

## *Legal Profession Board of Tasmania*

<b>Medium Neutral Citation:</b>	<b>COMPLAINANT v A PRACTITIONER [2017] LPBT 48</b>
<b>Considered:</b>	25 September 2017
<b>Determination date:</b>	26 September 2017
<b>Jurisdiction:</b>	Legal Profession Board, Tasmania
<b>Before:</b>	Mr. K Pitt QC (Chairman) Mr. A Mihal (Legal Member) Ms. J Paxton (Lay Member) Mr. P Dane (Lay Member)
<b>Determination:</b>	The complaint is summarily dismissed pursuant to section 433(1)(e) of the <i>Legal Profession Act 2007</i>
<b>Catchwords:</b>	<b>PROFESSIONS AND TRADES- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- Allegations of delay- failing to provide advice as to legal merits</b>
<b>Legislation:</b>	<i>Legal Profession Act (Tas) 2007</i> – ss 428(2), 433(1)(e)
<b>Category:</b>	Determination
<b>Parties:</b>	Complainant Practitioner
<b>File Number:</b>	2017/48

## REASONS FOR DETERMINATION

### Background

1. This matter comes to the Board by way of a complaint received on 5 June 2017.
2. The Complainant engaged the Practitioner in late 2008 in relation to the election of committee members to the 'the Club. Following advice from the Practitioner, the Complainant's dispute proceeded to arbitration pursuant to the constitution of the Club. That arbitration was unsuccessful, on the grounds the arbitrator did not have jurisdiction to make the award sought.
3. The Complainant made an enquiry of the Board in July 2010 in relation to a potential complaint against the Practitioner. The Complainant was provided with all of the necessary information to lodge a complaint at that time. At around the time the Complainant contacted the Board she was also in discussions with the Practitioner in relation to a reduction of her legal fees.

### The Complaint

4. The Complaint alleges the Practitioner:
  - a. Between late 2008 and mid-2011, failed to progress the Complainant's legal matter in any way; and
  - b. Between late 2008 and mid-2011, failed to provide advice as to the merits of the Complainant's legal matter having regard to the *Commercial Arbitration Act 1986* and *Associations Incorporations Act 1964*.

### Relevant legislation and the law

5. The Practitioner is an Australian Legal Practitioner within the meaning of s 6 of the *Legal Profession Act 2007* ('the Act').
6. The Complaint alleges conduct that occurred between late 2008 and mid-2011. The Complaint was received by the Board on 5 June 2017, and accordingly the entirety of the complaint is more than 6 years old. Section 428(2) of the Act provides that:

*... 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 is capable of amounting to an allegation of professional misconduct and it is in the public interest to deal with the complaint.*
7. A determination by the Board in accordance with s 428(2) is final and cannot be challenged in any proceedings by the Complainant or the Australian legal practitioner concerned.
8. Section 421 of the Act relevantly defines professional misconduct:

***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.*

9. The legislative definitions are inclusive of the common law conduct definitions. The common law conduct definitions were stated in *Law Society of Tasmania v Turner & Kench* [2001] TASSC 129 by Crawford J:

*[44] ... professional misconduct consists in behaviour on the part of a legal practitioner which would reasonably be regarded as disgraceful or dishonourable by legal practitioners of good repute and competency.*

*[49] ... 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)*

10. The distinction between professional misconduct and unsatisfactory professional conduct is important and has significant consequences. It is clear, having regard to the legislative framework which sets out the sanctions available for each type of conduct, that professional misconduct requires conduct which is substantially more grave than unsatisfactory professional conduct.
11. Before the Board could deal with those matters of complaint which occurred more than three (3) years prior to the complaint being made, it would by reason of s 428 of the Act need to determine:
- a. That it is just and fair to deal with the complaint having regard to the delay and reasons for the delay; and
  - b. That the complaint involved an allegation of professional misconduct, and
  - c. That it is in the public interest to deal with the complaint.
12. If the Board is not satisfied of all three (3) preconditions, it has no power to deal with the complaint in respect of conduct which occurred more than three (3) years prior to the date of the complaint, otherwise than to dismiss it.
13. The Complainant says that she recently became aware of a publicly available decision concerning the Practitioner which appears to allege conduct which occurred during the same timeframe in which he was acting for her.
14. The Complainant has contended that the Practitioner's actions in delaying her legal matter could amount to professional misconduct if it is not an isolated incident.
15. Noting that the Complainant contacted the Board in 2010 and was provided with information in relation to lodging a complaint about the allegations of which she now complains, the Board does not consider it just and fair to deal with the complaint having regard to the delay and lack of any good reason for that delay.
16. The Board therefore does not make a determination pursuant to section 428(2) of the Act so as to enable it to deal with this complaint concerning the Practitioner's conduct, all of which occurred more than three years prior to the date of the complaint, otherwise than to dismiss the complaint.

## DETERMINATION

The Complaint concerns conduct alleged to have occurred more than three years prior to the complaint being made, and absent a determination of the Board pursuant to section 428(2), is summarily dismissed pursuant to section 433(1)(e) of the Act as the Board does not have the power to otherwise deal with it.

Legal Profession Board of Tasmania

Per: 

Chairperson

*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*