the application on certain terms. That offer to settle the application was open for seven days.

[54] The respondent did not respond to that letter of 23 August 2015.

[55] On 29 August 2015, Egnalig's solicitors wrote again seeking a response to their letter of 23 August. The respondent did not respond to that further letter.

[56] On 8 October 2015, the male client paid $2,000 into the respondent's trust account for fees and outlays in the Egnalig matter, and on 12 October 2015 paid a further $1,000 into the respondent's trust account.

[57] On 10 November 2015, the Chief Magistrate ordered, amongst other things, that the clients make disclosure of specific documents and provide further and better particulars within seven days.

[58] The clients did not comply with those orders.

[59] Under cover of a letter dated 16 December 2015, Egnalig's solicitors sent to the respondent a copy of the order dated 10 November 2015 and a copy of the application for summary judgment which Egnalig's solicitors had filed on 18 November 2015.

[60] By a letter dated 22 December 2015, Egnalig's solicitors wrote to the respondent alleging that the clients had still not complied with the court order of 10 November 2015.

[61] The respondent did not respond to that letter of 22 December 2015.

[62] On 15 January 2016, summary judgment was entered against the clients in the Egnalig matter.

[63] On 9 May 2016, the respondent paid David Purcell, barrister, for his fees in the amount of $1,192 from the moneys received in trust from the male client for work performed by Mr Purcell in the Egnalig matter.

[64] From 19 August 2015 to 27 January 2016, the respondent performed legal services to the value of $1,180 for the Egnalig matter. The clients have not been billed for, and therefore not paid, that amount.

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1 This application is referred to in the order of Chief Magistrate Rinaudo of 10 November 2015.

Other expenditure in relation to these matters

[65] In addition to the payments mentioned above, the Statement of Agreed Facts records payments to and arrangements with counsel for payment of fees in relation to all of these matters.

[66] On 4 February 2016, the respondent received a tax invoice from Mr Purcell in the amount of $11,000 for acting for the clients in relation to various matters including the Nelson matter, the Concha matter, the Prothero matter and the Egnalig matter.

[67] On 9 May 2016, the respondent paid $5,751.84 to Mr Purcell from the moneys held in trust. The respondent agreed to personally pay, and has continued to pay, the balance outstanding amount to Mr Purcell.

The respondent

[68] The respondent was born in 1950. He was admitted as a solicitor in the Australian Capital Territory in February 1986 and in Queensland on 30 June 1989. He has no previous adverse findings by any disciplinary body.

[69] At the time of the events in question, he was engaged in legal practice in Brisbane as the principal of Cruise Lawyers.

[70] In his affidavit, the respondent details his professional working history. After being admitted in Queensland in 1989, he worked for the Australian Government Solicitor in Townsville in a variety of areas of law. Some 18 months later he moved to the Brisbane office of the Australian Government Solicitor where he worked in customs, tax and general litigation matters. After about six months there, he moved to Taiwan to study Chinese. During his time in Taiwan, he worked part-time at Mallesons Stephen Jacques. He moved back to Australia in 1993, but did not initially practice law. He worked as company secretary for a public company for some three and a half years. During his last year in that role, he started practising law again part-time under the name "Leo Cruise & Co".

[71] The respondent commenced full-time sole practice in 1996, and continued to work as a sole practitioner until 2004.

[72] In 2004, the respondent employed a solicitor, Mr Bruce Hutton, who worked with the respondent for some three years. Mr Hutton conducted all of the firm's litigation matters. The respondent was predominantly practising in property, business and migration law. In 2007, Mr Hutton passed away suddenly. This had a devastating effect on the respondent. As the respondent was the only other solicitor in the firm, he had to take over all of the litigation files. Additionally, and while he was dealing with Mr Hutton's death and the increased workload, the respondent was audited five times in two years by the Queensland Law Society, with no adverse findings. These matters combined caused him considerable stress and resulted in him reassessing his circumstances. He says that in late 2009, after all of the existing litigation matters had concluded, he decided not to do any more litigation and that he would cease taking instructions on most migration matters.

