

Legal Profession Board of Tasmania

Medium Neutral Citation: **Complainant v A Practitioner [2018]**
LPBT 50

Considered / Heard: **25 June 2018**

Determination date: **26 June 2018**

Jurisdiction: Legal Profession Board, Tasmania

Before: Mr K Pitt QC (Chairman)
Mr G Jones (Legal Member)
Mr A Mihal (Legal Member)
Mr D Lewis (Legal Member)
Ms J Paxton (Lay Member)
Mr P Dane (Lay Member)

Determination: The complaint is dismissed pursuant to section 433(1)(a) and (e) of the *Legal Profession Act 2007*.

Catchwords: **PROFESSIONS AND TRADES- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- allegations of delay in administering estate- allegations of failing to invest estate funds appropriately- allegations of conflict of interest**

Legislation: *Legal Profession Act (Tas) 2007* s 433(1)(a), s 433(1)(e)

Category: Determination

Parties: (Complainant)
(Practitioner)

File Number: 2018/50

REASONS FOR DETERMINATION

Background

1. This matter comes to the Board by way of a complaint received on 12 December 2017.
2. The information provided by the Complainant was extremely limited. Accordingly much of the available background information has been obtained from the Practitioner.
3. The Complainant's father ('the Deceased') died intestate.
4. In October 2013 the Practitioner was instructed by the Complainant and/or the Complainant's sibling. Instructions appeared to have been received sporadically.
5. The estate was complicated because of the lack of a will, and because there were step children and the Deceased was still married to the Complainant's mother when he died.
6. The only asset of the estate was a property where the Complainant's sibling lived. It appears she failed to make mortgage payments and the mortgagor foreclosed on the property and sold it.
7. The law practice acting for the mortgagor held surplus funds from the sale of \$77,905.21.
8. To the Practitioner's knowledge, the surplus funds were the only asset of the Deceased's estate. The law practice would only release the surplus funds once Letters of Administration were issued.
9. In August 2017 documents were filed with the Probate Registry to obtain Letters of Administration.
10. In mid January 2018, the surplus funds were released to the Practitioner.
11. Having paid a number of the Deceased's debts, the remainder of the money was distributed by the Practitioner in early February 2018.
12. The Practitioner stated that he provided the Complainant and her sibling with a Letters of Administration information kit about the distribution of the funds and thereafter closed his file, the Deceased's estate having been finalised.

The Complaint

13. The Complaint alleges the Practitioner:
 - A. Delayed the finalisation of the Complainant's father's estate;
 - B. Provided conflicting advice with respect to the beneficiaries and how the estate funds would be distributed;
 - C. Failed to respond to emails and phone calls;

- D. Failed to progress the Complainant's father's estate in any meaningful way for a period of 2 years;
 - E. Failed to invest the estate funds in an interest bearing account in circumstances where the funds have been in the Practitioner's trust account not earning interest for an extended period of time;
 - F. Failed to act as the Complainant instructed in circumstances where the Complainant is one of two executors of the Complainant's father's estate;
 - G. Acted from a conflict of interest due to the Practitioner's personal friendship with the Complainant's father and another friend 'Mr J'; and
 - H. Failed to account to the Complainant as executor in relation to the funds held in trust for the estate.
14. The Board has considered submissions from the Practitioner and the relevant supporting documentation. No submissions were made by the Complainant, other than in the actual complaint, despite her being given numerous opportunities to supplement her original allegations.

Relevant legislation and the law

15. The Practitioner is an Australian legal practitioner within the meaning of s 6 of the *Legal Profession Act 2007* ('the Act').
16. The Complaint alleges conduct that occurred from October 2013. The Complaint was received by the Board in December 2017, and accordingly significant parts of the complaint are more than three 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.*
17. 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.
18. Section 420 of the Act defines unsatisfactory professional conduct:
- 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. 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.*

20. 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)

21. 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.

22. 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 482 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.

23. 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.

24. On the information available to the Board, noting the broad nature of the allegations, the conduct referred to in those parts of the complaint which may have occurred between October 2013 and December 2014 could not reasonably amount to professional misconduct either within the definition of the term under section 421 of the Act or at common law.
25. The Board therefore does not make a determination pursuant to section 428(2) of the Act so as to enable it to deal with those parts of the complaint concerning the Practitioner's conduct, which occurred more than three years prior to the date of the complaint, otherwise than to dismiss the complaint in so far as it alleges conduct earlier than 17 December 2014.
26. The remainder of the complaint has been addressed by the Practitioner. As the Deceased died intestate, the Complainant was not an executor, although there is no dispute that she or her sibling ultimately provided necessary instructions to the Practitioner. Noting the complications to the estate due to the mortgagor sale, and that funds were not received until January 2018 and were distributed within a few weeks, the allegations regarding investing the estate funds and accounting to the estate are lacking in substance.
27. The Practitioner has denied a conflict of interest with respect to 'Mr J', who appears merely to have been a friend of the Deceased who referred the Complainant and her sibling to the Practitioner. No conflict is apparent from the material before the Board.
28. It follows that the complaint must be dismissed.

DETERMINATION

The Complaint partly 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), those parts of the complaint are summarily dismissed pursuant to section 433(1)(e) of the Act as the Board does not have the power to otherwise deal with it.

The remainder of the complaint is summarily dismissed pursuant to section 433(1)(a) of the *Legal Profession Act 2007* as it is lacking in substance.

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