

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v O'Connor* [2006] LPT 001

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
JOHN EDMUND MICHAEL O'CONNOR
(respondent)

FILE NO: S8656 of 2005

DELIVERED ON: 14 March 2006

DELIVERED AT: Brisbane

HEARING DATE: 27 February 2006

TRIBUNAL

MEMBER: Mullins J

PANEL Mr MD Woods

MEMBERS: Ms M Pacheco

ORDER: **John Edmund Michael O'Connor is guilty of unsatisfactory professional conduct in that during the course of an investigation of a complaint made pursuant to the *Legal Profession Act 2004* he wrote a letter dated 10 June 2005 to the complainant demanding an apology and the retraction of the complaint in breach of his professional obligation in acting on behalf of the solicitor the subject of the complaint.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – disciplinary proceedings - duty of a solicitor acting for a solicitor against whom an investigation of a complaint made under the *Legal Profession Act 2004* (Q) had commenced to advise solicitor who is the client of the obligation to cooperate and assist reasonably with the investigation of the complaint – where solicitor sent a letter to the complainant alleging that complaint amounted to defamation of the solicitor who was the subject of the complaint and requested an apology and retraction of the allegations – where sending of the letter to the complainant breached the solicitor's duty to advise the solicitor who was the subject of the complaint to cooperate with the investigation – where the sending of the letter to the complainant was unsatisfactory professional conduct

Legal Profession Act 2004

Attorney-General v Clough [2002] 1 QdR 116

Re B [1981] 2 NSWLR 372

Council of the Queensland Law Society Inc v Whitman [2003] QCA 438

Johns v Law Society of New South Wales [1982] 2 NSWLR 1
Re Veron; Ex parte Law Society of New South Wales (1966) 84 WN (Pt 1) (NSW) 136

COUNSEL: SA McLean for the applicant
 PJ Favell for the respondent

SOLICITORS: Legal Services Commission for the applicant
 FG Forde Knapp & Marshall for the respondent

- [1] **MULLINS J:** By application filed on 14 October 2005 pursuant to s 276 of the *Legal Profession Act 2004* (“the Act”) the Commissioner sought orders that the respondent is guilty of professional misconduct or, alternatively, unsatisfactory professional conduct. At the commencement of the hearing of the application, the Tribunal at the request of the Commissioner varied the particulars of the charge that the Commissioner alleged constituted either professional misconduct or unsatisfactory professional conduct. That variation was not opposed by the respondent. The charge, as varied, is:

“During the course of an investigation of a complaint made pursuant to the *Legal Profession Act 2004*, the respondent wrote a letter dated 10 June 2005 to the complainant demanding an apology and the retraction of the complaint in breach of his professional obligation in acting on behalf of the solicitor the subject of the complaint.”

Particulars of the charge

- [2] The particulars of the charge that were ultimately provided by the Commissioner at the hearing of the charge are:
- “1.1. At all material times, the respondent was:
 - (a) a legal practitioner;
 - (b) the principal in the law firm John M O’Connor & Company;
 - (c) acting on behalf of Mr Phillip Dooley, a solicitor employed by the respondent’s law firm.
 - 1.2. On or about 20 November 2004, Ms Delma Garrett – Benson (“**complainant**”) made a complaint (“**complaint**”) to the applicant about the conduct of Mr Phillip Dooley pursuant to section 256 of the Act.
 - 1.3 The complaint was referred to the Queensland Law Society for investigation (“**investigation**”) pursuant to section 265 of the Act.
 - 1.4. On 10 June 2005, during the course of the investigation, the respondent wrote to the complainant in which he stated, *inter alia*:

“The complaint in question amounts to a very serious defamation of our client and the allegations are clearly untrue. We are instructed to demand that you produce in writing a clear and unqualified apology to Mr Dooley and immediately formally notify the Legal Services Commission

and the Queensland Law Society that you retract the allegations made against our client without qualification.

Further, having regard to our client's professional reputation and the gravity of the allegations made, our client is clearly entitled to substantial compensation as well as an apology.

Failing a satisfactory reply by the 24th June 2005 our instructions are to institute appropriate legal action and in the circumstances our client reserves all rights."

