

IN THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

ACTION NO. 5 OF 2014

IN THE MATTER OF THE LEGAL PRACTITIONERS ACT, 1981

AND

GREGORY JAMES FINLAYSON

1. By complaint dated 3 April 2014, the Legal Practitioners Conduct Board (the Board), now the Legal Profession Conduct Commissioner (the Commissioner), charged the practitioner with two counts of unprofessional conduct. The conduct the subject of both counts was said to have occurred at a directions hearing on 4 July 2011 before Federal Magistrate Simpson (now Judge Simpson) in the Federal Magistrates Court (now the Federal Circuit Court) at Adelaide.
2. The practitioner was the solicitor for the applicants in Trade Practices proceedings commenced in the Federal Magistrates Court on 7 October 2010. The respondents were represented by a Melbourne law firm.
3. Count 1 alleged that, at the hearing on 4 July 2011, the practitioner (a) failed to comply with his obligation of candour and frankness and (b) provided misleading information to Federal Magistrate Simpson, which information he knew was misleading, or in the alternative, he was reckless as to whether the information was misleading.
4. Count 2 alleged that, at the same hearing, the practitioner attempted to take advantage of his failure to comply with the obligation of candour and frankness and his misleading statements by seeking an order for costs in any event.
5. On the date of the scheduled hearing of this complaint, the Commissioner and the practitioner indicated that further discussions had occurred and agreement had been reached in relation to the matter which no longer required a hearing. The matter was listed for submissions.
6. The Commissioner did not proceed with the allegation of unprofessional conduct but rather submitted that the conduct was unsatisfactory in regard to both counts, namely, that the conduct involved a failure to meet the standard of conduct

observed by competent legal practitioners of good repute. The Commissioner did not press those parts of the counts regarding the practitioner's state of mind, namely, the allegation in count 1 that the practitioner knowingly or recklessly misled the court or the allegation in count 2 that the practitioner knowingly attempted to take advantage of the absence of the opposing party at the hearing.

7. The Commissioner's position was based largely on the practitioner's inexperience at the time of the conduct. The practitioner was admitted as a legal practitioner on 9 July 2010, having completed his law degree as a mature age student in New South Wales. Upon his admission he was employed by Grope Hamilton Lawyers as a salaried solicitor. He was employed by that firm at the time of this conduct on 4 July 2011.
8. We received a book of documents, a supplementary book of documents and an affidavit of the practitioner sworn on 2 December 2014. The Commissioner did not apply to cross-examine the practitioner.
9. The conduct the subject of both counts was admitted by the practitioner.
10. The following was not in dispute:-
 - a. On 24 November 2010, the respondents in the Trade Practices proceedings successfully applied for the applicants' Statement of Claim to be struck out. The applicants were ordered to file and serve an affidavit annexing a proposed amended statement of claim on or before 21 January 2011.
 - b. On 12 April 2011, Simpson FM reserved judgment in relation to an application by the respondents for the Court to disallow the applicants from filing the latest version of the Statement of Claim.
 - c. On or about 15 June 2011, the practitioner received an Application in a Case from the respondents for summary dismissal.
 - d. The Application in a Case was listed for hearing on 4 July 2011.
 - e. On 29 June 2011, the solicitor for the respondents sent the practitioner an email enclosing Minutes of Consent Orders regarding a timetable for the filing of affidavits, the exchange of submissions and the listing of the hearing of the Application. The email invited the practitioner to agree to the proposed orders and sign and return the Minutes to the respondents' solicitors.