[73] Then, in 2015, Ms Anu Mohan started work experience at the respondent's firm as part of her immigration law course. She had previously worked as a solicitor for another firm, but had not practised for several years. On 1 July 2015, after she had

completed her work experience, Ms Mohan started working for the respondent as a consultant. She usually worked four to five hours per day, five days per week.

[74] The respondent describes the circumstances under which he met the clients. The first occasion was at the end of May 2015, when the respondent notarised a document for the male client. In mid-June 2015, the male client contacted the respondent asking if the respondent was willing to act for the clients in court proceedings (the Concha matter). The respondent says that he was wary of accepting any litigation matters, and by then it was his usual practice to refuse or refer those matters elsewhere. In that particular case, the respondent considered that, since Ms Mohan had started working for him and was interested in taking on the case, he would accept the matter. He also felt confident that Ms Mohan could handle the matter because of her previous experience and that he would be available to guide her.

[75] The respondent said that, in his dealing with the clients, he found them to be very difficult, particularly when it came to requests for money in trust for fees and disbursements, such as counsel's fees which he required in their matters.

[76] When the respondent told the client that he would act for them in the Concha matter, he said that he would require $5,000 paid into his trust account to start work. He says that the male client told him that he would deposit money into the trust account without delay. The respondent understood that the claim and statement of claim had been served on the clients in early June and the defence was due to be filed within the next couple of days. He recalls that Ms Mohan followed up with the clients in relation to the $5,000 and she told him that the male client said he would deposit it.

[77] However, despite not having received any money in trust from the clients, the respondent drafted and filed a defence in the Concha matter on 2 July 2015.

[78] The respondent confirms having received the letter from Concha's solicitors alleging that the defence was grossly deficient and requesting an amended defence be filed by 10 July 2015. He says that after receiving this letter he made another request by telephone to the male client asking him to deposit $5,000 into the trust account and telling the male client that the respondent was not in a position to do any further work on the matter until he received that money. He says the male client again said that he would deposit $5,000 as requested.

[79] This is the extent of the information provided in the respondent's affidavit concerning his work on the Concha file. So far as the other matters are concerned, the respondent's affidavit continued:

> 12. I recall that [Ms Mohan] made further requests of Mr Aguilar, by telephone, to deposit $5,000 into our trust account and each time Mr Aguilar promised that he would. Around the same time that [Ms Mohan] and I were chasing Mr and Mrs Aguilar for money in trust, they also came to me about three other litigation matters, which are also the subject of the discipline application: the Nelson matter, the Prothero matter and the Egnalig matter. I agreed to act for them in these additional matters also on the basis that moneys be deposited into trust. On 3 August 2015, we finally received $3,000 in trust and on 13 August 2015, a further $1,000 for the Concha matter.

[80] The respondent's affidavit then turned to outline his deteriorating mental condition. He says that in mid-August 2015, while he was waiting for money to come in from the clients and the pressure was mounting on their matters from the respective plaintiffs' solicitors, he "stopped properly functioning mentally". He described that period as being "like a black haze that I did not realise I was in and did not see coming". He said that he kept going into the office because he felt he needed to show up to work because he had people who relied on him. He recalls he had "some sort of mental block on the litigation matters" and, while he was able to answer questions about them, he was not mentally engaged with them.

[81] The respondent says that this mental state continued until late December 2015 when Ms Mohan noticed there was something wrong with the respondent. She told him he needed to do something, and he called the barrister, Mr Purcell, for assistance. The respondent then describes conferring with Mr Purcell in early January 2016 in relation to all of the clients' files, with Mr Purcell setting out a proposed plan of attack about how to move each of their matters forward. Shortly after that conference, the respondent received a letter from another firm indicating that they were now acting for the clients.

