

**LEGAL PROFESSION BOARD OF TASMANIA**

No. 02/2017

**COMPLAINANT**

**Complainant**

**-AND-**

**A PRACTITIONER**

**Legal Practitioner**

**DECISION AND REASONS FOR DECISION**

**Decision**

1. The complaint is dismissed.

**Background**

2. The Complainant was represented by the legal practice for his workers compensation claim from on or about 19 November 2012 until on or about 18 November 2013. The Complainant was advised that the work on his matter would be done collectively: a more junior solicitor doing the day to day work; and the Practitioner, a senior lawyer, as supervisor. The retainer was what is known as a 'no-win-no-fee' retainer.
3. The Complainant had been given notice that his weekly workers compensation payments would be terminated in October 2012. The legal practice referred the termination of the Complainant's weekly payments to the Workers Compensation and Rehabilitation Tribunal ('the Tribunal') for determination, sought an expert medical opinion, appeared on the Complainant's behalf at a conciliation conference and sought an opinion from counsel.
4. The Complainant was independently negotiating with the Fund ('Fund') with regard to incapacity benefits during the period in which he retained the legal practice for his workers compensation matter.

5. The Tribunal referral of the Complainant's weekly workers compensation payments did not go to hearing. Prior to and at the conciliation conference the Practitioner advised the Complainant that his chances of success at hearing were low and that the legal practice was against taking the matter to hearing. The Practitioner indicated that in his view, if successful, the Complainant would only achieve an amount significantly less than the range of figures he had previously been advised by the junior solicitor. The Complainant was unhappy with the Practitioner's advice. Counsel's opinion was sought. Counsel's opinion dated 16 May 2013 ('the second advice') advised the Complainant to make an offer to settle in a range that was again less than the advice he had previously received. The legal practice in turn advised the Complainant that they were not willing to take the matter to hearing and advised him to settle.
6. At the time the Complainant ceased instructing the legal practice, agreement to settle the Complainant's workers compensation referral and all other entitlements under the legislation had been reached, but a dispute had arisen between the Complainant and the employer with regard to the wording of a recital in the Deed of Release.
7. The Complainant sought legal advice elsewhere. The legal practice provided one of his subsequent legal representatives with advice from counsel relating to the Complainant's matter dated 8 May 2013 ('the first advice'). The Complainant had not been provided with the first advice before.

### **Reasons for Decision**

8. The Complainant lodged his written complaint about the Practitioner on 18 May 2016.
9. In his complaint the Complainant alleged that the Practitioner:
  - A. *Following the conciliation conference, provided advice to the Complainant, being advice not to proceed to a hearing of the Complainant's workers compensation matter and to settle the claim for between \$15,000.00 - \$25,000.00, when such advice, and or the enquiries made in order to furnish such advice, fell short of the standard of competence and diligence that the Complainant was entitled to expect because:*

- i. *The First Advice indicated that there was a sufficient foundation to contest the s.86 (1) (c) termination of payments and that Counsel's advice was "generally positive"; and/or;*
  - ii. *The advice in the letter from the junior practitioner dated 16 May 2013 and the Second Advice was not applicable to the Complainant's circumstances because it was based upon the premise that the Complainant was receiving a Fund pension when the Complainant was not receiving a pension from the Fund on or about 16 May 2013 and following, but had accepted the payment of a lump sum benefit.*
- B. *In or around May 2013, failed to provide a copy of Counsel's advice dated 8 May 2013 to the Complainant or inform him of the nature and substance of that advice.*
  - C. *Failed to adequately advise the Complainant about the content of the Deed of Release prior to settlement.*
  - D. *On or around 14 October 2013, contrary to the Complainant's instructions, provided to the Crown Solicitor for approval a revised wording of recital "B" of the proposed Deed of Release in circumstances where the Complainant had not provided his agreement to the said revised wording, but rather on or about 23 August 2013, had agreed to different wording".*
  - E. *Provided the Complainant with misleading information about the Counsel's opinion as to his matter when Counsel had not considered the brief on your matter.*

Conduct occurring more than three years from the date of lodging the complaint.