Relevant facts

- [3] The respondent is the principal of the law firm JM O'Connor & Company ("the firm"). At all relevant times the firm has acted for Jodaway Pty Ltd ("Jodaway"). In or about April 2002 Jodaway acquired Palm Springs Retirement Village which consisted of about 76 units, a number of which were leased. Jodaway caused a plan of subdivision to be prepared and a Community Titles Scheme for that plan was registered, so that the units which had been leased were given separate freehold titles.
- [4] The firm was instructed by Jodaway to act on its behalf in preparing a contract for the sale of unit 30 to Ms Garrett-Benson ("the complainant"). Those instructions were carried out in the firm by an employed solicitor Mr Dooley. Although the respondent had prepared the pro forma contract for sales of units in the Palm Springs Retirement Village, he had delegated the performance of the conveyancing to Mr Dooley. The contract for the sale of unit 30 was prepared by Mr Dooley. Pursuant to that contract which was dated 20 October 2003 the complainant purchased Lot 30 on SP150828 in the Palm Springs Retirement Village CTS30852 from Jodaway for a purchase price of \$94,000. The settlement date under the contract was stated to be 22 October 2003. Special condition 7 of the contract related to the extension of a courtyard area attached to the subject unit. Special condition 9 of the contract was in the following terms:
- "On the settlement date the sum of \$14,000.00 being part of the Seller's sale proceeds will be paid into the trust account and (*sic*) of John M O'Connor & Company and held there until the works referred to in Special Condition 7 are completed in accordance with the provisions contained therein and then the said sum is to be paid to the Seller subject to any adjustments for local government rates and body corporate levies."
- [5] The complainant acted on her own behalf in the conveyance. She advised Jodaway's manager who had negotiated the terms of the sale with her that she had lectured in law. The respondent was informed by Mr Dooley that settlement of the contract did take place on 22 October 2003 and that one of the cheques provided by the complainant at the settlement was a bank cheque in the sum of \$80,000 drawn in favour of Assured Management Limited which was Jodaway's mortgagee. The respondent has exhibited to his affidavit filed in this proceeding photocopies of the two bank cheques which Mr Dooley has informed the respondent were handed over by the complainant at the settlement of the contract on 22 October 2003.

- [6] According to the trust account ledger of the firm, a cheque in the sum of \$13,897.50 from the complainant was deposited to the trust account on 23 October 2003 to be held on account of Jodaway for balance of purchase price. According to the trust account ledger, on 16 March 2004 the sum of \$312.78 was paid to the complainant as balance adjustment on settlement and on 18 March 2004 the balance remaining of the funds provided by the complainant of \$13,584.72 was paid to Jodaway.
- [7] On or about 23 November 2004 the Commission received a complaint from the complainant in respect of Mr Dooley. The complainant made an extensive number of complaints against Mr Dooley. Her main complaint appears to be that the purchase price had been disbursed in full to Jodaway when she says that she still did not have a title to a unit with a separate bedroom as of October 2004.
- [8] On or about 13 November 2004 the Commission forwarded the complainant's complaint against Mr Dooley to the Queensland Law Society ("the Society") for investigation pursuant to s 265(2) of the Act.
- [9] The complainant sent a letter to Jodaway care of the firm that was received by the firm on 7 December 2004 in which the complainant requested "a bank draft for \$13160 being interest on funds deposited with you of \$94,000 and to be due to me from the Interest Bearing Deposit to be established under cl 2.3 once it became apparent settlement was to take place more than 60 days after the deposit of funds with you at the given rate of 12%". Mr Dooley wrote the letter sent from the firm to the complainant dated 14 December 2004 that recited Mr Dooley's understanding of the transaction that had taken place between Jodaway and the complainant and on behalf of Jodaway denied any liability for the complainant's claim.
- [10] There is nothing in the material filed for the purpose of the proceeding against the respondent about what transpired in respect of the investigation of the complainant's complaint after referral by the Commissioner to the Society until the Society sent a letter dated 25 May 2005 to the respondent advising of the complaint made by the complainant and requesting a full explanation of the matters referred to in the complaint. The complainant's complaint was unequivocally made against Mr Dooley. Although Mr Dooley was an employee of the respondent, there was no complaint by the complainant at that stage against the respondent personally in respect of the firm's role as the solicitor for Jodaway. Notwithstanding that, the letter from the Society to the respondent advised him in relation to the complainant's complaint:
- "In this case, the Legal Services Commissioner has referred the abovementioned complaint to the Society for investigation. This complaint alleges professional misconduct or unsatisfactory professional conduct by your firm, in particular, Mr Philip Cowan Dooley, solicitor, in respect to the sale of Unit 30, Palm Springs Retirement Village, by Jodaway Pty Ltd to the complainant in this instance."
- [11] It was wrong of the Society to address the letter about the complainant's complaint (that purports to be sent in compliance with the requirement of s 267(1) of the Act to give written notice of the making of the complaint to the legal practitioner against whom the complaint has been made to the respondent). It was also wrong of the Society to describe the complaint as making allegations of professional misconduct or unsatisfactory professional conduct against the respondent's firm.

