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| Case Name: | Council of the Law Society of NSW v Berger (No. 2) |
| Medium Neutral Citation: | [2018] NSWCATOD 4 |
| Hearing Date(s): | 22 November 2017 |
| Date of Orders: | 5 January 2018 |
| Decision Date: | 5 January 2018 |
| Jurisdiction: | Occupational Division |
| Before: | Hon G Mullane ADCJ (Principal Member) M Riordan (Senior Member) E Hayes (General Member ) |
| Decision: | 1. The name of the Respondent Victor Berger is to be removed from the roll of local lawyers.   2. The respondent must pay the costs of the applicant of or incidental to both the proceedings number 2015/00383879 and 2016/00378630 as agreed or as assessed. |
| Catchwords: | Solicitor – Professional Misconduct – Removal from Roll |
| Legislation Cited: | Legal Profession Act 2004 |
| Category: | Principal judgment |
| Parties: | Council of the Law Society of NSW (Applicant) Victor Berger (Respondent) |
| Representation: | Counsel: Mr G Johnson (Applicant) Mr D Lloyd SC (Respondent)   Solicitors: Law Society of NSW (Applicant) Remington & Co (Respondent ) |
| File Number(s): | 2015/00383879 & 2016/00378630 |

reasons for decision

Introduction

1. The Stage 1 decision in these proceedings is reported as *Law Society of NSW v Berger (No. 1)* at [2017] NSWCATOD 137 (21 September 2017).
2. In that decision the Tribunal identified extensive incidents of unsatisfactory professional conduct by the respondent solicitor and also incidents of professional misconduct by him.
3. This was the Stage 2 hearing on 22 November 2017 to determine what the outcome of the proceedings should be.

Antecedents

1. The practitioner has been the subject of 4 earlier complaints to the Legal Services Commissioner that had been investigated and found proved.

2007

1. Mrs S was a single woman 84 years of age. She had been suffering from frontal lobe Alzheimer’s dementia. She had been diagnosed with suffering dementia and she had a mastectomy about 12 years before. The dementia was gradually worsening and had compromised her ability to make decisions and judgments for herself.
2. In May 2007 Mrs S suffered a stroke. She was admitted to the Prince of Wales Hospital for treatment. The stroke worsened her dementia. She was also suffering from hypothyroidism.
3. Mrs S was in the Intensive Care Ward at the Prince of Wales Hospital. Her daughter, AS, sought to have Mrs S execute a Power of Attorney appointing Ms AS as attorney for Mrs S. On 30 May 2007 Ms AS was at the hospital trying to organise for Mrs S to sign a Power of Attorney. She asked the social worker to ask the medical team to certify that Mrs S had capacity to make informed decisions. That request was conveyed to a resident medical officer but no such report or certificate was provided.
4. The nursing staff recorded in their notes on 26 May 2007:-

“Daughter [AS] with solicitor to have Power of Attorney signed. Nursing staff have explained to solicitor that patient is quite confused and it may be more appropriate to speak to medical staff in regards to this matter prior to completing form”.

1. The solicitor referred to was the solicitor for Mrs S, Mr Rogers. He apparently did not return to the hospital. On 28 May 2007 the nursing records include an entry:-

“Family have been in to visit and requesting to speak to medical staff tomorrow. This is in regards patient’s confusion and if she is capable of signing a Power of Attorney form. I have asked them to call tomorrow A.M. to make a suitable appointment.”

1. There was also another entry on that date:-

“…. daughter [A.S.] with solicitor to have Power of Attorney signed. Nursing staff have explained to solicitor that patient is quite confused and it may be more appropriate to speak to medical staff in regards this matter prior to completing form.”

1. It appears that this was a reference to the same incident.
2. There is then a further nursing record of 30 May 2007:-

“[A.S.] is trying to organise Power of Attorney for self and wants med team to state [Mrs S] has the capacity to make informed decisions, discussed about cognitive status and capacity to make decisions. Handed over information about Guardianship Tribunal. Informed RMO [AS] request for report stating [Mrs S’s] cognitive status….”