[82] The respondent says that some months after he stopped acting for the clients he saw his general practitioner to talk about what had happened. He said that the general practitioner was not much help "because he told me that I seemed to be okay then and that I should just be careful in the future". The respondent continued:

> 17. Since this proceeding was commenced in or about July 2017, I have reflected on the period from mid-2015 to early 2016 when I acted for Mr and Mrs Aguilar. I realise that I suffered some sort of mental breakdown. I did not get professional help. I just tried to deal with it on my own. This was also what I did when Bruce passed away in 2007; I tried to deal with everything on my own even though I was, I now realise, not coping.

[83] In his affidavit, the respondent describes having contacted LawCare and having had some psychological treatment. He also describes having implemented a new policy at his firm by which clients are advised about the absolute necessity to deposit funds in trust before work commences and the firm ensures that the funds have been deposited before work starts. Litigation and migration files, which are the most time sensitive and high pressure matters, are assigned to Ms Mohan. A single email address has been established so that incoming emails can be monitored.

[84] The respondent's affidavit concluded:

> I recognise now that over a period of time leading up to about mid-2015, things were getting on top of me. The matters involving Mr and Mrs Aguilar seemed to have been the straw that broke the camel's back. I realise now, but did not then, that I was in the middle of a depressive episode or a 'breakdown'. Since seeking assistance as described above, I have very quickly come to understand what occurred. I am committed to furthering that understanding and, with professional assistance, developing strategies to assist me.

[85] At the hearing before this Tribunal, and to reinforce his commitment to ensuring that he is in a sufficiently fit mental state to appropriately fulfil the functions of legal practice, the respondent offered the Tribunal an undertaking to continue to consult with the LawCare-referred psychologist for so long and with such regularity as the

psychologist considers therapeutically necessary for the respondent to function appropriately in legal practice.

The conduct

[86] The first question for the Tribunal for the purpose of deciding this discipline application is whether it is satisfied that the respondent has engaged in unsatisfactory professional conduct or professional misconduct. In that regard, the applicant, quite properly in the circumstances of this case, did not argue for a finding of professional misconduct but limited itself to a contention that the respondent's conduct under each of the allegations and as a whole amounted to unsatisfactory professional conduct.

[87] Section 418 of the *LPA* provides:

> **418 Meaning of unsatisfactory professional conduct**
>
> *Unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening in connection with the practice of law that 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.

[88] In respect of the Nelson matter, the impugned conduct was the respondent's failure to make a timely application to set aside the default judgment. At the hearing before this Tribunal, it was conceded that there was no issue that the clients had instructed Ms Mohan on 7 August 2015 to make that application. Beyond the general explanation of the psychological pressures under which he was suffering, the respondent provided no excuse or explanation for the failure to follow the clients' instructions. From the uncontentious material before this Tribunal, it is to be inferred that attention was only drawn to this matter when counsel was engaged in January 2016 to sort out all of the clients' matters, and the application to set aside the default judgment was then quickly made and dealt with.

[89] It is trite to observe that solicitors owe a range of fundamental duties to their clients, including:

(a) the duty to act in the clients' best interests;[2] and

(b) the duty to "deliver legal services competently, diligently and as promptly as reasonably possible".[3]

[90] The respondent's delay in making the application to set aside the default judgment obviously had the potential to cause damage to the clients' interests by the simple fact of the judgment against them being permitted to stand on the public record for an extended period. The failure to act on the clients' instructions in a timely way self-evidently amounted to both a failure to act in the clients' best interests and a failure to act competently, diligently and as promptly as reasonably possible. It thereby fell short of the standard of competence and diligence to be expected of a reasonably competent solicitor, and was unsatisfactory professional conduct.

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2 *Australian Solicitors Conduct Rules* ("*ASCR*"), r 4.1.1.

3 *ASCR*, r 4.1.3

[91] In respect of the Concha matter, the applicant advanced two categories of conduct as constituting unsatisfactory professional conduct.

[92] The first was the failure to file an amended defence on time. Under the relevant order, the amended defence was to be filed on 28 August 2015 (which was a Friday). It was filed on the following Wednesday, 2 September 2015. The Tribunal does not in any way condone non-compliance with court-ordered timetables and directions. But a minor non-compliance such as this does not, of itself, bespeak a failure to attain and maintain the necessary standard of reasonable competence.

