SUPREME COURT OF QUEENSLAND

CITATION:	*Re: N (a solicitor)* [2010] QSC 267
PARTIES:	**N (A SOLICITOR)**
FILE NO/S:	BS 7926 of 2010
DIVISION:	Trial
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 December 2009; 19 February 2010
JUDGE:	Fryberg J
ORDERS:	**No order made**
CATCHWORDS:	Profession and trades – Lawyers – Duties and liabilities – Duties to court – Generally – Duty to ensure matters are dealt with expeditiously – Criminal matter *Legal Profession Act 2007* (Qld), s 418 *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446, cited
COUNSEL:	P J Davis SC for N
SOLICITORS:	S & Co

[1] **FRYBERG J:** After hearing submissions on behalf of a solicitor in February this year I decided not to refer a matter involving the solicitor to the Legal Services Commissioner for investigation. These are my reasons for that decision.

Events prior to the sentence hearing

[2] At all material times N was a solicitor employed by the firm S & Co. In June 2009 the firm was retained by T to act on his behalf in relation to a number of drug charges, including production of methylamphetamine. T had previously been represented by other solicitors and they wrote a letter to S & Co outlining the position the prosecutions had reached. The letter disclosed that a hand-up committal in October 2008 had resulted in T's committal for trial on six charges,

including one production charge. Commerciality was contested. Committal proceedings on a further seven charges, including another production charge, had been adjourned to permit them to be the subject of an ex officio indictment, but no such indictment had yet been prepared. Following presentation of an indictment in March 2009, the first six matters had been listed for sentence in this Court, to be heard on 27 July 2009. No analyst's certificate had been received in respect of any of the charges.

[3] N interviewed the client on 1 July 2009. She took instructions on which to base an application for legal aid (the previous solicitors had not been willing to handle the matter on that basis), and confirmed his instructions that he wished to enter a plea of guilty to each of the charges on which he had been committed and to request an ex officio indictment in relation to the outstanding matters. N considered that the matter was not ready to proceed and on 2 July arranged with the list manager for it to be delisted.

[4] Legal aid was granted in respect of the committed charges on 3 July 2009 and in respect of the outstanding production charge on 15 July 2009. No further instructions were taken from the client.

[5] In mid-September 2009 the matter was relisted for hearing on 18 December. T was informed of the relisting, but apparently no further instructions were taken at this time.

[6] N briefed counsel for the sentence hearing on 29 October 2009. Instructions had still not been taken from T and no statement from him was included in the brief.

[7] Under Practice Direction 2 of 2000, the Crown and the defence were both required to sign and file a certificate "confirming that the factual basis for an intended plea of guilty has been agreed upon" in relation to the proposed ex officio indictment. That certificate, with a statement of agreed facts annexed and apparently signed by T personally, was received by the Court on 26 November 2009. N herself received the documents the following day. The certificate set out the relevant facts. It did not refer explicitly to the question of commerciality. Unfortunately it was not provided to defence counsel until the Crown prosecutor sent him a copy on 18 December.[1]

[8] A conference with T was arranged to be held in counsel's chambers on the afternoon of 14 December. N made notes at that conference. T again specifically instructed that there was no commercial purpose in his production of methylamphetamine; it was for his own use. T then signed the ex officio indictment. "Confirming the Crown's position as to the factual basis they would be pressing at sentence" was a subject of discussion. Following the conference counsel spoke to an officer of the Director of Public Prosecutions about the factual basis that the Crown would press at sentence; the content of the conversation has not been revealed.

[9] The next day, N e-mailed counsel, "[H]ave you had a chance to get a request away yet to the DPP to particularise their case in relation to the production and what they

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[1] I infer this from counsel's statement to the Court that the Crown provided the two factual schedules on the morning of the hearing; see para [12].

rely on to be any commercial element etc." Counsel responded that he would get something to the DPP "in the morning", i.e. 16 December. There is no evidence that he did so. However, presumably at N's request, T sent a handwritten statement of personal circumstances to her that day. It did not deal with the circumstances of the offending and N made no attempt to draft a statement about those circumstances for him from her conference notes.

[10] Counsel spoke to the Crown prosecutor on 17 December and e-mailed N "indicating that he still had not heard anything from the Crown with respect to the factual basis". That is puzzling. If it is meant to convey that counsel was not informed of the Crown's position regarding commerciality, it is contrary to what is set out in a letter from an officer of the Director of Public Prosecutions to N's firm tendered by her counsel at the February hearing.[2] In that letter it is asserted that the prosecutor communicated the Crown's position on commerciality by e-mail to defence counsel on 17 December. On that day the Crown prosecutor informed counsel that in relation to commerciality "the Crown could not take the matter any further other than the fact that [T] was located with drug laboratory equipment and after analysis some of those items were found to have methylamphetamine on them". There is no evidence that counsel informed N of this until the following day.