- f. On 1 July 2011, the practitioner sent an email stating that 'I understand you have engaged counsel on directions. I am instructed to seek orders for production of the Share Register at the hearing and we are otherwise content with the timetable proposed'.
- g. On 4 July 2011 at 7:02am (CST), the respondent's solicitor sent an email to the practitioner regarding the hearing in the proceedings that morning, attaching amended Minutes of Consent Orders. He wrote 'Given your clients have now foreshadowed making an application we have amended our proposed orders to incorporate this into the timetable. Can you please confirm if these are acceptable so the expense and inconvenience of an attendance in person this morning might be avoided'.
- h. On 4 July 2011 at 8:40am (CST), the respondent's solicitor rang the practitioner.
- i. On 4 July 2011 at 8:57am (CST), the respondent's solicitor sent an email to the practitioner referring to their telephone conversation and wrote 'As discussed, we are in agreement as to the proposed orders I sent this morning but you proposed to attend Court to arrange a convenient date for the hearing with the Court. On this basis, we do not propose to attend but would request that you communicate to the Court that Mr Abbott is available on Friday only as he is in a trial. If Friday is not convenient we intent to brief Mr Robertson SC. We are informed that his available dates are as follows.....Obviously it is a matter for His Honour as to the date he fixes, but we would be grateful if these dates could be brought to the Court's attention'. The practitioner did not receive or read this email before leaving for court.
- j. The practitioner spoke to counsel who he had briefed in the matter twice that morning. First, as he was arriving at the office that day. Second, on his way to court.
- k. On 4 July 2011 at about 9.41pm (CST), the practitioner appeared before Federal Magistrate Simpson at the hearing. There was no appearance for the Respondent.

11. At the hearing on 4 July 2011,

- a. the practitioner advised Simpson FM that he had received a telephone call from solicitors for the applicants to 'tell me they've not able to be here this morning'. Simpson FM then said 'They're not able to be here. I find that amazing'. The practitioner agreed. After a brief exchange about the name of the firm acting for the respondents, Simpson FM then said 'Well, if they can't be here, they should have a barrister here to appear on their behalf...it's their application'. The practitioner agreed.
- b. In response to the question 'Why shouldn't I just strike out the application?', the practitioner stated that 'they have asked me to ask your Honour for a timetable, but I'm in your Honour's hands'. Simpson FM asked the practitioner to pass on that it was unacceptable 'that they simply don't appear', indicating it is discourteous to the court. The practitioner said he was 'in the position where they have simply told me that they would like a timetable set'. There was discussion about the timetable.
- c. Having set a timetable, Simpson FM asked the practitioner 'Nothing else?'. The practitioner made an application for 'costs of today, in any event', then 'perhaps if the costs of today be the plaintiff's costs of this application'. Simpson FM ordered 'that the respondent's costs of today be reserved'.
- d. Finally, Simpson FM raised the fact that he was working on a decision in relation to the pleadings in the matter and queried whether he should await the outcome of the application before dealing with the judgment. There was some discussion about the issue. It was determined that the decision would be postponed pending the outcome of the application.
- e. The matter was adjourned to 11 October 2011.

12. In his amended reply dated 18 November 2014 to this complaint, the practitioner

- a. stated he did not receive or read the email sent on 4 July 2011 at 8:57am before attending court;
- b. admitted that the conduct the subject of count 1 was unsatisfactory, acknowledging that
 - i. he failed to comply with his obligation of candour and frankness by failing to inform Simpson FM of the history of communications about the proposed timetable, the Minutes of Consent Orders, the position

of the absent party and the existence of a dispute between the parties regarding the production of the Share Register, but did not appreciate the nature and extent of his duties at the time;

ii. he made misleading statements when he said that the solicitors for the absent party 'have asked me to ask your Honour for a timetable, but I'm in your Honour's hands' and 'I'm in the position where they have simply told me that they would like a timetable set, and...' but did not appreciate at the time that they had the potential to be misleading; and

c. admitted that his conduct in apply for costs (count 2) was unsatisfactory, but denied he knowingly attempted to take advantage of his failure to comply with the obligation of candour and frankness and his misleading statements by seeking that order.

13. We are satisfied that the conduct the subject of both counts was unsatisfactory conduct and find the practitioner guilty accordingly. We are satisfied that the practitioner's very limited experience at the time of the conduct (one year post admission) was such that the conduct falls short of unprofessional conduct because of his lack of knowledge. We accept his submission that prior to this occasion he had never appeared at a hearing where the other party was not represented and did not appreciate his obligations.

