

SUPREME COURT OF QUEENSLAND

CITATION: *Rosen v Legal Services Commissioner* [2016] QCA 190

PARTIES: **WARREN LANCE ROSEN**
(appellant)
v
LEGAL SERVICES COMMISSIONER
(respondent)

FILE NO/S: Appeal No 9813 of 2015
QCAT No 151 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane – [2015] QCAT 306

DELIVERED ON: 22 July 2016

DELIVERED AT: Brisbane

HEARING DATE: 1 April 2016

JUDGES: Margaret McMurdo P and Gotterson JA and Burns J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for an extension of time to appeal is refused with costs.**
2. The appeal is dismissed with costs.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where the appellant acted for a client in divorce proceedings – where the appellant then acted for the former client’s spouse, the complainant, in her divorce proceedings against the former client – where the former client obtained an injunction preventing the appellant from acting for the complainant – where the appellant alleges there was no confidential information the complainant did not already know, the former client waived confidentiality, and the complainant instructed him to contest the application for an injunction – whether the appellant breached his duty of confidentiality to the former client by acting for the complainant – whether the appellant’s conduct amounted to unsatisfactory professional conduct
PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – COSTS AND ORDERS –

where the appellant was ordered to repay the complainant legal service fees as well as pay compensation for an adverse costs order made against her in the application for an injunction – where the complainant was the appellant’s client and entitled to make a complaint under s 429 *Legal Profession Act* – whether the complainant was entitled to a compensation order under Part 4.10 *Legal Profession Act*

Legal Profession Act 2007 (Qld), s 3, s 418, s 420, s 428, s 429, s 464, s 465, s 468

Clark Boyce v Mouat [1994] 1 AC 428, cited
Farrington v Rowe McBride and Partners [1985] 1 NZLR 83; [1985] NZCA 21, cited
Fordham v Legal Practitioners’ Complaints Committee (1997) 18 WAR 467, cited
Grievs & Tully [2011] FamCA 617, cited
Haber v Mandel [2011] FMCAfam 1564, related
Magro v Magro (1989) FLC 92-005; [1989] FamCA 2, cited
Mallesons Stephen Jaques v KPMG Peat Marwick (1990) 4 WAR 357, cited
McMillan & McMillan (2000) 26 Fam LR 653; [2000] FamCA 1046, cited

COUNSEL: A J Kimmins for the appellant
 G R Rice QC for the respondent

SOLICITORS: Rosen Lawyers for the appellant
 Legal Services Commissioner for the respondent

- [1] **MARGARET McMURDO P:** On 3 August 2015 the Queensland Civil and Administrative Tribunal found the appellant, Warren Rosen, guilty of unsatisfactory professional conduct by breaching Rule 4 of the *Legal Profession (Solicitors) Rule* 2007 (Qld).¹ It publicly reprimanded him and ordered him to pay a penalty of \$1,500, as well as the respondent’s costs. It also made orders concerning a complaint against Mr Rosen brought by Ms Haber for compensation, which was to be heard on the papers. On 3 September 2015 the Tribunal ordered Mr Rosen to repay Ms Haber \$9,170.17 in legal services fees, and to pay \$7,500 in compensation.
- [2] On 30 September 2015 Mr Rosen purported to file an appeal against both the orders of 3 August and 3 September, together with an application for leave to appeal from the decision of 3 August and an application to stay both orders. By the time the matter was heard in this Court, it was clear that Mr Rosen had appealed as of right under s 468 *Legal Profession Act* 2007 (Qld) from the order of 3 September and was seeking an extension of time to appeal from the order of 3 August. He did not pursue his application to stay both orders. In effect, this Court treated his misconceived application as one for an extension of time to appeal from the order of 3 August. In support of that application, he deposed that only when he received the Tribunal’s reasons for the order of 3 September did he decide, after discussing it with counsel, to appeal that order; this necessitated an appeal from the Tribunal’s order of 3 August. The two

¹ *Legal Services Commissioner v Rosen* [2015] QCAT 306, [33] mistakenly refers to “unsatisfactory professional misconduct”.

matters, he contended, were closely interrelated and should be heard together and the respondent would suffer no disadvantage from the granting of the extension of time. With the concurrence of counsel for both parties, this Court heard argument in support of the proposed appeal from the 3 August order before determining whether to grant an extension of time.

