IN THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

ACTIONs No. 4 of 2017 & 7 of 2018

THE LEGAL PRACTITIONERS ACT 1981

IN THE MATTER OF:

JOHN MARK FITZPATRICK

REASONS

Background

1. In these two actions the Legal Profession Conduct Commissioner ("the **Commissioner**") has charged John Mark Fitzpatrick ("the **Practitioner**") with professional misconduct and unsatisfactory professional conduct pursuant to s82(2) of the *Legal Practitioners Act 1981* (SA) ("the **Act**").
2. The first hearing of the inquiry in action 4 of 2017 took place on 13 - 14 February 2018 before a differently constituted Tribunal and was adjourned part-heard. During the period of the adjournment, actions 6 and 7 of 2018 were commenced with a view to them being heard concurrently, and with an application by the Commissioner to lay a charge out of time in action 6 of 2018. The extension of time needed in action 6 of 2018 was ultimately refused.
3. The second hearing of the inquiry into the charge in action 4 of 2017 and 7 of 2018 proceeded concurrently with the inquiries in actions 9 of 2018 and 3 of 2023 on 28 May 2024.
4. At the first hearing in February 2018, the Practitioner was represented by a solicitor and Counsel. At the second hearing in May 2024, the Practitioner was unrepresented and did not attend the hearing.

5. For an overview of why these and action 9 of 2018 have taken so long to reach a full hearing, see the decision published by the Tribunal[1] on 26 April 2023 and the addendum thereto published 16 August 2023. At the risk of over-simplification, one Tribunal member had to be recused whilst the Commissioner investigated a complaint made against that member, and later the Presiding Member was appointed to judicial office, leaving only a single lay Tribunal member unable to conclude the inquiry. That precipitated an argument about the reconstitution of the Tribunal and an application for a stay of proceedings by the Practitioner.
6. In summary, the charge in action 7 of 2018 dated 9 April 2018 alleges:
    a. In count 1 that the Practitioner failed to lodge a low income sole practitioner statutory declaration ("**Low Fee Earner Declaration**") for the 2014-2015 financial year by 31 August 2015 in breach of his undertaking given to the Law Society of South Australia (the "**Law Society**") on 30 June 2014.
    b. In count 2 that the Practitioner failed to respond to requests from the Law Society Audit Officer to supply supporting documentation for his Mandatory Continuing Professional Development ("**MCDP**") activities for the period 1 April 2014 – 31 March 2015.
    c. In count 3 that the Practitioner delayed without reasonable excuse in transferring documents of a former client, Mr Albert Wiggins to the client's new firm, Piper Alderman as he had been authorised and instructed in writing to do.
    d. In count 4 that between 1 May 2015 – 8 January 2016 the Practitioner failed without reasonable excuse to respond to telephone messages and correspondence from Piper Alderman in relation to the transfer of Mr Wiggins' documents.
7. In summary, the charge in action 4 of 2017 filed 23 February 2017 and amended by consent and with leave of the Tribunal on 13 February 2018 alleges 5 counts of failing to respond to requests for information from the Commissioner in circumstances where the Commissioner had five investigations running into the Practitioner's suspected professional misconduct and 5 counts of failing to respond to notices issued under clause 4(1) of Schedule 4 to the Act. In the course of each of the five investigations, the Commissioner requested the Practitioner to provide information first, then when no substantive response was received, issued a statutory notice.

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[1] Differently constituted, Presiding Member M Pyke KC.

8. The investigation which led to counts 3 and 4 in action 4 of 2017 was the same one that resulted in count 1 in action 7 of 2018. Similarly, counts 5 and 6 in action 4 of 2017 relate to the substantive conduct which became count 2 in action 7 of 2018. Counts 9 and 10 in action 4 of 2017 relate to the substantive conduct in counts 3 and 4 in action 7 of 2018.
9. There is no corresponding substantive conduct before the Tribunal connected to counts 1 and 2 in action 4 of 2017, being the investigation into practising the law without a practising certificate as the application to lay a charge out of time in action 6 of 2018 was refused.
10. The Practitioner filed a response to the charge in action 4 of 2017 dated 29 May 2017, and at the February 2018 hearing the Tribunal was informed that because the amendments to the charge were not material, there was no need to amend the response. There was no response filed in action 7 of 2018. However, due to the overlap in the subject matter of actions 4 of 2017 and 7 of 2018, the Practitioner's attitude to the charge in the latter action can be readily gleaned from his response in action 4 of 2017.