[11] Counsel received a schedule of facts to be alleged by the Crown in relation to the offences for which T had been committed for trial on the morning of 18 December. The information in that schedule came from the police brief which N had received with the letter from the previous solicitors in June. It contained nothing which might be expected to have taken T or his legal advisers by surprise. Neither it nor the earlier schedule in respect of the ex officio offences expressly alleged a commercial purpose. The issue of commerciality was discussed with T in conference on the morning of 18 December, as was the issue of the drawing of inferences that may be open to the Court. N's notes of the conference suggest that T was advised that it was open to the judge to infer commerciality and that affidavit material on behalf of the defence was necessary.

The aborted sentence hearing

[12] When the matter was called on, counsel applied for an adjournment. He submitted:

> "It wasn't until Monday of this week that the analyst's certificate in respect of the second production was obtained. I had a conference with my instructing solicitor and Mr [T] on that day and an indication was sought from the Crown at that stage as to certain factual matters. There was some follow-up communication through the week, but it was not until essentially 4.30 yesterday afternoon that the Crown communicated its position, and I don't – I'm not being critical of my learned friend, I understand the difficulties – but there were materials provided as late as this morning in respect of the matter.
> HIS HONOUR: What?
> MR [J]: Factual schedules and annexures to, two factual schedules. Ultimately, I'm simply not in a position where I can adequately

[2] I have had that letter marked ex 1, a matter overlooked at the hearing.

> represent my client in the sentence proceedings if they were to proceed today.
> HIS HONOUR: What, have you not had time to read these documents?
> MR [J]: I've read the documents, but it could well be that there would be a necessity to place materials from the defence before the Court.
> HIS HONOUR: What sort of material?
> MR [J]: Potentially affidavit material.
> HIS HONOUR: From whom?
> MR [J]: Well, from my client and potentially his partner.
> HIS HONOUR: Well, you can call him to give it, can't you? Why go to the – I mean, I agree with you that affidavits would ordinarily be better, but given the lateness of the hour, so to speak, why can't we just do it orally?
> MR [J]: I would be very reluctant to do so and I imagine as would my client. I've canvassed various options with him. I suspect that this matter is something that can be resolved but there is significant unease in the way that it has unfolded and the opportunity that the defence has had and that really form the basis of my application. We're just not ready to proceed.
> HIS HONOUR: You're speaking perhaps in code, but if you are I'm not understanding the code.
> MR [J]: Well, we're not ready to go. It's really as blunt as I can be.
> HIS HONOUR: What do you need to do to get ready? So far all that you've said is that you've had time to read the documents but you haven't had time to prepare affidavits. Well, that can be overcome. What do you need time to do?
> MR [J]: Well, certainly for that to take place -----
> HIS HONOUR: But why can't you call him to give oral evidence and the other lady to give oral evidence?
> MR [J]: Look, I haven't had the chance to know precisely what would be said and I'm hardly going to call my client in that situation."

Counsel admitted that the defence did not have from the client a detailed statement "which obviously is necessary and hasn't been done"; and explained that the reason for this was that the defence had not received the Crown's version of the facts. (That was not correct in relation to the offences in the ex officio indictment. If N attempted to have the error corrected, her efforts bore no fruit.) As counsel frankly put it, "We're not ready to go."

[13] In those circumstances I granted the adjournment sought by the defence. I publicly criticised N's conduct of the matter and requested that the solicitors make submissions as to why I should not refer the matter to the Legal Services Commissioner for investigation. To allow time for that I stood the matter down until the afternoon.

The first submissions hearing

[14] N came before me that afternoon represented by senior counsel. At that stage most of the facts set out in paras [2] to [10] above were not known to the Court. Senior

counsel had conferred with both N and counsel who had appeared on the sentence that morning. He was told that no instructions had been taken from T on the issue of commerciality. He submitted that it had not been necessary to do so unless and until "the prosecution made it plain that they were alleging commerciality". He submitted that the time when instructions were taken was a matter for professional judgment and that the course taken by N was unremarkable. He submitted that in a case such as the present it was not necessary for a defence solicitor to seek those instructions even when it is known that the sentencing date is approaching, not even to meet allegations which could reasonably be anticipated. That occurred only in a perfect world, not when one considered the practical realities of a legally aided sentence hearing. He submitted that a solicitor's primary role on a sentence was to determine whether or not the allegations made by the prosecution were able to be proved and to advise the client accordingly; it was not to engage in some sort of broad ranging enquiry about what happened and why. In particular asking the question "Was this commercial?" should not be done.