- [3] Mr Rosen's grounds of appeal, which seem to have been framed to cover both the appeal from the 3 September order and the proposed appeal for which an extension of time is needed from the 3 August order, were that the Tribunal erred in law in finding:
- (a) he was guilty of breaching Rule 4;
 - (b) that the former client, Mandel, had not waived any confidentiality or objection to Mr Rosen acting for the complainant, Ms Haber, against him;
 - (c) that he was guilty of unsatisfactory professional conduct;
 - (d) that Ms Haber was entitled to seek compensation; and
 - (e) in not finding that only Mr Mandel (and therefore not Ms Haber) could be awarded compensation.

Statement of agreed facts

- [4] The following facts were agreed before the Tribunal.² Mr Rosen, who was born in February 1947, was admitted as a solicitor in New South Wales in 1970 and in Queensland in 1987. He has no previous findings against him by a disciplinary body. He was the principal of Rosen Lawyers. Prior to October 2006 he had acted for Ms Haber in unrelated family law proceedings. Between 1 October 2006 and 30 June 2007, he acted for Mr Mandel in relation to a property settlement between Mr Mandel and his first wife. On or about 16 April 2011, he accepted instructions from Ms Haber, who had become Mr Mandel's second wife, to represent her in an application for a property settlement against Mr Mandel.
- [5] In a letter dated 19 April 2011, Mr Rosen wrote to Mr Mandel:
- “We note that notwithstanding we acted for Ms Haber in the first instance in respect of the dissolution of her previous marriage we are aware that we subsequently acted for you in respect of your Divorce.
- The relevant question would be whether we are in receipt of any confidential information in relation to you, as a result of acting for you, which might be used against you in the break down of your current marriage with Ms Haber.
- We are of the view that we are not aware of any confidential information, or any other information, which you would not otherwise be required to disclose in these proceedings.
- We would recommend that you seek independent legal advice.”³
- [6] On 6 May 2011, Mr Rosen wrote to Mr Mandel in these terms:

² AB 249 – 306.

³ Annexure 1, AB 254.

“We refer to your telephone conversation with the writer on the 3rd May 2011.

We confirm that:-

1. That you have no objection to us acting on behalf of our client in respect of matters arising out of the break down of her marriage to you.
2. That you do not, at least at this point in time, intend to instruct legal personal representation and
3. That you would like to negotiate a settlement.”⁴

- [7] On 26 May 2011, Mr Mandel and Mr Rosen exchanged emails about identifying and valuing property and disclosing bank statements. On 27 May 2011 Mr Mandel emailed the respondent:

“At this stage I am attending to my own discussions, and when we get to a civil agreement on values, then we can finalise the end result with my own legal advise, of this you are aware.”⁵ (Errors in the original).

- [8] On 6 June 2011, Mr Rosen wrote to Mr Mandel stating:

“It appears to the writer that there is no further use in attempting to negotiate this matter on a non litigated basis.

By commencing litigation this will enable us to obtain appropriate Directions for the appointment of joint single experts and the sharing of their fees as well as any other issues relating to disclosure of the like.”⁶

- [9] On about 24 June 2011, Mr Rosen filed an application for property settlement on behalf of Ms Haber, returnable on 13 September 2011. On about 12 July 2011, Mr Mandel retained Holloway Jenkins Lawyers to act on his behalf in the proceedings. That same day, Mr Mandel’s lawyers advised Mr Rosen that Mr Mandel objected to Mr Rosen acting for Ms Haber in the proceedings, as he had previously acted for and taken instructions from Mr Mandel in relation to a will and his first divorce. They advised Mr Rosen that Mr Mandel had previously provided confidential information to him and reasonably believed that there was a risk this information may be used against him, or at least to his disadvantage, in the current proceedings. They also told Mr Rosen that, if he did not desist from acting for Ms Haber, Mr Mandel would file an application seeking an order restraining him from acting.⁷
- [10] On 18 July 2011, Mr Rosen advised Mr Mandel’s lawyers that Mr Mandel had been provided adequate opportunity to object to Mr Rosen acting on behalf of Ms Haber and was now precluded from raising any objection.⁸
- [11] Mr Mandel’s lawyers responded on 26 July 2011, requesting that he urgently advise whether he intended to cease acting for Ms Haber.⁹ He continued to represent her.

⁴ Annexure 2, AB 255.

⁵ Annexure 4, AB 259.

⁶ Annexure 5, AB 260.

⁷ Annexure 6, AB 261.

⁸ Annexure 7, AB 263.

⁹ Annexure 8, AB 265.