Evidence and Written Submissions

11. For the purposes of both actions 4 of 2017 and 7 of 2018, the Tribunal admitted volume 1 of a Book of Documents prepared by the Commissioner (Exhibit C1).[2] It includes affidavit evidence, expert medical reports and transcript from Supreme Court proceedings in action SCCIV 292 of 2017[3] ("**SASC Proceedings**") which the Tribunal is entitled to receive pursuant to s84(7)(a) of the Act.
12. Exhibit C1, the content of which had been agreed by the Practitioner when he was represented, included documents provided by the Practitioner's former solicitor to the Commissioner's office in support of the response to the charge in action 4 of 2017.
13. No witnesses were called to give oral evidence on 28 May 2024.
14. The Commissioner filed a comprehensive written Outline of Submissions on 27 May 2024, and at the Tribunal's invitation, short Further Submissions on 30 May 2024 which addressed the question of receipt of the oral evidence adduced at the February 2018 hearing.

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[2] Being the same exhibit from the February 2018 hearing. Volume 2 of the book of documents MFI C2 from the February 2018 hearing was not tendered.
[3] In which the Commissioner applied for an interim suspension of the Practitioner's practising certificate.

15. Whilst the Commissioner was prepared to proceed on the basis of exhibit C1 only, he did not oppose us taking into account the transcript of evidence taken in February 2018, all of which was evidence led by the Practitioner. It consists of evidence from:
    a. Dr Bagvati Asokan, Psychiatrist;[4]
    b. Dr David Mitchell, retired General Practitioner;[5] and
    c. the Practitioner.[6]
16. Whether a tribunal will have regard to evidence taken by a previous, differently constituted tribunal will ultimately be determined by reference to fairness. Factors such as whether:
    a. there is accurate transcript or audio recording available, and if not the quality of notes taken,
    b. the evidence was contested,
    c. credit was in issue,
    d. the evidence was concluded or incomplete

    will all weigh into the decision. Similarly, where a significant passage of time has passed, evidence taken from witnesses in an earlier hearing may well be more reliable due to fading memories, and in some cases witnesses may have died, cannot be located or are otherwise no longer available.
17. In the present instance, where we note Member Burgess was present for both the 2018 and 2024 hearings, the major disadvantage in us having regard to the oral evidence from 2018 would be to the Commissioner, because the proceedings were adjourned before his Counsel had the opportunity to cross examine the Practitioner. The oral evidence was all called by the Practitioner, and therefore was viewed by his then legal representatives as helpful to his defence. Whilst the Practitioner's evidence in chief was not concluded, we consider some oral evidence from him is better than none at all. It was open to the Practitioner to participate in the second hearing and resume his oral evidence. Although he claimed to be too unwell to attend on 28 May 2024, no medical certificate or report was provided to support this.

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[4] Commencing T.71 on 13 February 2018.
[5] Commencing T.147 on 14 February 2018.
[6] Commencing T.102 on 13 February 2018 and continuing 14 February 2018, but evidence in chief not concluded and no cross examination.

18. Overall, and having regard to what was said in *Bakarich v Commonwealth Bank of Australia (No.2)* [2012] NSWCA 390,[7] we have decided that the fairest approach is to read and have regard to the transcript of the February 2018 hearing.
19. In addition to the evidence from the February 2018 hearing, we have had regard to the opening submissions made by both parties, which has assisted to understand the Practitioner's argument regarding his psychiatric illness in circumstances where the Practitioner did not participate in the May 2024 hearing.

Consideration

20. The underlying conduct in actions 4 of 2017 and 7 of 2018 is admitted by the Practitioner in his response and First Affidavit dated 31 March 2017, however he submits that:
    a. He should not be found to have engaged in in professional misconduct or unsatisfactory professional conduct because he was suffering from a psychiatric illness which was not effectively treated at the relevant times; and
    b. That the conduct (either separately or if taken as a course of conduct) does not amount to professional misconduct or unsatisfactory professional conduct, and in the main, can be characterised as "administrative lapses".
21. We note that in his First Affidavit at paragraph 16(f) the Practitioner also admits to practising without a practising certificate during 2013, which conduct was the subject of the unsuccessful application by the Commissioner to lay a charge out of time in action 6 of 2018. For the avoidance of doubt, we have excluded this admitted conduct from our consideration of the charges and how the Practitioner's conduct should be characterised.

    Mental Illness
22. The Tribunal accepts that the Practitioner did in the whole of the period 2015-2016 suffer from a recognised psychiatric illness, namely major depression. We prefer this diagnosis by psychiatrist Dr Blakemore,[8] supported by Dr Asokan, over that of the Practitioner's now retired former General Practitioner, Dr Mitchell, of Post Traumatic Stress Disorder.[9]
23. The Tribunal also accepts that the Practitioner did not receive effective treatment for his mental illness until about April-May 2017, when he changed General

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[7] In particular at [34] – [49].