[15] As there had not been time to research the question of my power to refer matters to the Legal Service Commissioner, I reserved my decision and gave senior counsel leave to provide written submissions on that aspect of the matter.

[16] Counsel wrote to me on 29 January 2009:[3]

> "Yesterday, I became aware that, in the course of my submissions, I misled you about a significant issue, namely, whether instructions had been taken from [T] about the issue of commerciality. … [Y]esterday, I was advised by [N and her principal] that [her] handwritten notes on [T]'s file indicated that he *had* been asked about the issue of commerciality on two separate occasions."

Counsel was not certain whether his instructions on the issue of commerciality came from N or from the barrister who had appeared at the sentence hearing; and if the latter, he was not certain that N had been present at that time the instructions were given. He apologised and stated that he could no longer continue to act.

The second submissions hearing

[17] As a result of that letter I had the matter relisted on 19 February 2010. On that occasion Mr Davis SC appeared for N. He read two affidavits sworn by her. Much (but not all) of the information in paras [2] to [10] above is drawn from the larger of those affidavits. He submitted that I undoubtedly had power to refer the matter to the Legal Services Commissioner, but that I should not do so.

[18] N sought to explain the erroneous submissions at the first hearing in her affidavit. She deposed that when the sentence hearing was adjourned she became distressed and by the afternoon was very upset. "I did not at this time [the first hearing] pick up on the exchange being about the holding of instructions [about commerciality] rather than a signed statement of fact."

[19] I accept that these submissions regarding commerciality were the result of a misunderstanding, and were not the consequence of an attempt to mislead the Court. The way in which, and doubtless the haste with which, instructions were given to

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[3] Original emphasis. I have had that letter marked ex 2.

senior counsel to appear at the first hearing could easily have produced misunderstanding. N's distress, which I observed myself on 18 December 2009, explains her failure to correct the error. I disregarded the submissions for the purposes of my decision.

The issues

[20] Mr Davis submitted that the matter should not be referred to the Commissioner unless the evidence indicated a reasonable basis upon which he could consider that N's conduct was either unsatisfactory professional conduct or professional misconduct. I accepted that submission. In the circumstances of this case no other basis of referral (if any other basis exists) is apparent.

[21] The matter of concern was possible negligence in the preparation of the matter for the hearing on 18 December 2009, necessitating the adjournment of the sentence and the waste of court time. In particular the question arose whether it was negligent not to have prepared a statement by T giving his version of the circumstances of the offending involved in the charges for which he was committed for trial. Those circumstances were obviously of relevance in assessing T's criminality. It was the absence of such a statement which led to counsel's inability (or more accurately, unwillingness) to call T and his partner.

[22] Mr Davis submitted:

- where a client had instructed his solicitor that he would plead guilty to an indictable offence, it was not necessary for the solicitor to take a full statement from the client before indicating the plea (presumably, to the court and the DPP);
- this followed from a fundamental of criminal practice, that one doesn't take instructions until one has something on which to take instructions;
- it was a matter for the solicitor's judgment to determine when she was in possession of sufficient material to warrant taking full instructions and preparing a statement;
- it was reasonable for N to decide to wait for the Crown to provide its version of the facts surrounding those offences;
- there was no negligence.

The solicitor's conduct

[23] It is unnecessary here to examine the position as between solicitor and client in cases where the client seeks the solicitor's advice about whether to plead guilty. One might expect in such circumstances that it would be prudent for a solicitor to have written instructions as to the facts acknowledged by the client (even if only in note form) before providing such advice. In the present case, on 1 July 2009 T confirmed to N his instructions that he wished to plead guilty to the charges on which he had been committed for trial. It may be assumed that she was not retained to advise on that course.

[24] It is also unnecessary to decide whether a solicitor should take a statement from the client before indicating an intended plea of guilty to the court where a client has instructed his solicitor that he wishes to plead guilty to an indictable offence. I

point out that if the client should subsequently change his instructions, the solicitor's indication could be used in the trial as evidence of guilt. Moreover a solicitor has a duty to advise his client of the substantial discounts on sentence for an early plea of guilty, particularly one notified before or made at committal. If he does not take detailed instructions it is difficult to understand how that duty could be performed.

[25] It cannot be doubted that one of the duties of a solicitor engaged in litigation, criminal or civil, is the timely preparation of cases for hearing. In *Ashmore v Corporation of Lloyd's*, Lord Roskill said:

> "[I]n any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. *It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty.* Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."[4]

That was said in a civil case, but it applies with equal force in a criminal one. The duty is owed not only to the client; it is also owed to the court. On the criminal side, substantial public resources will be thrown away if a trial or hearing cannot proceed on its allocated date. If the accused is legally aided, it is not simply the resources of the prosecution and the court which will be wasted. In addition other litigants will be delayed in obtaining hearing dates. Any breach of duty is therefore not simply a matter between the solicitor and her client.