1. The practitioner was consulted by AS by telephone on 1 June 2007. He had not previously met her. He took instructions from her by telephone for a Power of Attorney and Appointment of an Enduring Guardian to be executed by Mrs S and appointing AS as attorney and as enduring guardian. The next day he attended with AS on Mrs S in the Intensive Care Unit of the Prince of Wales Hospital. He brought the forms with him.
2. The practitioner did not consult any of the medical staff about whether Mrs S had the capacity to validly execute the documents, but particularly the Power of Attorney. He relied upon his own assessment of her capacity. He does not have any medical qualification or training. Mrs S executed the Power of Attorney appointing AS as her attorney. AS was present throughout.
3. Mrs S had assets worth more than $10 million. AS used the power of attorney in 2007 to procure from those assets funds of $1,000,000 to contribute to her own superannuation and also sold millions of dollars’ worth of shares of Mrs S.
4. The Guardianship Tribunal on 9 April 2008 found that Mrs S did not have the required capacity to execute the Power of Attorney and that the document was a nullity. A complaint by another family member about the practitioner’s conduct in having Mrs S execute the Power of Attorney was made to the Legal Services Commissioner and the outcome was a caution by the Commissioner to the practitioner because he “took instructions re Power of Attorney when client lacked capacity”.

February 2009

1. As a result of a complaint by Mr & Mrs Adzioksi to the Legal Services Commissioner that year, there was an investigation and the Commissioner was satisfied that the practitioner had failed to make proper costs disclosures to the clients. The Legal Services Commissioner in February notified the practitioner that because the complaint *“was the first such complaint that had come to his notice*”, he proposed “*that the complaint be resolved by the practitioner giving an undertaking to comply with his statutory obligations to disclose the basis of his costs in all matters in which he is retained*”. The practitioner gave that undertaking on 18 March 2009.

April 2009

1. There was a complaint to the Legal Services Commissioner of “Excessive charging under *pro bono* Scheme”. It was established and is recorded as having been dealt with by “costs warning”.

August 2011

1. There was a further complaint to the Legal Services Commissioner alleging the practitioner had failed to comply with the costs disclosure requirements of Section 316 of the *Legal Profession Act 2004* (“the Act”). The investigation resulted in the practitioner being given a caution on 23 April 2012 under section 540(2)(a) of the Act for “*failure to disclose, in writing a substantial change to an estimate given in the initial Costs Agreement with the client, in contravention of section 316 of the Legal Profession Act 2004.”*

Other Complaints

1. In addition there is a list of more than 70 complaints received by the Legal Services Commissioner in respect of the practitioner in the period of 17 years from 1996 – 2013. Almost all of those complaints were not formally established. Some of them were dismissed, some were withdrawn, some were resolved by the Office of the Legal Services Commissioner. The inference is that in the period of 1996 – 2013 the practitioner was aware that there were extensive complaints. That is relevant, because it is likely that the practitioner would want to minimise complaints against him, particularly complaints that are made to the Legal Services Commissioner.

Character Evidence

1. In the Stage 2 hearing the practitioner relied upon 12 character witnesses. The witnesses include a Member of the Federal Parliament, two Rabbis, a Senior Counsel, businessmen, a company chairman, a chairman of a public company, a solicitor and a retired Supreme Court Judge.
2. All of the 12 witnesses relied upon had sworn two (2) affidavits; one (1) in August 2017 and the other in October 2017. The first affidavit included details of their past association with the practitioner and opinion as to his character. Some of them had known the practitioner for more than 40 years. Most had known him for a decade or more. All of them found him to be generous, sociable and honest and a valuable member of the community. He has an extensive involvement with charities, professional organisations and his church. The character witnesses based their opinions as to his honesty and integrity on their experiences of him. A couple of them had been clients of the practitioner.
3. Each of the witnesses also swore a second affidavit in October, which in effect said that they had read the reasons and the Tribunal’s findings in the Stage 1 hearing dated 21 September 2017 and that the contents of those findings did not change their earlier evidence.
4. There is no character evidence from any solicitor who has been a partner of the practitioner or worked in the same practice with him.
5. The clients who were found to be victims of the practitioner’s misconduct and unsatisfactory professional conduct were not Rabbis; they were not members of parliament, judges, Senior Counsel or prominent members of the community. Some of them were old; some were frail; some had cognitive decline; and some lacked the support of family and friends. The victims of his unsatisfactory professional conduct and his professional misconduct belonged to a different group to the character witnesses whose evidence was that they had known him only as a man of integrity and they were confident that he would not do anything that he recognised to be dishonest.
6. The Tribunal has concluded that the professional misconduct and the unsatisfactory professional conduct were aspects of the practitioner’s behaviour that he concealed from most of the people he mixed with in the community and in his charitable, professional and religious activities.