On or about 7 September 2011, Mr Mandel's lawyers filed an application in the Federal Magistrates Court seeking an order that Mr Rosen and any employee of Rosen Lawyers be restrained from acting for Ms Haber.

[12] On 8 September 2011, Mr Rosen wrote to Ms Haber in these terms:

“In our view you have two choices:-

1. Argue in the circumstances of this case that Mr Mandel is not entitled to seek an injunction to restrain the writer acting on your behalf; or alternatively
2. Terminate your instructions to the writer.

However, we would suspect that you would not be in a position to make such a decision until Affidavit's [sic] in response were prepared and a conference held with an experienced Barrister who could provide to you an independent advice.”¹⁰

[13] Ms Haber responded later that day stating:

“There is no way I will stop using Warren to represent me and will contest there [sic] application.”¹¹

[14] On 13 September 2011, Mr Mandel's lawyers advised Mr Rosen that he had not accurately set out the applicable legal principles in family law cases when a conflict of interest arises. They requested he review the case law, referring him to relevant decisions.¹² On 22 November 2011, they again requested that he reconsider acting for Ms Haber and advised that his failure to accede to their request would only further delay the resolution of the parties' dispute and add unnecessarily to their legal costs.¹³ Mr Rosen continued to represent Ms Haber. On 23 November 2011, Mr Rosen instructed a barrister to appear on behalf of Ms Haber at the hearing of the application for an injunction at which the Federal Magistrates Court ordered that he and any employee of his firm be restrained from acting for Ms Haber in the property settlement proceedings and that she be restrained from continuing to retain Rosen Lawyers as her legal representative.¹⁴ The court also ordered that she pay Mr Mandel's costs of and incidental to the application fixed in the sum of \$8,000. The federal magistrate stated:

“My view is that the costs to be awarded should be in excess of the normal scale costs. I do consider on the basis of the material before the Court that the application made by the husband had extremely good prospects of success from the outset.”¹⁵

[15] I will summarise the reasons of the federal magistrate,¹⁶ as well as those of the Tribunal for the orders of 3 August and 3 September, before stating my conclusions for refusing the application for an extension of time and the appeal.

¹⁰ Annexure 9, AB 266.

¹¹ Annexure 10, AB 267.

¹² Annexure 11, AB 268.

¹³ Annexure 12, AB 270.

¹⁴ Annexure 14, AB 273.

¹⁵ Annexure 16, AB 306.

¹⁶ *Haber & Mandel* [2011] FMCAfam 1564.

The decision of the Federal Magistrates Court

- [16] After stating the relevant factual background, his Honour referred to Mr Mandel's evidence that whilst Mr Rosen was acting for him in the breakdown of his first marriage, he took detailed instructions, negotiated with his first wife's solicitors, and represented him at a conciliation conference during which Mr Mandel provided confidential information. Mr Rosen had knowledge of all aspects of Mr Mandel's settlement with his first wife and of the related legal proceedings. His present lawyers informed him that this information is relevant in his proceedings against Ms Haber. Mr Mandel feared that if Mr Rosen continues to represent Ms Haber, he may reveal information arising from the case he handled for Mr Mandel to assist Ms Haber in her current proceedings against Mr Mandel. He feared Mr Rosen would use information obtained about Mr Mandel whilst previously acting for him to his disadvantage. He was also concerned that Mr Rosen's personal knowledge of him as a client included that he suffers from depression and anxiety. Mr Rosen knew how these conditions affected Mr Mandel and of his strengths and weaknesses. If Mr Rosen continued to represent Ms Haber, Mr Mandel considered she would have an unfair advantage in negotiations between them.¹⁷
- [17] The federal magistrate noted that Ms Haber maintained that she was aware of all the so-called confidential information provided by Mr Mandel to Mr Rosen. His Honour rejected that contention, concluding that it was not really possible for Ms Haber to be certain that everything that was told to the solicitor was also told to her.¹⁸ His Honour referred to *McMillan & McMillan*¹⁹ which established that the court has power to make orders restraining a firm of solicitors from continuing to act for a party if it is of the view that it would be likely that those solicitors may have confidential information relating to the other party to the proceedings "arising out of a former relationship of solicitor and client with that party which may be used to the advantage of the present client or to the disadvantage of the former client in the current proceedings."²⁰ It is sufficient if a party swears that he or she has conveyed confidential information to his or her solicitors and he or she believes that information may be used to his or her disadvantage in the proceedings; there only need be a theoretical risk of prejudice; proof of prejudice is unnecessary.²¹ There was evidence, the federal magistrate accepted, that showed that Mr Mandel conveyed confidential information to Mr Rosen in the earlier proceedings and Mr Mandel now believes that information may be used to his disadvantage. A theoretical risk of prejudice was sufficient to make the orders sought.²²
- [18] The federal magistrate considered that *Grieves & Tully*,²³ citing *Magro v Magro*,²⁴ established it was sufficient to give an injunction if the solicitor was in possession of privileged material belonging to the former client which could be used for the benefit of the present client, even if this was limited to impressions of the former client's personality gained after many hours of confidence, which could be "exploited by a skilful advocate presented with those impressions."²⁵ The proceedings in which

¹⁷ Above, [3].