- [12] As it happens, it appears that the Society's letter first came to the attention of Mr Dooley and not the respondent. The respondent did not himself see the Society's letter until 10 June 2005 when Mr Dooley showed to the respondent his proposed response to the letter. The respondent describes in his affidavit that "Mr Dooley was most incensed at Mrs Garrett-Benson's conduct in the matter and told me that he intended to sue her personally for defamation."
- [13] The respondent also describes his reaction at the contents of the complainant's written complaint, a copy of which accompanied the Society's letter:
"I was horrified at her description of Mr Dooley's conduct and the associated criminal reflection on my office of her following words '*My letter concerns Mr Dooley's fraud and misapplication of funds.*' (page 2 of [attachment A to the complaint]). She went on to describe our letter to her 1st March requesting the \$14,000.00 to be held in trust '*surely clear evidence of fraudulent intentions...*' (page 2 of [Attachment A to the complaint]). Likewise is her further description of the request for \$14,000.00 as being "... *also a fraudulent attempt in the false documents to claim funds of \$14,000.00...*" (page 3 of [attachment A to the complaint]). All of our actions to which she refers in those quotations from her letter had all been foreshadowed by the contract which she had signed."
- [14] The respondent states that he perused the firm's file and formed the opinion that the complainant's complaint was completely baseless and without any foundation. The respondent states that he offered to write a letter on Mr Dooley's behalf refuting the complainant's allegations and demanding a retraction and apology and that Mr Dooley instructed the respondent to write such a letter.
- [15] The respondent states that he considered the question of whether the complainant had the benefit of absolute privilege in respect of her allegations and for the reasons which he set out in his affidavit he formed the view, and advised Mr Dooley accordingly, that he did not think that the defence of absolute privilege would apply.
- [16] Mr Dooley approved the draft of the letter prepared by the respondent and the letter dated 10 June 2005 ("the subject letter") was sent by the respondent to the complainant. The last three paragraphs of the subject letter are set out in paragraph 1.4 of the particulars of the charge. The opening two paragraphs of the letter stated:
"We act on behalf of Philip Dooley and have been instructed to write to you with reference to a complaint by you against Mr Dooley which was lodged with the Legal Services Commission on the 20th November 2004 in which you made unsubstantiated and completely false allegations against our client and then subsequently repeated those allegations in a statement dated the 22nd December 2004 which was prepared to support your earlier complaint.

The Queensland Law Society notified our client of your complaint on the 26th May 2005."
- [17] Under cover of letter dated 30 June 2005 the complainant forwarded a copy of the subject letter to the Commissioner describing it as "an attempt to bully me out of a complaint from me, which you are processing" and requested the Commissioner to take some action about the subject letter.