[93] Of more concern, however, is the other category of conduct relied on by the applicant.

[94] As appears from the narrative above, the respondent's conduct of the Concha matter was characterised by repeated failures to respond to correspondence from the plaintiff's solicitors in connection with the litigation. Before this Tribunal, the respondent accepted that he should have responded to communications from the plaintiff's solicitors, and that his conduct fell short of the appropriate standard.[4]

[95] Leaving to one side, but not ignoring, the professional discourtesy inherent in this conduct, there are several reasons why the respondent's failures to respond in this context need to be viewed quite seriously.

[96] First, and fundamentally, he was acting for clients in litigation governed by the *Uniform Civil Procedure Rules* under which, by r 5(3), his clients were subject to an implied undertaking to the Court and the other parties "to proceed in an expeditious way". Like every other undertaking to the Court, the undertaking implied by r 5(3) is a serious matter. Conduct by a solicitor which imperils a client's observance of that undertaking is an equally serious matter, and is patently conduct not in the client's best interests.

[97] Secondly, one of the items to which the respondent did not respond was a complaint made under *UCPR* r 444. Again, this is not an inconsequential error. Receipt of a notice properly given under r 444 demands a response – so much is clear from the terms of r 445 which provides that, upon receipt of a r 444 letter, the party "must write" to the complaining party and specifies the matters which must be contained in that response. Absent any particular circumstances to excuse or explain a failure to comply with these rules, it is clear that such a failure is conduct which is not in the client's best interests.

[98] The respondent's conduct in the course of acting in the Concha matter did not comprise an isolated example of a failure to respond. Rather, it involved repeated failures to respond, and evinced a pattern of delay and behaviour which was not in the clients' best interests. The stress and psychological difficulties under which the respondent was labouring may provide an explanation for the behaviour, but even the respondent accepts that they are not an excuse.

[99] The Tribunal is satisfied that the respondent engaged in unsatisfactory professional conduct in his handling of the Concha matter.

[100] Similar observations and findings apply in respect of the Prothero matter, and particularly insofar as it relates to a failure to respond to a r 444 letter. The respondent

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4 Respondent's written submissions, para 23.

accepted that the evidence established failures to respond to communications from the plaintiff's solicitors and that an amended defence was not filed within the time ordered by the Magistrates Court. He accepted that the communications should have been responded to and not left unanswered.

[101] It was argued on behalf of the respondent, however, that the discipline application did not allege that the respondent should have taken any particular step or responded in any particular way to the identified communications. Reference was made to the explanation that substantive responses were not given because the respondent had not, despite repeated requests, been adequately put into funds by the clients.

[102] As to the failure to file the defence, it was argued that the relevant order was against the clients, not the respondent as their lawyer and that "the nature and extent of his obligations in that capacity could not be said to have extended to the preparation and filing of a defence without payment or money in trust to secure that".

[103] With respect, the proper and appropriate answer to these arguments lies in the respondent's own written submissions:[5]

> The respondent's failure was in not responding at all to the communications. He would have discharged his obligations in that regard by responding to the effect that he did not have instructions. Or, in circumstances where the clients had not, despite requests, put him in funds, he could simply have ceased to act for them.

[104] The respondent says that these were difficult clients, and the difficulties were compounded by their reluctance to place him in funds. But they were his clients, and he continued to act for them despite not having been placed in funds. And, for so long as he continued to act for them, the respondent owed the clients the fundamental duties set out above. The fact that he may have been able to terminate the retainer, but for whatever reason chose not to, does not excuse him from the obligation to continue to perform his duties and observe the appropriate professional standards.

[105] The respondent's conduct in respect of the Prothero matter was not, as was sought to be argued on his behalf, nothing more than an error of judgment. It was a consistent pattern of unacceptable behaviour which, in the view of this Tribunal, amounted to unsatisfactory professional conduct.