[8] Exhibit C1 p. 367, p.372, noting his view that an adjustment disorder with depressed and anxious mood would be another possible diagnosis.

[9] Exhibit C1 p.378-379, Dr Mitchell also gave evidence of "chronic anxiety" but admitted that he did not have specialist psychiatric training and that his views on treatment were unconventional.

Practitioners,[10] was referred to a psychiatrist and commenced taking an effective dose of antidepressant medication.[11] In fact during lengthy periods the Practitioner obtained no medical treatment at all. In submissions the Commissioner invited us to infer that this was because the Practitioner was not genuinely unwell, but we decline to make such a finding.

24. The Tribunal finds, based on the opinion of Dr Blakemore,[12] that the Practitioner's mental illness was likely a contributing factor in the conduct the subject of these charges. In addition, as the Practitioner acknowledged in his Affidavit of 31 March 2017:[13]

> *It is not to overstate this matter to say that I have buried my head in the sand.*
>
> *...*
>
> *I have permitted these matters to snowball, such that I could not face the task at hand. With each new complaint magnifying the previous complaint, I became more and more paralysed by the thought of dealing with these matters.*

25. Unfortunately, this is a common response to investigations by the Commissioner, especially in practitioners with mental health concerns. However mental illness is not a defence to professional misconduct (nor unsatisfactory professional conduct). Frankly to suggest so is offensive to the many legal practitioners who live with mental illness, manage their health appropriately and who abide by their professional responsibilities and obligations, the requirement in Australian Solicitors Conduct Rule 43 included.[14]
26. It is a matter that will be taken into account in assessment of the appropriate sanction, but mental illness does not impact whether the charge is proven. The test for the standard of conduct expected of a legal practitioner is an objective one. Mental illness cannot provide a defence to liability, no matter how debilitating. Were that so, the entire legislative aim of protection of members of the public would be undermined. The Tribunal applies these established principles as set out by Perry ACJ in *LPCB v Ardalich* at [42] – [49].
27. If a practitioner's mental health is so poor that they are incapable of dealing with the regulatory authority for an extended period of time, then this calls into question whether they should be practising the law. The Tribunal encourages the

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[10] Dr Moten took over the Practitioner's primary care.
[11] Exhibit C1 pp.376-377, report of Dr Asokan dated 3 November 2017, T71 at lines 21-35.
[12] Exhibit C1 p.375, report of Dr Blakemore dated 16 November 2017.
[13] Exhibit C1 p.31.
[14] A legal practitioner must be timely, open, and frank in his or her dealings with a regulatory authority.

Commissioner to exercise the powers in section 77J(1)(b)(i) and (ii) of the Act in appropriate cases. In the Practitioner's case, the Supreme Court imposed similar conditions (as to medical treatment and mentoring) in the SASC Proceedings.

28. As the experience in multiple matters involving the Practitioner now shows, the conditions imposed by the Court did not alter his repeated failure to deal with requests for responses to investigations, statutory notices to compel written responses and production of documents followed by own initiative investigations into his failure to comply. This is a great shame as the Tribunal is certain that dealing with the Commissioner promptly, and bringing the matters to a substantive conclusion as quickly as possible would have avoided the undoubted ongoing aggravation of the Practitioner's mental illness caused by disciplinary proceedings being on foot for so long.

The nature of the conduct

29. Failing to respond in an adequate and timely manner to the Commissioner's requests for information and documents, in breach of ASCR 43, can by virtue of s70(a) of the Act constitute unsatisfactory professional conduct or professional misconduct. We reject the Practitioner's argument that these failures are not serious and should be viewed as mere "administrative lapses".
30. There is ample authority that failing to comply with even a single notice issued under clause 4(1) of Schedule 4 to the Act, or its interstate equivalent provisions, constitutes professional misconduct.[15]
31. The charge in action 4 of 2017 invites us to find that there have been 10 separate instances of professional misconduct. In the alternative, the Commissioner submits that the whole of the omissions the subject of counts 1-10 inclusive could be treated as a course of conduct which amounts to professional misconduct.
32. Since each count of failing to respond to the Commissioner's request for information (1, 3, 5, 7 and 9) was followed by the issue of a statutory notice compelling effectively the same information (2, 4, 6, 8 and 10), we have determined to treat the Practitioner's failure to comply with respect to each investigation as a course of conduct, with the result being 5 instances of proven professional misconduct.
33. Failing to honour an undertaking given in the course of legal practice, in breach of ASCR 6.1, can by virtue of s70(a) of the Act constitute unsatisfactory professional conduct or professional misconduct. There are numerous authorities emphasising