- [18] The Commissioner sent a letter to the respondent dated 22 July 2005 giving him notice pursuant to s 267 of the Act of the complainant's allegation that the subject letter was an attempt to bully her out of the complaint she made against Mr Dooley. The Commissioner requested pursuant to s 269(1) of the Act a full written explanation of the respondent's conduct and asked the respondent to address a number of specific matters including the basis for the respondent's belief that the complaint against Mr Dooley amounts to "a very serious defamation of our client and the allegations are completely untrue" and the legal basis for the respondent to seek on behalf of Mr Dooley an apology and to suggest there was an entitlement of Mr Dooley to substantial compensation.
- [19] The respondent provided a full response to the Commissioner by letter dated 8 August 2005. The respondent pointed out that as a solicitor Mr Dooley has a professional reputation to protect and that the complainant had damaged that reputation. The respondent explained that the making of an apology would normally be taken into account in mitigating the damages for which a defendant is liable for defamation and that was why the complainant was given an opportunity to apologise and retract the defamatory statements. The respondent stated that a claim for economic loss may arise from any loss of opportunity in Mr Dooley's professional career as a result of the damage to his professional reputation.

The original terms of the charge

- [20] The charge against the respondent was framed in the application that was filed as follows:
- "That on or about 10 June 2005 the respondent threatened a detriment to Ms Delma Garrett – Benson (*'complainant'*) with the purpose of deterring the complainant from pursuing a complaint made under the *Legal Profession Act 2004*, without reasonable cause."
- [21] The particulars of that charge included the following allegations:
- "1.5. The respondent knew, or ought to have known, that complaints to the Legal Services Commission enjoy absolute privilege pursuant to the provisions of section 11 of the *Defamation Act*.
- 1.6 The respondent threatened the detriment with the purpose of deterring the complainant from pursuing the complaint."
- [22] Prior to the commencement of the hearing of this application, the Commissioner foreshadowed that the charge and the particulars of the charge would be amended. One of the amendments was to delete paragraphs 1.5 and 1.6 of the particulars and to insert in lieu the following:
- "1.5 The particulars of charge are aggravated by the respondent threatening the commencement of proceedings for defamation failing a satisfactory reply in circumstances where complaints made pursuant to the Act are protected by absolute privilege."
- [23] When the hearing commenced the particulars of charge were varied by the deletion of paragraph 1.5 as set out in the preceding paragraph at the request of the Commissioner. For the purpose of the hearing it was common ground between the

parties that there was uncertainty concerning the question of whether s 11 of the *Defamation Act 1889* applied to the complainant's complaint and the Commissioner did not seek to prove that the complainant's complaint was protected by absolute privilege.

- [24] The charge as originally framed contained a serious allegation that the respondent by sending the subject letter threatened a detriment to the complainant with the purpose of deterring the complainant from pursuing her complaint against Mr Dooley. When the respondent sent his letter dated 8 August 2005 to the Commissioner, he advised:

“I am not a bully and nor is my client and I had no intention to “bully” her. However I believe that Mrs Garrett-Benson has deliberately defamed my client and he is entitled to defend himself.”

- [25] The respondent stated in paragraphs 34 and 36 of his affidavit:

“34. In my opinion her complaint to the Law Society was clearly and unequivocally false and completely defamatory. At all times I was acting on instructions and I believed that in sending the letter I was not in any way acting contrary to the law. If I thought that in sending that letter I was possibly engaging in professional misconduct or unsatisfactory professional conduct I would not have sent the letter. I understand that this type of letter is a standard letter sent before proceedings for defamation are commenced. I believed that I was not engaging in any conduct which amounted to conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

...

36. I had no intention whatsoever of “bullying” Mrs. Garrett-Benson out of making a complaint and neither in my letter of the 10th June or elsewhere did I make any attempt to dissuade her from complaining to the Law Society or the Legal Services Commissioner. There was absolutely no reason why I should have had anything to fear from her doing so. All that I did in my letter was to maintain a right to recover damages against her on behalf of Mr Dooley for her arguably dishonest and defamatory statements and in particular made to an organization which controls or monitors every aspect of a solicitors practice and demand on behalf of Mr. Dooley a retraction and an apology.”