[106] The same considerations apply in consideration of the respondent's conduct of the Egnalig matter. It is apposite to note the following paragraph in the respondent's written submissions:[6]

> As with Charge 4, the respondent accepts that the communications from the plaintiffs' solicitors should have been responded to, if only to say that he was not in a position to respond substantively. The respondent could have simply ceased to act for the clients.

[107] The failure to comply with the court order for disclosure and the delivery of particulars was sought to be deflected by a contention to the effect that this was not the respondent's fault but was down to the clients as a consequence of their failure to put the respondent in funds. Whether the respondent, as a solicitor, was subject to a

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5 At para 29.

6 At para 34.

personal obligation to ensure compliance with the court orders is, however, not to the point. What is relevant is that, still being under the retainer to act for the clients, he owed the clients the duties referred to above. The relevant vice is not in the non-compliance with the court order of itself (although that is no mere trifle). Rather, the episode is symptomatic of the respondent's general conduct in failing to attend properly to his clients' best interests, including by acting to ensure that they complied with court orders and the implied undertaking imposed on them by virtue of *UCPR* r 5(3).

[108] The Tribunal is satisfied that the respondent's conduct in relation to the Egnalig matter amounted to unsatisfactory professional conduct.

Appropriate orders

[109] Having made findings that the respondent engaged in unsatisfactory professional misconduct, the discretion of the Tribunal under s 456 of the *LPA* is then enlivened to make any order which the Tribunal thinks fit. This is a wide discretion, the exercise of which is informed by an understanding that this disciplinary jurisdiction is fundamentally protective of the public rather than punitive of the practitioner, and that 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".[7]

[110] As is apparent from the discussion above, the period covered by the four charges was marked by a lack of proper attention by the respondent to the best interest of the clients resulting in unacceptable delays in attending to their matters. An isolated instance of delay will not necessarily amount to misconduct or require some intervention or order by the Tribunal to ensure the protection of the public. At the other end of the scale, an entrenched pattern of delay may bespeak a serious lack of capacity on the part of a practitioner to attend properly to a client's interests, in which case protection of the public is a matter of significant concern. In this regard, Professor Dal Pont has said (omitting references and citations):[8]

> Gross neglect and delay can constitute professional misconduct because it both endangers client interests and brings the profession into serious disrepute. Disciplinary-wise the concern is not chiefly on an isolated instance of neglect or delay, but on where it is either sustained or gross. As such a single instance of neglect or delay ordinarily will not justify a finding of misconduct, and nor by itself will the failure to answer correspondence.

[111] It was submitted for the applicant that the respondent should be subject to an order that he pay a modest fine and that there be a public reprimand.

[112] There are a number of matters which stand to the respondent's credit when considering the appropriate orders to be made. He did not seek to excuse his conduct. Both in the affidavit he filed and in the submissions made on his behalf, he made appropriate acknowledgment of his shortcomings and expressed remorse. Importantly, he detailed the important practical and rehabilitative steps he has put in place to guard against a repeat of similar conduct. He has offered the Tribunal an

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7 *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301; [2009] 1 Qd R 149 at [122]; and see *Legal Services Commissioner v Meehan* [2019] QCAT 17 at [31].

8 G E Dal Pont *Lawyers' Professional Responsibility* (Thomson Reuters Australia, 6th ed, 2017) at [25.85].

undertaking directed to ensuring that he can maintain appropriate levels of practice. Apart from this particular period, in connection with acting for these particular clients, there is no suggestion that the respondent's long tenure in practice has in any way been compromised by any other failures for any other clients to observe appropriate standards. There is no history of any other disciplinary complaints.

[113] In the written submissions filed on his behalf, emphasis was laid on the fact that the respondent had already suffered financially in the obligations he had to counsel and in the fees he did not render to the clients for work done. The submissions also referred to and relied on the respondent's evidence of the psychological difficulties to which he had deposed and the rehabilitation and prevention strategies he had developed. It was submitted that no pecuniary penalty should be imposed because this would be disproportionate to the conduct involved. The respondent's ultimate submission was:[9]

> If any sanction at all is to be imposed, a reprimand is more than ample to meet the proper objectives of this proceeding and the Tribunal's public determination of it.