¹⁸ Above, [4] and [5].

¹⁹ [2000] FamCA 1046.

²⁰ *Haber v Mandel* [2011] FMCAfam 1564, [5].

²¹ Above, [5] and [6].

²² Above, [7].

²³ [2011] FamCA 617.

²⁴ (1989) FLC 92-005.

²⁵ [2011] FMCAfam 1564, [10].

Mr Rosen acting for Mr Mandel provided many opportunities for Mr Mandel to pass on confidential information.²⁶

- [19] Mr Mandel's delay in objecting to Mr Rosen acting for Ms Haber, the federal magistrate considered, was fully explained by Mr Mandel who was initially self-represented. It was true that Mr Rosen drew the possible conflict to Mr Mandel's attention at an early stage.²⁷ But as soon as Mr Mandel obtained legal advice, his lawyers objected to Mr Rosen acting for Ms Haber. In those circumstances there had been no unexplained delay that could cause prejudice to Ms Haber.²⁸

The decision of the Tribunal on 3 August 2015

- [20] The Tribunal noted that Mr Rosen was charged with either unsatisfactory professional conduct or professional misconduct²⁹ by contravening Rule 4 by representing a client against a former client between 14 April 2011 and 24 November 2015. Mr Rosen resisted the application claiming that he was not in possession of confidential information from Mr Mandel; that if he were, Mr Mandel had waived the confidentiality; and if he had not waived the confidentiality, Mr Rosen nevertheless had received instructions from Ms Haber to contest the application for an injunction restraining him from acting for her.³⁰ The Tribunal then set out a summary of the agreed facts,³¹ and Rule 4.³²
- [21] Ms Haber and Mr Mandel, as opposing parties in an adversarial property settlement proceeding arising out of an emotional and acrimonious divorce, the Tribunal noted, obviously have opposing interests as each seeks a more favourable allocation of resources from a limited estate.³³ The decision of the federal magistrate clearly articulated the existence of confidential information relating to the property settlement previously negotiated by Mr Rosen with Mr Mandel's former wife and Mr Mandel's emotional, psychological and mental qualities.³⁴
- [22] The Tribunal continued:

“[21] Legal practitioners in property settlement proceedings often possess an intimate relationship with their clients. Sensitive information regarding marital transgressions, financial and property arrangements, relational affectivity, custodial preferences, and dispositional qualities are necessarily commuted to the legal practitioner for the exclusive purpose of facilitating the optimal management of the settlement proceedings. If legal practitioners retaining such confidential information were permitted to represent an opposing party in later proceedings in circumstances giving rise to a risk of misuse, the administration of justice would be brought into disrepute and the public would be discouraged from candidly disclosing prejudicial or embarrassing

²⁶ Above, [9].

²⁷ Above, [10] and [11].

²⁸ Above, [11].

²⁹ *Legal Services Commissioner v Rosen* [2015] QCAT 306, [2] mistakenly refers to “unprofessional or professional misconduct”.

³⁰ Above, [2] – [3].

³¹ Above, [4] – [16].

³² Above, [17].

³³ Above, [19].

³⁴ Above, [20].

information to their legal practitioners. Any reduction in the quality and quantity of information exchanged between solicitor and client diminishes the standard of legal representation and advice and may unnecessarily prolong legal disputes.