The Seriousness of the Complaints Found Proved Against the Practitioner

1. In the Tribunal’s Stage 1 decision, there is extensive detail of the complaints that were proved. In particular, the practitioner was found to have repeatedly failed to comply with the legislative requirements in relation to disclosure of costs to clients. He denied clients disclosures, including estimates of total legal costs.
2. There was also the incident of gross overcharging where he charged a client at solicitor’s rates for work which was not legal work and for which the client had not agreed to pay, and for which he had made no disclosure as to likely total costs or rates.
3. There were also numerous instances where he misappropriated trust monies of clients or dealt with client’s money without authority. There were numerous breaches of the legislative rules for trust money.
4. There was also the incident where he was the stakeholder of a deposit of $57,500.00 from Mr and Mrs H as deposit for the purchase by them of a property from his company. He took the deposit without notice to Mr and Mrs H, in breach of the conditions of the contract and used it for his own purposes.
5. Numerous instances of misappropriation were proved and the proved grounds included dishonest and fraudulent behaviour, which are extensive and extremely serious in nature. Standing alone, they would justify an order for the practitioner’s name to be removed from the local roll of lawyers.
6. The Tribunal considers it relevant in determining the final orders that the practitioner has not repaid any part of the $57,500.00 deposit monies to Mr and Mrs H. Also, in his affidavit sworn 22 November 2017, he deposed that he had not repaid any of the money that he took in 2016 from the trust funds of the estate of Mrs N in purported payment of his costs.

The Practitioner’s Evidence

1. The practitioner relied upon an affidavit of 20 November 2017 which was filed the day before the Stage 2 hearing. He acknowledged the findings of the Tribunal “*reveal many failings on my part to meet my professional obligations*”. But he said: “*I do not believe that I have engaged in dishonesty…*.”.
2. The practitioner deposed to the effect that if his name was not removed from the roll of local lawyers, “*I would be prepared to undertake attend (sic) whatever course in Ethics, Costs Disclosures and Costs Agreements, Professional Conduct Courses as may be required*”. He said that he had attended a Legal Practice Management Course in 2013 and that the topics covered included “Ethics and Professional Responsibility”, “Trust Account Pitfalls and Problems” and “Trust Account Rules and Practice”.
3. In addition, the practitioner deposed if a condition were imposed on his Practising Certificate to the effect that he should not operate a trust account or that he should have a mentor, “*I would accept this and would be prepared to attend weekly meetings with a mentor and file reviews at regular intervals. I would be prepared to meet the fees of that mentor*”.
4. The practitioner deposed that the findings revealed “*serious problems in particular to my attitude towards costs disclosures to clients*”. He said that if he was permitted to continue practising he would consent to a condition on his Practising Certificate that required him to undergo regular audits of his practice to ensure that costs disclosures were made.
5. The practitioner also alleged that he suffers from significant financial problems. He deposed that since his Practising Certificate was suspended in October 2013, he and his wife and their Family Trust have had to sell about 12 properties (including their home) because of financial pressures and that the proceeds have been used to satisfy personal loans, caveats, mortgages and legal fees. He deposed that the funds “*of about $170,000.00”* that he misappropriated from the estate of Mrs N have been used to “*pay various debts and for the expenses of recovery of including legal fees I incurred in such proceedings*”.
6. The practitioner also alleged that he has not enjoyed good health since his Practising Certificate was suspended and that he has since undergone cardiac surgery and a hip replacement and experienced “*great stress*” as a result of the suspension and the loss of his income from working as a solicitor. The practitioner also deposed:

28. I am deeply apologetic for all of the facts and circumstances relating to your conclusion. You have revealed to me a side of my character I have not realised and must accept the possibility of same even though I have absolutely tried to do and believed I had only honest intentions.