14. Nevertheless, we are concerned about the degree to which the practitioner failed to appreciate his obligations at the time of the hearing, even for a relatively new practitioner. This is particularly in light of the fact that the practitioner has received reprimands from the Legal Practitioners Conduct Board dated 9 August 2013 and 12 May 2014 in regard to two complaints for conduct occurring in 2010 concerning a Facebook transmission, an email to a practitioner and publication of references to ongoing proceedings including derogatory and defamatory remarks about two legal practitioners.¹

15. Being recently admitted, the practitioner would have received informal supervision to varying degrees from his employers. Having received two reprimands in the past,

¹ The Commissioner is currently investigating other conduct which is referred to in a judgment by Simpson FM. We have been asked by the Commissioner not to await the outcome of that investigation in order to avoid delay in imposing the supervision sought by the Commissioner. We agree to do so for that reason and have not taken that matter into account.

we are of the view that supervision, formalised as a condition of his practising certificate, is now required. This is also the view of the Commissioner and the practitioner. Draft orders were provided.

16. The practitioner is currently a sole practitioner. He set up on his own in April 2013. He left his employment with Grope Hamilton Lawyers in August 2011. He was employed by Mr Allen Burttt until April 2013 when he set up his own practice. He currently practises out of Mr Burttt's premises.
17. Having been the practitioner's employer, Mr Burttt has informally supervised the practitioner in the past. We have been advised by counsel for the practitioner, Mr Griffin QC, that Mr Burttt has been made aware of the current matter and consents to the draft orders regarding supervision.
18. Mr Griffin also submitted that the practitioner voluntarily undertook 10 points of ethics last year even though the rules regarding Continuing Professional Development require only 1 point to be obtained in regard to ethics. We are of the view that this should continue. An order to that effect was not opposed by the practitioner.
19. We make the following orders pursuant to section 82(6)(a) of the *Legal Practitioners Act, 1981* (SA) (the Act) by consent:-

1. The Practitioner is reprimanded pursuant to section 82(6)(a)(i) of the Act.
2. With the consent of the Practitioner, the following conditions relating to the practitioner's legal practice are imposed on his practising certificate pursuant to section 82(6)(a)(iii)(A) of the Act:
 - 2.1. For the period of two years commencing on 12 January 2015 and ending on 12 January 2017 ("the Supervision Period") the Practitioner may practise the profession of the law only if under the supervision of a legal practitioner of not less than 10 years post admission experience ("the Supervisor").
 - 2.2. Until further order the Supervisor will be Allen Burttt, a legal practitioner in the State of South Australia.
 - 2.3. The Practitioner will notify the Legal Profession Conduct Commissioner ("the Commissioner") and the Tribunal within seven (7) days of the Practitioner becoming aware that the Supervisor is unable or unwilling to continue in the role of Supervisor. In those circumstances the Practitioner must nominate an alternative Supervisor for consideration by the Commissioner, and any replacement is to be authorised by the Tribunal.
 - 2.4. The Practitioner will pay the costs of the Supervisor in relation to the supervision of the Practitioner's practice.

- 2.5. The Practitioner will within seven (7) days of the date of this Order provide written notification to existing clients of the Practitioner's practice, or of any legal practice in which the Practitioner is engaged as a legal practitioner, of the following matters:-
 - 2.5.1. the terms of this Order; and
 - 2.5.2. that client confidentiality and legal professional privilege will be strictly maintained.
- 2.6. The Practitioner will, at the commencement of any new retainer with a client during the Supervision Period, whether a client of the Practitioner's practice or of any other practice in which the Practitioner is or may be engaged as a legal practitioner, provide notification of the following matters:-
 - 2.6.1. the terms of this Order;
 - 2.6.2. the name of the Supervisor; and
 - 2.6.3. that client confidentiality and legal professional privilege will be strictly maintained.
- 2.7. The Practitioner will request each client referred to at paragraphs 2.5 and 2.6 above to provide written acknowledgement of the notification given in accordance with paragraphs 2.5 or 2.6 together with their written consent for the Practitioner's file in relation to the client's matter to be viewed by the Supervisor for the purposes of supervision.
- 2.8. The Practitioner will allow unrestricted access by the Supervisor to the Practitioner's diary and/or electronic calendar, to all client files and records of the Practitioner's practice and to any client files of any other legal practice upon which the Practitioner is or may be engaged.
- 2.9. The Practitioner will meet with the Supervisor at intervals of not less than once each calendar month, or more frequently should the Supervisor determine in his sole discretion that that is necessary, save that the Practitioner shall not be in breach of these conditions if the Practitioner and/or the Supervisor are absent from their respective practices on a period of leave. The first of such meetings is to take place within fourteen (14) days of the date of this Order.
- 2.10. The Practitioner, in addition to the requirement at paragraph 2.9 above, and save for hearings listed on short notice or where it is otherwise impracticable to do so, will meet or consult with the Supervisor prior to the Practitioner appearing before any Court or Tribunal as counsel in relation to a client matter and will comply with any reasonable direction of the Supervisor in relation to the Court or Tribunal appearance.
- 2.11. Prior to the first meeting required by the terms of paragraph 2.9 above the Practitioner will prepare and provide to the Supervisor a written summary of all current client matters involving litigation or anticipated litigation before a Court or Tribunal ("Client Summary") including but not limited to the following for each client:-
 - 2.11.1. client name;
 - 2.11.2. client reference;