[114] In the particular circumstances of this case, the Tribunal is not satisfied that any public protective purpose would be achieved by the imposition of a modest fine. Insofar as ongoing protection of the public against such conduct by the respondent is concerned, he has expressly deposed not merely to having insight into the issues which he faced at the time, but actively having put in place a series of controls to ensure that there is no repetition. Importantly, he has offered the Tribunal an unequivocal and open-ended undertaking with respect to psychological treatment. The giving of that undertaking is, of course, a serious matter in itself, and one on which this Tribunal places express reliance.

[115] When considering the question of a public reprimand, there is a broader public interest to be considered which is akin to the notion of general deterrence in criminal sentencing. In *Legal Services Commissioner v Brown*,[10] this Tribunal said:[11]

> The making of a public reprimand is a serious step by the Tribunal and not one which should be taken or regarded lightly. The public reprimand is and will continue to be a permanent public blemish on the respondent's professional record. It is and will continue to stand as a permanent reminder to the respondent, to the profession and to the public at large that there are adverse personal consequences when one engages in professional misconduct of this type.

[116] Those observations were consistent with what had been said in *Council of the New South Wales Bar Association v Lott*:[12]

> A reprimand is a serious matter. It marks the disgrace of a member of an honourable profession inherent in the misconduct.

[117] This case is an example of unsatisfactory professional conduct occurring repeatedly over an extended period of some six months. It is in the public interest, and in the

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9 Respondent's written submissions, para 49.

10 [2018] QCAT 263.

11 At [42].

12 [2018] NSWCATOD 99 at [35].

interest of the profession, for disapproval of this degree of unsatisfactory professional conduct to be marked by the issuing of a public reprimand against the respondent.

[118] Turning to the question of costs, s 462(1) of the *LPA* effectively requires the Tribunal to make a costs order against a person whom it has found to have engaged in unsatisfactory professional conduct unless the Tribunal is satisfied exceptional circumstances exist. It has not been suggested that any such exceptional circumstances exist in the present case.

[119] The applicant submitted that the Tribunal ought order that the respondent pay the applicant's costs to be assessed.

[120] While not opposing a costs order in principle, two submissions were made for the respondent:

(a) Any costs order in favour of the applicant ought exclude from its ambit the costs associated with the charge which was withdrawn (Charge 2); and

(b) For the applicant simply to seek an order that costs be assessed is inappropriate in light of s 107 of the *Queensland Civil and Administrative Tribunal Act* 2007 ("*QCAT Act*").

[121] Section 462 of the *LPA* provides:

462 Costs

(1) A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.

(2) A disciplinary body may make an order requiring a person whom it has found not to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, if the disciplinary body is satisfied that—

(a) the sole or principal reason why the proceeding was started in the disciplinary body was the person's failure to cooperate with the commissioner or a relevant regulatory authority; or

(b) there is some other reason warranting the making of an order in the particular circumstances.

(3) Without limiting subsection (2) a disciplinary body that makes an order under section 460 may make a further order requiring an Australian legal practitioner, in relation to whom the order under section 460 relates, to pay costs in relation to the order.

(4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that—

(a) the Australian legal practitioner or law practice employee has not engaged in prescribed conduct; and

(b) the body considers that special circumstances warrant the making of the order.

(5) An order for costs—

(a) may be for a stated amount; or

(b) may be for an unstated amount but must state the basis on which the amount must be decided.

(6) An order for costs may state the terms on which costs must be paid.

(7) The only other circumstance in which the tribunal exercising its jurisdiction in relation to a disciplinary application may award costs are the circumstances stated in the QCAT Act, section 103 or 104.

Note—

See the QCAT Act, sections 106 to 109 for provisions about the tribunal awarding costs.