- [26] The charge, as varied at the hearing, did not allege that the respondent had the purpose of deterring the complainant from pursuing the complaint and the Commissioner did not seek to prove that the respondent had the purpose that was alleged in the charge as originally framed. Apart from the contents of the subject letter, the Commissioner did not adduce any evidence relevant to any alleged purpose of the respondent in sending the subject letter. In the light of the respondent's letter to the Commissioner dated 8 August 2005 which was confirmed by the contents of the respondent's affidavit, the Commissioner had no prospects of discharging the burden of proving that serious allegation that was made in the charge as originally framed.

Issues

- [27] The issues that have to be determined on this application are:
- (a) what is the professional obligation of a solicitor who is engaged to act on behalf of another solicitor against whom an investigation of a complaint made under the Act has commenced?
 - (b) was that professional obligation breached by the sending of the subject letter to the complainant by the respondent on behalf of Mr Dooley?
 - (c) if so, did the sending of that letter constitute professional misconduct or unsatisfactory professional conduct?

The relevant professional obligation

- [28] No point was made by the Commissioner that the respondent should not have written the subject letter to the complainant on the basis that he was the employer of Mr Dooley for the transactions which gave rise to the complainant's complaint. It was common ground at the hearing that the respondent's conduct in writing the subject letter had to be considered in the light of the role he played as the solicitor taking instructions from and advising Mr Dooley about whether to send the subject letter to the complainant.
- [29] It is implicit from the terms of the charge that the professional obligation that the Commissioner alleges the respondent was bound to observe in acting for Mr Dooley is one that was breached by the sending of the subject letter, but otherwise the particulars of the charge do not expressly disclose the nature and/or content of the professional obligation that the Commissioner alleges was not observed by the respondent.
- [30] At the commencement of the hearing of this application the respondent requested that the Commissioner identify the professional obligation which it is alleged was breached by the sending of the subject letter. At first Mr McLean of Counsel on behalf of the Commissioner sought to express the duties of a practitioner in the position of the respondent in very broad terms:
- (a) to assist the investigation;
 - (b) to cooperate with the investigation;
 - (c) to let the investigation take its course according to law; and
 - (d) not to engage in confrontational tactics or in an adversarial manner.
- [31] That expression of duties does not recognise that, although a solicitor who is engaged to act on behalf of the solicitor who is the subject of the complaint has a duty like all legal practitioners to uphold the law and facilitate the administration of the law, the solicitor also owes a duty to his or her client to exercise skill and care in acting for the client. The solicitor who is the subject of the complaint is entitled to obtain advice in respect of the complaint and the different courses of action and approaches to responding to the complaint and the consequences of them. The broad expression of duties put forward by the Commissioner wrongly attempts to equate the position of the solicitor who is acting on behalf of the solicitor who is the subject of the complaint with that of his or her client.
- [32] Ultimately the professional obligation that was alleged by the Commissioner to be breached was expressed in terms that the solicitor who is acting on behalf of the solicitor who is the subject of the complaint should advise the client who is the

solicitor to cooperate with the complaint/investigation process and not attempt to thwart the complaint/investigation process.