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[15] *In the matter of Dorrian* LPDT 15 April 2020, *In the matter of Hill* LPDT 25 June 2023, *Legal Services Commissioner v Jazayeri* [2024] QCAT 106, *Council of the Law Society of NSW v Autore* [2019] NSWCATOD 10.

the seriousness of a practitioner failing to comply with their undertaking, and it has frequently been found to amount to professional misconduct.[16]

34. In this case, the undertaking was given to the Law Society. All undertakings given in the course of legal practice are sacrosanct, whether they be to a Court or Tribunal, a regulatory authority, professional body, a fellow practitioner, law firm, opposing party or client. Failing to comply with an undertaking not only shows contempt for the person or institution to whom it was proffered, but tends to undermine the reputation of the profession as a whole.
35. A practitioner must never give an undertaking with which they cannot, or do not intend to, comply. If circumstances change such that a practitioner who thought they could comply with their undertaking at the time it was given can no longer do so, it is incumbent upon them to seek to be released. If the undertaking is to do something by a particular date, any request to be released, or to vary the terms of the undertaking must be made prior to the time the thing was promised to be done.
36. The Practitioner did eventually do what he promised in the relevant undertaking to the Law Society, that is he lodged the Low Fee Earner Declaration and paid the relevant amount due, but not until some 20 months' late. He never sought to be released from his undertaking, either before of after 31 August 2015.
37. Under Rule 3A.3 of the *Legal Practitioners Education and Admission Council* ("**LPEAC**") *Rules 2004*[17]

> *Before a practising certificate will be issued to or renewed by an individual legal practitioner who held a practising certificate in respect of any period after 1 July 2011, the applicant practitioner must first satisfy the Law Society that the practitioner has completed the prescribed amount of MCPD in respect of the preceding CPD year.*

38. This is usually achieved by every practitioner making a declaration that they have completed the required MCPD. However, each year, a number of practitioners are randomly selected for an audit of their MCPD activities. As can be seen from the underlined text, the obligation to satisfy the Law Society is on the practitioner. This requires the provision of documentation to enable the Law Society to reach the requisite state of satisfaction. Such documentation might include receipts for payment for conferences or MCPD seminars, statements of attendance, sign-in sheets or certificates of participation, the practitioner's notes taken during the

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[16] *In the matter of Dorrian* LPDT 15 April 2020, *Council of the Law Society of NSW v Petrovich* [2019] NSWCATOD 44, *Council of the Law Society of NSW v Powell* [2019] NSWCATOD 24.
[17] The version in force at the relevant time.

activities and/or copies of papers or presentations, even photographs or screen-shots of social media posts showing the practitioner in attendance.

39. The Practitioner in this case failed to respond to the Law Society Audit Officer's request for supporting documentation, thereby breaching LPEAC Rule 3A.3.
40. Unlike the ASCRs, the LPEAC Rules do not fall within the definition of "legal profession rules" for the purposes of the Act.[18] Nevertheless, we consider that a breach of the LEPEAC Rules should be treated similarly. It could therefore amount to either professional misconduct or unsatisfactory professional conduct. The Commissioner has contended the former, but in this instance, we consider the failure should be characterised as the latter.
41. We accept the Commissioner's submissions that significant delay of some 8 months, in the absence of reasonable excuse, in transferring a former client's documents and to respond to telephone messages and correspondence from the former client's new solicitors falls short of the standard of competence and diligence that a member of the pubic is entitled to expect of a reasonably competent legal practitioner. The signed client authority directing the Practitioner to release and forward the documents was dated 30 April 2015 and was sent by the new firm to the Practitioner the following day. Numerous telephone calls and letters to the Practitioner followed requesting that he transfer the client's documents until the Practitioner finally provided an electronic copy of the client's Will on 31 December 2015 and the original on 8 January 2016.
42. The Tribunal will need to consider what action should now be taken in light of the findings in each of these actions, 9 of 2018 and 3 of 2023.

The Tribunal Orders:

1. In action 4 of 2017 on counts 1 – 10 of the charge inclusive, the Practitioner has engaged in five courses of conduct each amounting to professional misconduct.
2. In action 7 of 2018:
    a. On count 1 the Practitioner has engaged in professional misconduct;
    b. On count 2 the Practitioner has engaged in unsatisfactory professional conduct;
    c. On counts 3-4 inclusive the Practitioner has engaged in unsatisfactory professional conduct.
3. The Tribunal will invite submissions as to the appropriate sanction.

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[18] Though arguably they should have been prescribed by the Legal Practitioners Regulations, they have not been.

4. Costs reserved.

DATED the 11th of June 2024.

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K Clark SC

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A Burgess AM

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L Hastwell