(8) In this section—

engaged in prescribed conduct means engaged in unsatisfactory professional conduct or professional misconduct, or of misconduct in relation to a relevant practice, as mentioned in section 456(1) or 458(1).

[122] The Tribunal is a "disciplinary body" for the purposes of s 462.[13]

[123] Section 107 of the *QCAT Act* provides:

107 Fixing or assessing costs

(1) If the tribunal makes a costs order under this Act or an enabling Act, the tribunal must fix the costs if possible.

(2) If it is not possible to fix the costs having regard to the nature of the proceeding, the tribunal may make an order requiring that the costs be assessed under the rules.

(3) The rules may provide that costs must be assessed by reference to a scale under the rules applying to a court.

[124] The *LPA* is an "enabling Act" for the purposes of the *QCAT Act*.[14]

[125] Section 462 of the *LPA* operates to confer on the Tribunal the specific power to order costs and indeed circumscribes the way in which that power may be exercised. It is more than tolerably clear that s 462, read as a whole, effectively codifies the nature and ambit of the Tribunal's jurisdiction to award costs.

[126] Section 6(3) of the *QCAT Act* provides:

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13 See the definition of "disciplinary body" in *LPA*, Sch 2.

14 See definition of "enabling Act" in s 6 of the *QCAT Act*.

> An enabling Act conferring original jurisdiction on the Tribunal will generally state the Tribunal's functions in the jurisdiction, which may add to, otherwise vary, or exclude functions stated in this Act.

[127] Section 462 operates as a conferral of a specific jurisdiction on the Tribunal with respect to the costs of a discipline application. To the extent that s 462 of the *LPA* is inconsistent with s 107 of the *QCAT Act*, then s 462 prevails.[15] At the very least, the *QCAT Act* would be read as if s 462 were part of it,[16] and on that basis alone the specific provisions of s 462 would prevail.

[128] It is notable that s 462(5) requires that a costs order take one of two forms, namely:

(a) specifying a stated amount; or

(b) allowing an unstated amount but specifying the basis on which the amount must be decided.

[129] There is, however, nothing in s 462 generally or s 462(5) in particular which would compel a conclusion that one form of costs order is to be preferred to the other. If costs are to be ordered in a stated amount, then the estimation approach which would lead to the fixing of the amount of the costs must be logical, fair and reasonable.[17]

[130] In the present case, there is simply no evidentiary basis on which to make an estimation of costs. A submission on behalf of the respondent that, in such circumstances, the Tribunal should do the best it can having regard to its own knowledge and experience of likely proper costs cannot be accepted. In any event, even if one were having regard to s 107 of the *QCAT Act*, it is clearly not possible on the current state of the material before the Tribunal for the Tribunal to fix the costs. Notwithstanding the robustness with which the Tribunal customarily approaches resolution of many of the matters which come before it, that robustness must yield to principle.

[131] In *Legal Services Commissioner v McQuaid*,[18] the Court of Appeal recently reaffirmed the proposition that s 462 of the *LPA* does not confer on the Tribunal a general discretion as to costs. Morrison JA, with whom Sofronoff P and Douglas J agreed, said that s 462(1) "is not apt to confer or preserve the broad discretion over costs commonly found in statutory provisions conferring power to award costs".[19] The Court of Appeal in that case reaffirmed the interpretation and application of s 462 (and its predecessor) in *Legal Services Commissioner v Baker (No 2)*[20] and *Legal Services Commissioner v Bradshaw*.[21] In *Baker's* case (in which the present s 462 was s 286), McPherson JA said:[22]

> In my view, however, the criterion adopted in s 286(1) is whether the practitioner has been found guilty of one or more of the forms of misconduct

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15 *QCAT Act*, s 7(2).

16 *QCAT Act*, s 7(3).

17 *Legal Services Commissioner v McQuaid* [2019] QCA 136 at [87], citing *Amos v Monsour Pty Ltd* [2009] 2 Qd R 303; [2009] QCA 65.

18 [2019] QCA 136.

19 At [28].

20 [2006] QCA 145; [2006] 2 Qd R 249.