- [33] It was submitted on behalf of the Commissioner that the professional obligation of a legal practitioner to cooperate with the complaint/investigation process followed from the existence of the legislative regime set up in chapter 3 of the Act concerning complaints, investigation matters and discipline and the professional standards applicable to solicitors developed by the common law. As to the specific content of the professional obligation, the Commissioner relied on the specification in s 243(c) of the Act that one of the three main purposes of chapter 3 was “to provide a means of redress for complaints by consumers of the services of the legal profession”, the obligations imposed by s 269 of the Act on a legal practitioner who is the subject of an investigation and that it is an offence under s 571 of the Act for a person to obstruct an investigator in the exercise of a power. Under s 269(1)(a) of the Act, the entity carrying out the investigation into a complaint may for the investigation require the legal practitioner who is the subject of the investigation to give the entity a full explanation of the matter being investigated, to appear before the entity at a stated reasonable time and place or to produce to the entity any document in the practitioner’s custody, possession or control that the practitioner is entitled at law to produce. Subject to the exceptions provided for in s 269(6) of the Act dealing with an explanation that would contravene, or invalidate, the practitioner’s policy for professional indemnity insurance or an explanation that would tend to incriminate the practitioner, s 269(2) of the Act specifies that the legal practitioner must comply with a requirement made of the practitioner under s 269(1)(a) of the Act and it is expressed to be an offence if the legal practitioner does not do so.
- [34] The Commissioner also referred to a number of statements found in authorities dealing with the obligation of a solicitor to cooperate in the complaint/investigation and disciplinary process. These statements included the observation of the New South Wales Court of Appeal in *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136, 141-142:
- “The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument.”
- [35] In that case the Court was critical of the approach taken by the solicitor on the disciplinary proceeding against that solicitor that was being heard by the Court. The Court considered it was a case that called for the solicitor to meet the situation by a denial or explanation upon oath and that he had failed to do so, relying on his Counsel’s cross-examination of some of the deponents who had sworn affidavits against him and the arguments that were put forward from the Bar table.
- [36] Reference was also made by the Commissioner to the description of the obligation of a solicitor or barrister whose conduct is the subject of an inquiry whether by the Court or by the relevant disciplinary committee as being the “obligation to inform and assist”: *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1, 6.
- [37] The Commissioner also relied on the statement made by the Court of Appeal in *Council of the Queensland Law Society Inc v Whitman* [2003] QCA 438 at paragraph [36] in commenting adversely on the approach taken by a solicitor who

had been the subject of disciplinary proceedings in the Solicitors' Complaints Tribunal:

“The respondent was generally uncooperative with the appellant, and apparently took an unduly combative approach before the Tribunal. Neither the investigation, nor the hearing, is criminal in nature: it is a process directed towards protection of the public. Recognising that, a practitioner is duty bound to cooperate reasonably in the process.”

- [38] The Act gathered together a number of reforms in relation to the regulation of the legal profession including what was described in the Explanatory Notes for the *Legal Profession Bill 2004* as “greater independence, accountability and transparency in the complaint and disciplinary processes for lawyers”.
- [39] It is in the interests of the legal profession and the public for a complaint by a member against a legal practitioner to be dealt with in an independent, expeditious and professional manner. The Commissioner is obliged under s 253 of the Act to deal with complaints as effectively and expeditiously as is practicable. The Commissioner has the power under s 259 of the Act to dismiss a complaint summarily, even without completing an investigation.
- [40] The Commissioner may investigate the complaint under s 266 of the Act or refer it to the relevant regulatory authority (being the Society or the Bar Association) to investigate the complaint under s 265 of the Act. After the investigation of the complaint, the Commissioner must make a decision either to start a disciplinary proceeding (under s 267 of the Act) or to dismiss the complaint (under s 274 of the Act).
- [41] Legal practitioners must be expected to be familiar with the regime set up under chapter 3 of the Act and that an important aspect of the regime is the protection for the public which is achieved by providing for the independent and transparent process for complaints by consumers of the services of the legal profession to be dealt with. This regime has built upon and refined the complaint, investigation and disciplinary processes that had applied prior to the Act. I therefore accept the submission on behalf of the Commissioner that the authoritative statements made prior to the Act to the effect that the obligation on the part of the solicitor who is the subject of the complaint is to cooperate reasonably with and assist with information for the complaint, investigation and disciplinary processes remain generally applicable under chapter 3 of the Act. It follows as a corollary of that obligation that the solicitor who is the subject of the complaint which is being investigated should not attempt to thwart or interfere with the investigation.
- [42] A solicitor who is engaged to act on behalf of a solicitor who is the subject of the complaint has a duty to advise his or her client with reasonable care and skill in relation to the client's options when faced with a complaint that is being investigated by either the Commissioner or the relevant regulatory authority including a duty to advise his or her client of the obligation to cooperate and assist reasonably with the investigation of the complaint. The solicitor who acts on behalf of the solicitor who is the subject of the complaint also has a duty to uphold the law and further the administration of the law. Although this is usually treated as imposing an obligation on a legal practitioner not to participate in a transaction which involves a breach of the law, the obligation is wider than that, as was

recognised by Moffitt P in discussing the position of a barrister in *Re B* [1981] 2 NSWLR 372, 381-382:

“The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty in the public interest is to conduct himself in relation to those privileges and otherwise in a manner which will uphold the law and further its pure administration. By reason of the privilege which the law attaches to communications between barristers and client in relation to litigation, a barrister, by being a barrister, is in the unique situation that he does much of his work in secret protected by his client’s privilege. However his duty to his client is tempered and indeed overridden by his public duty to uphold the law and neither break the law himself nor participate or encourage its breach and in other well-known ways to conduct himself in a manner which will serve the proper and fair administration of the law.”