29. I accept that:-

I have made errors of judgment;

I have not been tough enough upon myself; and

I have not been tough enough to ensure that what I am bound to do has been achieved.”

Conclusions – Orders under Section 562 of the Act

1. The findings in the reasons of 21 September 2017 and the evidence that the Tribunal has discussed in this decision establish that during the period from 2007 until October 2013 the practitioner repeatedly failed to comply with his costs disclosure obligations under the Act. The Tribunal regards it as significant that the practitioner persisted in this conduct over a lengthy period and in circumstances where he was not only aware of complaints made against him by his clients regarding costs matters, but he had on more than one occasion given an undertaking to the Legal Services Commissioner that he would comply with the costs disclosure obligations and he had been cautioned for overcharging and for his failure to make proper costs disclosures. He also engaged in an extremely serious instance of overcharging, numerous incidents of failure to comply with the laws governing the handling of trust money and also misappropriated trust money.
2. In view of the practitioner’s entrenched inadequacies regarding costs disclosures and his conduct that has been dishonest and sometimes fraudulent, as well as his repeated failures to comply with the laws regarding the management of trust money and his continuing denial that any of the conduct that has been found to have occurred is “dishonest”, the Tribunal is not satisfied that he is currently fit to practice as a legal practitioner.
3. The practitioner has not demonstrated any convincing insight into the nature of his conduct and he has not expressed any real remorse for any of his actions. There is no evidence that he has paid compensation to any victim of his unsatisfactory professional conduct and professional misconduct.
4. The Tribunal notes that during the Stage 2 hearing his Counsel informed the Tribunal that the practitioner intended to lodge an appeal to the Court of Appeal in relation to the Stage 1 decision. While the stated intention to appeal may explain the absence of any evidence of this nature, the Tribunal is faced with a scenario in which there is no evidence that the Tribunal is able to rely upon in order to find that the practitioner has learned and changed so much from his mistakes and his suspension that he is not likely to engage in further professional misconduct or unsatisfactory professional conduct if he is permitted to resume legal practice.
5. In other words, there is no evidence before the Tribunal that supports a finding that the practitioner is not likely to remain permanently unfit to practice as a legal practitioner. For this reason, the Tribunal is satisfied that the protection of the public requires the Tribunal to make an order that the practitioner’s name be removed from the roll of local lawyers.

Costs

1. The Law Society seeks an order that the practitioner pay its costs of these proceedings.
2. As the Tribunal has made findings of professional misconduct and unsatisfactory professional conduct against the practitioner, the Tribunal is bound by Schedule 5, Cl 23 of the *Civil and Administrative Tribunal Act 2013 (“the CAT Act”)* which provides*,* relevantly:

23   Costs consequent of adverse conduct findings

(1) Despite section 60 of this Act, the Tribunal must make orders requiring a respondent lawyer whom it has found to have engaged in unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Commissioner, a Council and the complainant), unless the Tribunal is satisfied that exceptional circumstances exist.

…

(6) The Tribunal may fix the amount of costs itself or order that the amount of costs be assessed by a costs assessor under the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*).

(7) An order for costs may specify the terms on which costs must be paid.

1. The practitioner has not established that any exceptional circumstances exist such that he should not be ordered to pay the Law Society’s costs. The Tribunal therefore orders that he pay the Law Society’s costs of both Tribunal applications, as agreed or assessed.

Orders

1. The name of the Respondent, Victor Berger, is to be removed from the roll of local lawyers.
2. The respondent must pay the costs of the applicant of or incidental to both the proceedings number 2015/00383879 and 2016/00378630 as agreed or as assessed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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