21 [2009] QCA 126.

22 At [56].

specified in s 286(7). If he has, then an order requiring him to pay costs must be made against him unless the Tribunal is satisfied that "exceptional circumstances" exist. It is true that s 286(1) refers simply to "costs" and not to all the costs of the proceedings; but the latter is I consider its primary meaning in this context. Section 286(1) is not designed to confer or preserve the broad discretion over costs commonly found in statutory provisions conferring power to award costs. If it had been intended to do so, it could and would have been expressed to that effect. On the contrary, the mandatory rule imposed by s 286(1) is designed to follow unless the Tribunal is satisfied that exceptional circumstances exist that call for some other order to be made, either generally or in terms of an amount under s 286(5)(a) or (b) or against the Commissioner under s 286(4).

[132] In *Legal Services Commissioner v McQuaid*, the Court of Appeal also expressly rejected the notion that the Tribunal has a power to limit the costs awarded to the applicant under s 462(1). Morrison JA, with whom Sofronoff P and Douglas J agreed, said (and omitting citations):[23]

> [31] The Tribunal's approach was to "limit the costs to be awarded to the applicant".[24] Accepting the interpretation of s 462(1) to be that it refers to "all the costs of the proceedings", as if s 462(1) referred to "the costs",[25] one must then turn to s 462(5). It provides that an order for costs may be one of two things, namely:
>
> (a) "for a stated amount"; or
>
> (b) "for an unstated amount but must state the basis upon which the amount must be decided".
>
> [32] On its face s 462(5) obliges the Tribunal to adopt one or other form of the order for costs. Either it can state the amount, or if it does not it must state the basis upon which the amount "must be decided". In the latter case, it seems plain that the basis for the decision as to the amount of the costs will not be one made by the Tribunal. That suggests, by inference, an order for costs to be assessed.
>
> [33] What s 462(5) does not permit is an order that limits the costs. To do so would run contrary to the obligation in s 462(1), which provides that the disciplinary body or Tribunal "must make an order" as to costs, and those costs, following *Baker* and *Bradshaw*, are all the costs of the proceedings. I do not accept the respondent's submission that this approach would render s 462(4)(a) nugatory. Under that subsection an order for costs 'may be for a stated amount'. The two forms of order can operate together, as *Baker* recognised. One can envisage cases where the order is made under s 462(1) but the evidence establishes what those costs actually are, in which case they can be for a "stated amount".

[133] In the present case, there is nothing before the Tribunal which would allow the Tribunal properly to make an order for costs in a stated amount under s 462(5)(a). Nor, on the strength of the authorities referred to above, is there any power in the

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23 At [31] – [33].

24 Reasons below at [48].

25 The interpretation as found in *Baker* at [56], and adopted in *Bradshaw* at [63].

Tribunal to limit the costs order made under s 462(1). The respondent's submissions on costs must therefore be rejected.

[134] Accordingly, the order will be under s 462(5)(b) that the respondent pay the applicant's costs of and incidental to this discipline application, such costs to be assessed on the standard basis as if the discipline application were a proceeding before the Supreme Court of Queensland.

Conclusion

[135] For the above reasons, the decision of the Tribunal is that there be the following orders:

> UPON the respondent undertaking to the Tribunal that the respondent will continue to consult with the LawCare-referred psychologist for so long and with such regularity as the psychologist considers therapeutically necessary for the respondent to function appropriately in legal practice,
>
> it is the decision of the Tribunal that:
>
> 1. the respondent be publicly reprimanded;
> 2. 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 the discipline application were a proceeding before the Supreme Court of Queensland.

[136] The male client has filed a notice of intention to seek compensation order. There will be the following additional orders:

> 3. Martin Aguilar shall advise the Tribunal and the respondent as to whether he wishes to pursue his notice of intention to seek compensation order within 14 days from the date of this decision.
> 4. If Martin Aguilar advises that he wishes to pursue a compensation order, then the matter will be listed for directions on a date to be advised by the Tribunal.