- [22] On the evidence presented to the Tribunal, we are satisfied on the balance of probabilities, having regard to the gravity of the allegations made against the respondent, that the respondent possessed confidential information of Mr Mandel. Furthermore, the Tribunal is not satisfied that the information, including the material appertaining to Mr Mandel's emotional, psychological or mental qualities, would necessarily be disclosed, or otherwise become available, to the respondent during the property settlement proceedings.
- [23] The respondent possesses a duty to act in the best interests of the complainant. This requires the use of not merely the legal skills and resources at the respondent's disposition, but all knowledge and information which may be in the possession of the respondent. Therefore, the respondent was required, by reason of his fiduciary duties, to utilise the confidential information to promote the interests of the complainant. The respondent was not absolved of this obligation by reason of conflicting duties of confidentiality owed to the complainant.
- [24] There is a real possibility – in the sense of being concrete, tangible and not insignificant – that this information may be used to the detriment of Mr Mandel. It is well established, by experience and precedent, that a skilled advocate or negotiator may exploit the mental, emotional and psychological attributes of an opposing party to their disadvantage. For this reason, it is untenable to propose that the confidential information possessed by the respondent could not justify a reasonable conclusion that there is a real possibility that the information could be used to Mr Mandel's detriment.
- [25] The respondent nonetheless contends that Mr Mandel has 'waived' his right to either the confidentiality of the information or object to the respondent's continued representation of the complainant. The respondent appears to rely on the fact that Mr Mandel was advised on 19 April 2011 of the confidential information possessed by the respondent, and failed to promptly object until 12 July 2011 to his continued representation of the complainant. Put another way, the less than three month delay is alleged to give rise to an implied waiver of the right to object to the respondent's representation of the complainant.
- [26] Mr Mandel was, and is, hardly a well-resourced and advised person. Although Mr Mandel has previously been involved in property settlement proceedings, he could not be accurately described as knowledgeable in the law and practice prevailing within this area of law. There is no evidence that Mr Mandel adequately appreciated the significance of the respondent

possessing confidential information, or that his delay might undermine his right to object to the respondent's continued representation of the complainant. Immediately on retaining Holloway Jenkins Lawyers, Mr Mandel instructed his solicitors to object to the respondent's continued representation of the complainant. In light of these circumstances, it cannot be concluded that the delay gave rise to a waiver of Mr Mande's right to object to the respondent acting for the complainant.

[27] Accordingly, the respondent is found guilty of breaching Rule 4 of the *Legal Profession (Solicitors) Rule 2007 (Qld)*.³⁵

[23] The Tribunal considered that Mr Rosen's conduct was not so grave as to require a finding that he was no longer a fit and proper person to practise law; he was neither dishonest nor malicious but his conduct was unethical and potentially unfair to Ms Haber.³⁶ Mr Rosen submitted that his conduct was not unprofessional because Ms Haber instructed him to contest the application for an injunction. That contention did not address the gravamen of the charge, namely the conflict of interest.³⁷ Mr Rosen was given repeated warnings by Mr Mandel's lawyers. He should have provided more complete and comprehensive advice to Ms Haber against resisting the application so as to avoid unnecessary costs. In seeking to retain Ms Haber as a client when he was clearly disqualified from representing her, he failed in his duty to act in her best interests and to exercise independent judgment.³⁸ The Tribunal was satisfied he committed unsatisfactory professional conduct in breach of Rule 4.³⁹ The Tribunal noted that there was no allegation that he had exploited the confidential information to benefit Ms Haber. She provided a broadly positive review of the quality of his legal services. His conduct, however, was exacerbated by his failure to respond to the objections and advice from Mr Mandel's lawyers. As an accredited specialist in family law, he should have been aware of the broad approach to conflicts of interest in the context of property settlement proceedings. He demonstrated a gross failure to exercise the professional judgment and independence expected of an experienced legal practitioner.⁴⁰ There was a clear public interest in imposing condign penalties to deter other legal practitioners from engaging in similar conduct. Having regard to Mr Rosen's long-standing unblemished record of service there was little need for personal deterrence.⁴¹

The decision of the Tribunal on 3 September 2015

[24] Ms Haber filed a notice of intention to seek compensation under the *Legal Profession Act* on 9 August 2013. The Tribunal invited Mr Rosen and Ms Haber to file submissions but neither did so.⁴² A compensation order may only be granted where the complainant has suffered pecuniary loss as a result of impugned conduct under the *Legal Profession Act* and it is in the interests of justice that such an order be made under s 465(1) *Legal Profession Act*.⁴³ Ms Haber claimed \$49,530.75 in compensation,

³⁵ Above, [21]-[27].

³⁶ Above, [30].

³⁷ Above, [31].

³⁸ Above, [32].

³⁹ Above, [33]. See also, footnote 1.

⁴⁰ Above, [35] and [36].

⁴¹ Above, [37].

⁴² *Legal Services Commissioner v Rosen* [2015] QCAT 339, [3].