10. There are restrictions upon the Board's capacity to deal with complaints about conduct occurring more than three years before the date of the complaint. These restrictions are the consequence of section 428 of the *Legal Profession Act 2007* ("the Act"):

*"428. Complaints made more than 3 years after conduct concerned*

- 1. *A complaint may be made about conduct of an Australian legal practitioner irrespective of when the conduct is alleged to have occurred.*
- 2. *However, a complaint cannot be dealt with (otherwise than to dismiss it) if the complaint is made more than 3 years after the conduct is alleged to have occurred, unless the Board determines that –*
  - a. *it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; and*
  - b. *the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.*
- 3. *A determination made under subsection (2) is final and cannot be challenged in any proceedings by the complainant or the Australian legal practitioner concerned."*

11. Parts of allegation A, allegation B and allegation E refer to conduct occurring more than three years from the date that the complaint was received and therefore the provisions of section 428 come into play. It follows that, unless the Board makes the determinations referred to in subsection (2) of s 428, the only way it can deal with the complaint is to dismiss it. In particular, only allegations of professional misconduct can be dealt with. Professional misconduct is defined in section 421 the Act:

**“s421. Professional misconduct**

1. For the purposes of this Act –

**"professional misconduct" includes –**

(a) *unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*

(b) *conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*

2. *For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.”*

12. At common law, professional misconduct is conduct which would be reasonably regarded as disgraceful or dishonourable by a practitioner’s brethren of good repute and competency<sup>1</sup>. Conduct which meets the common law test also amounts to professional misconduct for the purposes of the Act.

13. The Board considers that the conduct alleged by the Complainant in allegations A, B and E is not conduct that could amount to professional misconduct. Accordingly, pursuant to section 428 of the Act, the Board has no option but to dismiss these allegations (but for the conduct referred to in allegation A occurring within three years of the complaint being made). There is no need to consider the other pre-conditions referred to in section 428(2).

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<sup>1</sup> *Law Society of Tasmania v Turner and Kench* [2001] TASSC 129 [44]

Allegation A (restricted to conduct occurring within three years of 18 May 2016)

14. The Board had regard to all the material provided by the Complainant relating to this allegation, including the Practitioner's letters of advice, counsel's first advice and second advice (dated 16 May 2013) and advice that the Complainant received from his subsequent legal advisors. As required, the Board considered the submissions made by the Practitioner in response to the complaint. The Board also had regard to material obtained during the investigation from the legal practice's file leading up to the Conciliation conference and until the agreement to settle was reached, including correspondence, file notes, medical reports and material in the counsel brief prepared by the Practitioner.
15. The Complainant was influenced to settle his workers compensation claim and entitlements under the Act by reason of counsel's second advice. The Board notes that counsel's second advice that the risk of proceeding to hearing was substantial and unwarranted was premised upon a conclusion that a benefit the Complainant had accepted from the Fund would be reduced if his worker compensation weekly payments were resumed. Relying on the letter from the Fund dated 14 July 2014 provided by the Complainant, the Board accepts that this conclusion was not applicable in the circumstances of the Complainant because the Complainant had accepted his permanent incapacity benefit as a lump sum and not as a pension.
16. The Practitioner has indicated that he did not examine the facts behind counsel's second advice, but agreed in general that a commercial settlement was in the Complainant's best interests. The advice was sent to the Complainant along with a letter indicating that the legal practice suggested an offer in the range suggested by counsel plus costs and:  
  
*'If reaching a settlement is unsuccessful then we would recommend that the action be dismissed and each party walk away with their own costs. In your circumstances you would not be required to repay [the legal practice] for our work or for the disbursements incurred on your file due to the nature of your retainer agreement'*
17. The Complainant spoke with the junior practitioner at length. It is clear from the file note of this conversation that he was upset. He did not provide instructions to make

an offer in the terms advised. A few days passed where there appear to have been difficulties contacting him. By email dated 21 May 2013, the Complainant asked for a layman's explanation on how he could be unsuccessful and how he could be liable for costs if he goes to hearing on a no-win-no-fee basis. The Practitioner sent the Complainant an email dated 22 May 2013 saying that while they had recommended an offer be made between \$15 – 20,000 he thought the defendants were not likely to accept any offer and the best thing to hope for is each party bearing its own costs and dismissal of the application. The Practitioner said that '*if you decide that you do not want to accept our advice we will withdraw from representing you and advise the Tribunal that you need an adjournment to seek alternative advice*'.

18. Despite counsel's second advice being based on an incorrect assumption, and the Practitioner failing to examine the facts behind the advice, the Board considers that there is no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct as a consequence of any reliance upon and/or adoption of that advice by the Practitioner. The definition of professional misconduct has already been cited in this decision. The definition of unsatisfactory professional conduct in the Act is as follows:

**420. Unsatisfactory professional conduct**

*For the purposes of this Act –*

**unsatisfactory professional conduct** includes conduct of an Australian legal practitioner occurring 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.