This is of particular relevance in relation to taking instructions from a solicitor who is the subject of a complaint that is being investigated under chapter 3 of the Act. It means that the solicitor must advise his or her client in the context of the aims of the regime provided for in chapter 3 of the Act.

- [43] I therefore find that as part of the broader duty on the part of the respondent to advise Mr Dooley in relation to his options, as a result of finding out that the complainant had complained to the Commissioner about his conduct, the respondent had a duty to advise Mr Dooley of his obligation to cooperate and assist reasonably with the investigation of the complaint in the context of the aims of chapter 3 of the Act.

Whether the respondent breached his professional obligation

- [44] It is necessary to analyse carefully the subject letter. A submission was made on behalf of the Commissioner that the letter had the effect of demanding the complainant withdraw her complaint. The subject letter does not expressly seek the withdrawal of the complaint. It seeks to have the complainant withdraw the “unsubstantiated and completely false allegations against [Mr Dooley]” made in the complaint and the statement of the complainant dated 22 December 2004, on the basis that those allegations are “a very serious defamation of [Mr Dooley] and the allegations are clearly untrue”.
- [45] The subject letter did not identify specifically which of the allegations were considered by the respondent to be defamatory of Mr Dooley. The thrust of the subject letter is that all the allegations of misconduct made by the complainant in her complaint and supporting statement against Mr Dooley were considered by Mr Dooley to be false. The subject letter therefore has the effect of seeking the complainant to withdraw the substance of her complaint.
- [46] It was properly conceded on behalf of the Commissioner that even if the complainant had acted on that demand and withdrawn her complaint that would not necessarily have been the end of the investigation by the Society. The withdrawal of a complaint does not prevent action being taken on the complaint by the Commissioner on the Commissioner’s own initiative: s 260(3) of the Act. On any

view, the withdrawal of the complaint would have impeded the Commissioner's investigation of the complaint.

- [47] I accept the evidence of the respondent that he formed his opinion *bona fide* about the nature of the complainant's complaint against Mr Dooley. I also accept that when Mr Dooley instructed the respondent that he had a desire to protect his reputation, that legitimately raised as a matter for consideration by the respondent of what steps Mr Dooley should take in that regard.
- [48] The approach of the Commissioner to this application was that the merits of the complaint against Mr Dooley were not relevant to this proceeding against the respondent. The respondent also did not seek to have the merits of the complainant's complaint against Mr Dooley determined after the Commissioner abandoned the allegation that absolute privilege applied to the alleged defamatory statements in the complaint. The Commissioner conducted the application against the respondent on the basis that as a matter of principle there could not be any justification for the respondent to advise Mr Dooley to send the subject letter to the complainant or to accept instructions from Mr Dooley to send the subject letter to the complainant. The question of whether the respondent breached his professional obligation cannot be determined in isolation from the circumstances that resulted in the sending of the subject letter, even if the merits of the complaint are not determined.
- [49] The issue that the respondent was faced with when Mr Dooley sought his advice on 10 June 2005 was determining whether it was appropriate in the circumstances for the subject letter to be sent on behalf of Mr Dooley when an investigation under s 265 of the Act had commenced against Mr Dooley.
- [50] Although the respondent relies on the fact that the subject letter is an example of the standard type of letter sent before the issue of a proceeding for defamation, it is not mandatory for such a letter to be sent prior to the commencement of such a proceeding.
- [51] The respondent does not suggest in his affidavit that he advised Mr Dooley of his professional obligation to cooperate and assist reasonably with the investigation process under chapter 3 of the Act. The sending of the subject letter which the respondent advised Mr Dooley should be done was a course of action that had the effect of attempting to interfere with the investigation process (irrespective of whether that was the respondent's intent or not). In the circumstances, it was inappropriate for the respondent to send the subject letter which undermined the complaint/investigation process that was provided for in the Act for the protection of the public and the legal profession. The respondent therefore breached his professional obligation that he owed to Mr Dooley (and was also part of his professional obligation to uphold the law) to advise Mr Dooley to cooperate and assist reasonably with the investigation of the complainant's complaint in the context of the aims of chapter 3 of the Act by sending the subject letter. It does not matter that there was no breach of any law involved on the part of the respondent.