⁴³ Above, [4].

comprising \$8,000 in costs paid to Mr Mandel arising out of the application for an injunction; \$13,270.17 in professional fees paid to Mr Rosen for legal services for the property settlement proceedings; and \$28,260.58 in legal service fees and disbursements to her subsequent legal representatives in the property settlement.⁴⁴

- [25] The adverse costs order, the Tribunal considered, emanated directly from Mr Rosen's failure to comply with his professional obligations under Rule 4, and to exercise professional judgment and independence through dissuading the complainant from unnecessarily resisting the application for an injunction. As a result she was ordered to pay costs which she would not have sustained but for Mr Rosen's improper conduct. She was entitled to \$8,000 in compensation.⁴⁵
- [26] Mr Rosen, the Tribunal found, should have terminated his retainer with Ms Haber when he became aware of the conflict of interest arising from his former representation of Mr Mandel. She was therefore prima facie entitled to recover the full value of the legal service fees she paid to Mr Rosen.⁴⁶ She did however receive some benefit from those legal services and should not be unjustly enriched. The Tribunal determined that \$4,100 appropriately reflected the value of work she received from Mr Rosen for which she should not be compensated and that she should be awarded \$9,170.17.⁴⁷
- [27] The subsequent legal fees expended by Ms Haber, the Tribunal determined, would have been incurred irrespective of Mr Rosen's unsatisfactory professional conduct and could not be the subject of compensation under the *Legal Profession Act*.⁴⁸ Although the Tribunal considered an award of \$17,170.17 in compensation should be paid to Ms Haber, under s 464(d) *Legal Profession Act* it cannot make a compensation order in excess of \$7,500 without the consent of both the complainant and the law practice. As neither had consented, this was the upper threshold to that amount of compensation.⁴⁹ Accordingly the Tribunal ordered that Mr Rosen repay Ms Haber \$9,170.17 in legal service fees under s 464(a) *Legal Profession Act* and \$7,500 for the adverse costs order made by the federal magistrate under s 464(d)(i) *Legal Profession Act*.⁵⁰

The appeal from the Tribunal's orders of 3 August 2015 (Grounds (a), (b) and (c))

- [28] Rule 4 provides:

“4 Acting against a former client

A solicitor must not accept a retainer to act for another person in any matter, or in opposition to, the interest of a person ('the former client'):

- 4.1 for whom the solicitor or the solicitor's current or former law practice or the former law practice of a partner or employee of the solicitor or of the solicitor's law practice has acted previously and has thereby acquired information confidential to the former client and material to the matter; and

⁴⁴ Above, [5].

⁴⁵ Above, [6].

⁴⁶ Above, [7].

⁴⁷ Above, [8].

⁴⁸ Above, [9].

⁴⁹ Above, [10].

⁵⁰ Above, [11].

4.2 if the former client might reasonably conclude that there is a real possibility the information will be used to the former client's detriment."

[29] A breach of the *Legal Profession (Solicitors) Rule* may be regarded as unsatisfactory professional conduct or professional misconduct under s 420(1)(a) *Legal Profession Act*. Under s 418 *Legal Profession Act* the term "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."

[30] Mr Rosen's contentions are largely those he made to the Tribunal. The first is that he had not acquired confidential information of the kind intended to be covered by Rule 4 because there was nothing he knew about Mr Mandel that Ms Haber did not know. He emphasises that Ms Haber deposed that she was present at every meeting between Mr Mandel and Mr Rosen and there was "absolutely nothing" that she did not already know in relation to his property settlement with his first wife. Mr Rosen's second contention is that if he were in possession of confidential information of the kind referred to in Rule 4, Mr Mandel waived the confidentiality of that information by agreeing to Mr Rosen continuing to act for Ms Haber. His third contention is that, in all the circumstances, particularly as Ms Haber instructed him to contest the application for an injunction, his conduct, even if technically in breach of Rule 4, was not unsatisfactory professional conduct.

[31] It is true that Ms Haber deposed that she and Mr Mandel had many detailed discussions in 2006 and 2007 in relation to his property settlement concerning his first wife;⁵¹ that she was present with Mr Mandel at every meeting with Mr Rosen; and that there was absolutely nothing that she did not already know in relation to the property settlement with Mr Mandel's first wife.⁵² It nevertheless seems unlikely that Ms Haber would have been present for every communication between Mr Mandel and Mr Rosen during the period Mr Rosen was acting for him, for example, the conciliation conference.