- 2.11.3. a brief description of the nature of the matter;
 - 2.11.4. date and detail of the last action by the Practitioner on the file;
 - 2.11.5. provision for the Supervisor to note or make comment to indicate when specific matters are discussed and whether the Practitioner's file has been sighted; and
 - 2.11.6. any other matter that is reasonably required by the Supervisor.
- 2.12. The Practitioner must update the Client Summary referred to at paragraph 2.11 above, including by the addition of any new client matters, prior to the periodic meetings with the Supervisor as referred to at paragraph 2.9 above.
- 2.13. The Practitioner will provide to the Supervisor such information as the Supervisor may reasonably require in relation to the Practitioner's client matters and will respond to any enquiries made by the Supervisor as soon as is reasonably practicable.
- 2.14. At three monthly intervals during the Supervision Period the Practitioner will provide to the Commissioner, or will authorise the Supervisor to provide to the Commissioner, a report prepared by the Supervisor addressing the following:-
- 2.14.1. the Practitioner's level of cooperation with the Supervisor including his attendance at meetings and his response to the Supervisor's requests for information;
 - 2.14.2. the Practitioner's responsiveness to advice and guidance offered by the Supervisor.
 - 2.14.3. the Supervisor's opinion on whether the Practitioner has complied with his obligations as an officer of the Court;
 - 2.14.4. whether the Practitioner has provided notification to clients as required by paragraphs 2.5 and 2.6 above.
 - 2.14.5. whether the Practitioner has consulted with the Supervisor prior to each Court attendance as required by paragraph 2.10 above.
 - 2.14.6. the areas of law in which the Practitioner has conducted his legal practice during the Supervision Period.
- The first such report is to be provided to the Commissioner within three months of the date of this order.
- 2.15. By consenting to this Order the Practitioner authorises the Supervisor to respond to requests for information in relation to the Practitioner's practice that are reasonably made by the Commissioner.
- 2.16. By consenting to this Order the Practitioner authorises the Supervisor to report immediately to the Commissioner any matter of concern that the Supervisor may have in relation to:-
- 2.16.1. the Practitioner;
 - 2.16.2. the Practitioner's conduct of his legal practice;
 - 2.16.3. the Practitioner's compliance or non-compliance with these Orders.
- 2.17. The Practitioner will notify the Commissioner and the Tribunal in writing within seven (7) days if the Practitioner ceases sole practice and/or

commences employment as an employed practitioner and/or ceases legal practice.

2.18. By consenting to this Order the Practitioner authorises the Commissioner to provide to the Supervisor copies of any complaints received by the Commissioner about the Practitioner's conduct during the Supervision Period, and any information or material obtained by the Commissioner in the course of any investigation by the Commissioner into the Practitioner's conduct.

2.19. During the Supervision Period the Practitioner will not conduct or engage in legal practice other than in accordance with these Orders.

3. In regard to his Continuing Professional Development, pursuant to section 82(6)(a)(iii)(B), the practitioner must complete a total of 8 points for Practical Legal Ethics during the Supervision Period. This is in addition to Mandatory Continuing Professional Development requirements.
4. The Practitioner will pay to the Commissioner the costs of the Legal Practitioners Conduct Board and of the Commissioner in relation to these proceedings, such costs to be agreed or subject to adjudication before the Supreme Court.

DATED 8 JANUARY 2015



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Liesl Chapman SC



Pam McEwin



Greg Holland