Was the sending of the subject letter professional misconduct or unsatisfactory professional conduct?

- [52] Once the charge was varied so that there was no allegation against the respondent that the subject letter was written with the purpose of deterring the complainant

from pursuing the complaint, the seriousness of the charge against the respondent was correspondingly reduced. At the hearing of the application the Commissioner concentrated on arguing that the sending of the subject letter in the circumstances was unsatisfactory professional conduct and (although not abandoning the argument) did not forcefully press the claim that it amounted to professional misconduct. Having regard to the finding I have made about the *bona fide* opinion formed by the respondent before sending the subject letter and that the only allegation which is the subject of the charge against the respondent is the sending of the subject letter, this is not a matter of professional misconduct, as contemplated by s 245 of the Act which (in addition to the meaning given in the provision itself) incorporates relevant case law on the meaning of professional misconduct, as the definition in s 245 of the Act is not exhaustive:

“**Professional misconduct** includes-

- (a) unsatisfactory professional conduct of an Australian legal practitioner, if 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 happening in connection with the practice of law or happening 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.”

[53] The meaning of unsatisfactory professional conduct which is also defined in a way that is not exhaustive is found in s 244 of the Act:

“**Unsatisfactory professional conduct** includes conduct of an Australian legal practitioner happening 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.”

[54] The Act therefore provides for two categories of conduct for the purpose of disciplinary proceedings. Although s 246 of the Act gives examples of conduct constituting unsatisfactory professional conduct or professional misconduct, a comparison of the definitions in sections 244 and 245 of the Act shows that there is a distinction in the gravity of the conduct that applies to each of the categories. Prior to the Act there had been some confusion in the authorities as to the nature of the conduct required to prove the charge of unsatisfactory professional conduct where the conduct falls short of being professional misconduct, but still involves conduct that falls short of an acceptable professional standard: see the discussion by Muir J in *Attorney-General v Clough* [2002] 1 QdR 116, 135-138. Whatever confusion has existed in the past based on various formulations of statutory standards of conduct, the Act maintains a distinction in the gravity of the conduct in each of the categories.

[55] I have identified the obligation to which the respondent was subject when Mr Dooley sought his advice about the complainant’s complaint. It was inappropriate for the respondent to send the subject letter. A solicitor who was familiar with the aims of chapter 3 of the Act and the duty of a solicitor who is the subject of a complaint to cooperate and assist reasonably with the investigation process would

not have sent the subject letter to the complainant. During the course of argument the sending of the letter by the respondent was referred to as “a momentary lapse” or “a lack of judgment” by Mr Favell of counsel on behalf of the respondent. I accept that was the case, but unfortunately it occurred in connection with the investigation process of a complaint under chapter 3 of the Act. It is of great public importance for the legal profession to support the implementation of chapter 3 of the Act. By sending the subject letter the respondent fell short of the standard of competence expected of a reasonably competent legal practitioner.

Orders

- [56] I am therefore satisfied that the charge is proven and that the respondent is guilty of unsatisfactory professional conduct. The formal order which I make is:

John Edmund Michael O'Connor is guilty of unsatisfactory professional conduct in that during the course of an investigation of a complaint made pursuant to the *Legal Profession Act 2004* he wrote a letter dated 10 June 2005 to the complainant demanding an apology and the retraction of the complaint in breach of his professional obligation in acting on behalf of the solicitor the subject of the complaint.

- [57] The Tribunal will hear submissions from the parties on the issues of penalty and costs.