[32] In any case, Mr Mandel deposed that he had provided confidential information to Mr Rosen relevant to the current proceedings and that he feared Mr Rosen may use this information to assist Ms Haber in her case to Mr Mandel's disadvantage. Mr Mandel particularly adverted to Mr Rosen's knowledge that he suffered from depression and anxiety, how these conditions affected him, and his strengths and weaknesses. As a result, if Mr Rosen continued to act for Ms Haber, he apprehended she would obtain an unfair advantage in having Mr Rosen represent her in negotiations between them. Ms Haber's knowledge of the confidential information (or some of it) did not detract from the mandatory terms of Rule 4. Mr Rosen was required to refuse the retainer from Ms Haber, having previously acted for Mr Mandel and acquired information confidential to him and material to the matter in which Ms Haber wished him to act against Mr Mandel (Rule 4.1). In light of Mr Mandel's evidence, he might reasonably conclude that there was a real possibility the confidential information gained by Mr Rosen when he acted for Mr Mandel could be used to Mr Mandel's detriment if Mr Rosen continued to act for Ms Haber in the

⁵¹ See Affidavit of Haber, sworn on 8 May 2015, [5] and [6], AB 6.

⁵² Above, [17], AB 8.

current litigation (Rule 4.2). So much was rightly identified by the federal magistrate in granting the injunction⁵³ and in the Tribunal's reasons.⁵⁴ Mr Rosen's first contention is not made out: his conduct in acting for Ms Haber was a breach of Rule 4.

- [33] As to Mr Rosen's second contention, he accepted instructions from Ms Haber on 16 April 2011 to represent her in the dispute over property with Mr Mandel. He soon after advised Mr Mandel that he was acting for her, explaining that he did not believe he was in possession of confidential information as Mr Mandel would have to disclose it in the property settlement proceedings in any event. Mr Mandel was self-represented. His former relationship with Mr Rosen made him likely to accept Mr Rosen's statement of the law. According to Mr Rosen's file note of 3 May 2011, Mr Mandel told him he was going to try and work it out with Mr Rosen and did not intend to instruct a legal representative.⁵⁵ When no settlement was reached, Mr Rosen, on 24 June 2011, filed an application in the Federal Magistrates Court on behalf of Ms Haber for property settlement. On 12 July 2011, Mr Mandel retained lawyers in the proceedings who immediately wrote to Mr Rosen advising that Mr Mandel objected to him acting for the complainant as he had previously acted for Mr Mandel in a property settlement dispute. In circumstances where Mr Mandel was self-represented, was told by Mr Rosen that confidentiality was not a problem, and as soon as he obtained independent legal advice to the contrary objected to Mr Rosen appearing for Ms Haber, all within about two months, there has been no waiver of confidentiality by Mr Mandel through delay. This contention was rightly rejected by the Tribunal.⁵⁶
- [34] Mr Rosen's third contention has no relevance as to whether he breached Rule 4. At best, it concerns whether he was guilty of unsatisfactory professional conduct and, if so, the appropriate penalty. Prudently, he is not seeking to appeal from the penalty imposed.
- [35] It is little wonder that Ms Haber, at an emotional time in her life when she was vulnerable and needing legal advice from her solicitor, was most reluctant to change lawyers over the confidentiality issue, in the absence of firm advice that this was necessary and appropriate. She deposed that she told Mr Rosen that she would do what he thought was in her best interests.⁵⁷ The decision of the federal magistrate makes clear that a legal practitioner, particularly an experienced, accredited family law specialist like Mr Rosen, should have known that the application for an injunction was likely to be successful. Mr Mandel's lawyers tried their best to persuade Mr Rosen of this, even providing references to relevant authorities. Mr Rosen persistently failed to advise Ms Haber that the application was likely to be granted or that, in unsuccessfully resisting it, she would likely have a costs order made against her. The fact that he received instructions from Ms Haber to contest the application in these circumstances does not assist him. She gave those instructions without proper advice.
- [36] The relationship between client and solicitor is one of the most important fiduciary duty relationships known to the law.⁵⁸ Solicitors cannot properly discharge their duties to a client whose interests are in conflict with those of a former client. Where there is a conflict in these responsibilities, lawyers must ensure that they fully disclose

⁵³ *Haber & Mandel* [2011] FMCAfam 1564, [4] – [10].

⁵⁴ [2014] QCAT 306, [20] – [22].

⁵⁵ AB 98.

⁵⁶ [2014] QCAT 306, [25] and [26], set out at [21] of these reasons.

⁵⁷ Affidavit of Haber, sworn on 8 May 2015, [13], AB 7.