19. The legislative definitions are inclusive of the common law conduct definitions. The common law definition of unprofessional conduct was stated in *Law Society of Tasmania v Turner and Kench* [2001] TASSC 129 [49] as follows:

*"in this State, unprofessional conduct extends to conduct which might reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession who are of good repute and competency (the so called common law test)"*

20. The material in the file supports that the Practitioner had been advising the Complainant that his chances of success at hearing were poor prior to receiving counsel's advice:

- The file note of the attendance prior to the conciliation conference (dated 4 April 2013) says '*[The Practitioner] is concerned and will advise to settle for whatever we can get*' and '*would be reluctant to go to hearing*'.
- During discussions on the day of the conciliation conference, it was suggested that if a particular barrister would provide advice on the matter and would agree to take the matter to hearing on a no-win-no-fee basis then the legal practice would do so. The Complainant agreed to this course. The barrister agreed to have a look at the brief in order to determine whether or not the matter could be taken on speculatively. The junior solicitor spoke with the barrister. The file note of this conversation includes a note that the barrister said the matter was risky and s/he was not in a position to provide written advice, but could refer the file to a second barrister (it was the second barrister who provided the first and second advices).
- The legal practice's file indicates that the Practitioner again spoke to the Complainant about the risks of going to hearing and that '*he should consider trying to settle for any amount he can get*' on 29 April 2013. This was a 25 minute conversation.

21. In general, a solicitor is entitled to rely upon the advice of counsel properly instructed<sup>2</sup>. In this case, it was the junior solicitor, not the Practitioner, who prepared the brief for counsel and who communicated with counsel leading up to the provision of the first and second advice. The incorrect assumption in counsel's second advice related to the impact of the resumption of workers compensation weekly payments on the Complainant's Fund permanent incapacity benefit. The Practitioner was not retained to advise the Complainant about his Fund entitlements and had informed the Complainant, in summary, that he did not give advice about such matters,

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<sup>2</sup> *Moy v Pettman Smith (a firm)* [2005] 1 WLR 581

although as the legal practice felt his claim was risky, accepting whatever the Fund were offering might be beneficial. The Board considers that it was reasonable to rely on counsel's advice as to Fund matters in these circumstances.

22. The Board notes that the Complainant's workers compensation referral was not straightforward. There were differing medical opinions as to the Complainant's diagnosis and the cause of his condition. The Complainant had suffered two injuries pre-dating his difficulties in the workplace and which arguably caused or contributed to his difficulties in the workplace. The estimation of chances of success at hearing in such cases is a matter about which the opinions of appropriately competent and diligent solicitors might reasonably differ.
23. The Board is satisfied that there is no likelihood that the Practitioner's conduct from 18 May 2013 onwards can be proved to have fallen below the requisite standard in the circumstances. The Board notes that, in any disciplinary proceeding flowing from a complaint, it carries the burden of proving unsatisfactory professional conduct or professional misconduct<sup>3</sup> to what is known as the *Briginshaw* standard, or the standard of 'reasonable satisfaction'<sup>4</sup>.

Allegation C: failure to adequately advise the Complainant about the Deed of Release prior to settlement.

24. The Practitioner was not handling the day to day carriage of the file and was not involved with the provision of any information to the Complainant about the Deed of Release. In addition to this, the Deed of Release was not drafted until after settlement and was drafted by the solicitor for the employer. The Board considers that there is no substance to the allegation that the Practitioner failed to adequately advise the Complainant about the Deed of Release prior to settlement and accordingly dismisses this allegation pursuant to section 433(1)(a) of the Act.

Allegation D: provided revised wording of the Deed of Release contrary to instructions on or about 14 October 2013

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<sup>3</sup> *Southern Law Society v Westbrook* (1910) 10 CLR 609 per Isaacs J, at 627

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

25. The Practitioner was not involved with drafting or negotiating the wording of recital B in the Deed of Release. The Board therefore considers that there is no substance to this allegation and accordingly dismisses it pursuant to section 433(1)(a) of the Act.

### **Conclusion**

26. The circumstances of his workers compensation claim and the dispute about the wording of the Deed of Release have been unfortunate for the Complainant. The Complainant was provided with variant advice from his two legal advisors at the legal practice, some of which was unwelcome to him and which he found difficult to accept. He changed lawyers and then discovered that the counsel's advice he had relied upon when reluctantly agreeing to settle his matter was incorrect, and there had been earlier more positive advice which he had not received. He also received information from other lawyers which differed or appeared to contradict advice and information he had been given by the legal practice. While confident of its decision, the Board wishes to acknowledge that this complaint has not been an easy matter to consider.

27. For the reasons outlined above the complaint is dismissed.

Decision dated the 12<sup>th</sup> day of January, 2017

Legal Profession Board of Tasmania

Per:



Board Member

*Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.*

***Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.***

***Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the Legal Profession (Disciplinary Tribunal) Rules 2010 (see <http://www.lpbt.com.au/policy-and-guidelines/>).***

*The contact details of the relevant bodies are as follows:*

*Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860*

*Supreme Court, General Enquiries: 1300 664 608*