[26] In the present matter the defence case was not prepared in time for the listed hearing. N had notice of the listing about three months in advance, giving her abundant time to prepare. She deposed:

> "53. I made a professional call with respect to the taking of instructions and the necessary details of those instructions. I did this on the basis of knowing the necessity of getting our client's responses to this Schedule of Facts that the Crown had intended to rely on, however I had taken the general instructions from the client as referred to above.
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> 54. The timing of instructions and their detail was a professional judgment under the guidance of Counsel experienced in criminal matters."

[27] The evidence did not disclose when N was first told that the prosecution intended to produce a schedule of facts for the sentencing judge in relation to the charges on which T had been committed for trial. It must have been not long before the hearing date. The prosecution was under no duty to produce such a statement. It could if it wished inform the court orally of the circumstances of the offending. There is no evidence that the prosecutor undertook to deliver such a statement before the day of hearing.

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4 [1992] 1 WLR 446 at p 448 (emphasis added).

[28] N was not in a position where she had nothing in relation to which to take a statement from her client. She had the police brief from the committal proceedings. It contained all of the facts which formed the basis of the Crown allegations. It is true that the Crown sometimes departs from the allegations in the police brief, but there was no reason in the present case to think such a departure was contemplated. N also had the agreed statement of facts in relation to the offences in the ex officio indictment, which she had had for nearly four weeks. She made no attempt to obtain a statement from T about either set of offences.

[29] I do not accept that her omission to do so was the result of not having one of the schedules of facts. It is much more likely that T accepted the facts in the police brief and the agreed schedule, and that in consequence N saw no need to prepare a statement. Not until she conferred with counsel did she realise that the judge might infer commerciality from those facts even if the Crown did not explicitly support such an inference. That realisation came at the conference on 14 December, four days before the scheduled hearing date. Even that would have been enough time for preparation of a statement, given that the only possible issue between the parties was whether an inference of commerciality should be drawn. T's instructions on that issue were quite clear. Instead of preparing a statement, she pressed counsel to find out the Crown's position on commerciality. She was entitled to that information; but not having it did not excuse her failure to prepare the case for hearing.

[30] Her breach of duty probably amounted to unsatisfactory professional conduct within the meaning of s 418 of the *Legal Profession Act 2007*:

> "**418 Meaning of unsatisfactory professional conduct**
>
> 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."

In my judgment the facts provided abundant evidence warranting an investigation into the question.

Referral

[31] Nonetheless, I decided not to refer the matter to the Legal Services Commissioner. I did so because in the end I was not satisfied that the public interest would be served by such an investigation or by consequential proceedings against N. N was a young solicitor and had only 2½ years' experience in criminal practice. I was satisfied that enough had already happened to her publicly to ensure that there would be no repetition of her conduct.

[32] Second, I was conscious that the Commissioner's resources are limited and did not want him to feel under any duty to investigate a matter in which any need for personal deterrence had already been overcome. The Commissioner has more important matters to deal with.

[33] Third, counsel had been briefed in the matter for a month and a half and had at no time advised that a statement or affidavit might be required. It is true that he had not been instructed to advise on evidence, nor had he originally been briefed with

the statement of agreed facts made pursuant to the practice direction. However this was not a complex case. Counsel ought to have warned of the possibility that evidence might have to be called long before the day of hearing. He also ought to have informed N of the Crown's attitude on commerciality on 17 December 2009. That does not mean that N was relieved of the obligation to consider that possibility for herself. It simply means that because decisions on calling evidence are ultimately the responsibility of counsel, she did not bear sole responsibility for the omission, particularly having briefed experienced counsel.

[34] Finally, I felt that questions of general deterrence would adequately be served by my publishing my reasons for the course which I took. I have dealt with the matter at some length in the hope that these reasons may gain a wider audience among members of the profession.

Afterthought

[35] I am left with the uncomfortable feeling that the errors on the part of both N and counsel for T would not have occurred had the matter not been funded by legal aid. It ought to have been abundantly clear that a statement would be needed once commerciality was denied by the client. On the evidence no additional funding was available for taking a statement. It is a natural enough human reaction in such circumstances to seek to defer incurring the cost; but that is a reaction which is apt to blur the sound exercise of professional judgment. Having accepted a retainer, a true professional does not let the quality of the work undertaken suffer because the available remuneration is inadequate. If lawyers are not prepared to bear the cost of all necessary steps in a legal aid matter, regardless of funding, they should not take on the work.