⁵⁸ *Fordham v Legal Practitioners' Complaints Committee* (1997) 18 WAR 467, 476, citing with approval *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 361 – 362.

the material facts to both client and former client and obtain the informed consent of both before continuing to act: *Clark Boyce v Mouat*.⁵⁹ The conflict is between the continuing duty owed to the former client not to disclose or use to the former client's prejudice confidential information, and the solicitor's obligation to advance the case of his or her new client: *Mallesons Stephen Jaques v KPMG Peat Marwick*,⁶⁰ cited with approval in *Fordham v Legal Practitioners' Complaints Committee*.⁶¹ Apparently through lack of insight rather than malice or greed, Mr Rosen did not appreciate his ethical responsibilities. He did not disclose the true nature of the conflict of interest to either Mr Mandel or Ms Haber, so that their informed consent to his continued retainer with Ms Haber was never obtained. In continuing to act for Ms Haber he breached Rule 4. His conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.⁶² The proceedings before the federal magistrate, the Tribunal and this Court unfortunately suggest he lacked insight in the past and still lacks insight into his professional shortcomings in this regard. It would be prudent for him to seek counselling from senior practitioners on this issue. The applicant's third contention is not made out.

- [37] Mr Rosen has not demonstrated that if he were granted an extension of time to appeal from the Tribunal's decision of 3 August 2015, he would have any reasonable prospects of success in his proposed appeal. His application for an extension of time to appeal should be refused.

The appeal from the Tribunal's orders of 3 September 2015 (Ground (d) and (e))

- [38] In Mr Rosen's appeal from the Tribunal's order that he repay Ms Haber \$9,170.17 in legal service fees and \$7,500 in compensation for the adverse costs order made by the federal magistrate, he contends she was not a complainant entitled to seek compensation. He submits that only his former client, Mr Mandel, could be awarded compensation.
- [39] *Legal Profession Act*, Chapter 4, "Complaints and discipline", Part 4.2, "Key concepts", includes s 420 which lists conduct capable of constituting unsatisfactory professional conduct. Mr Rosen's impugned conduct came within s 420(1)(a). Part 4.4, "Complaints about Australian legal practitioners", includes s 428 which provides that a complaint may be made under this chapter about an Australian legal practitioner's conduct which amounts to unsatisfactory professional conduct.⁶³ Section 429 relevantly provides:

"429 Making a complaint

- (1) ... an entity may make a complaint...about the conduct of an Australian legal practitioner..., for example, an entity that—
- (a) is or was a client of the law practice; ..."

- [40] The term "entity" is not defined in the Act. It is clearly intended to have its ordinary and very wide meaning: "something that has a real existence".⁶⁴ The plain terms of

⁵⁹ [1994] 1 AC 428, 436, citing with approval Richardson J's observations in *Farrington v Rowe McBride and Partners* [1985] 1 NZLR 83, 90.

⁶⁰ (1991) 4 WAR 357, 360.

⁶¹ (1997) 18 WAR 467, 476.

⁶² *Legal Profession Act* s 418.

⁶³ *Legal Profession Act* s 428(1)(a).

⁶⁴ The Macquarie Dictionary, Federation Edition.

s 429(1)(a) provide that a complaint may be made by an entity that is or was a client of the law practice, a category within which Ms Haber clearly falls. She was entitled to make a complaint under s 429.

[41] *Legal Profession Act*, Part 4.10, “Compensation orders”, relevantly provides:

“464 Meaning of compensation order

A *compensation order* is 1 or more of the following—

(a) an order that a law practice...must repay the whole or a stated part of the amount that the law practice charged a complainant for stated legal services;

...

(d) an order that a law practice pay to a complainant an amount by way of compensation for pecuniary loss suffered because of conduct that has been found to be—

(i) unsatisfactory professional conduct ... of an Australian legal practitioner involved in the relevant practice; ...”

465 Compensation order relating to pecuniary loss

(1) Unless the parties agree, a compensation order that is the type of order mentioned in section 464(d) must not be made unless the disciplinary body making the order is satisfied—

(a) if there is a complainant in relation to the discipline application – that the complainant has suffered pecuniary loss because of the conduct concerned; and

(b) that it is in the interests of justice that an order of that type be made.

...”

[42] These provisions make clear that Ms Haber was entitled as a complainant to apply for compensation for the fees she paid to Mr Rosen up to and including the determination of the injunction application. Her instructions to him to continue to act in the matter, as I have explained, were not informed and do not preclude her from being a complainant under the *Legal Profession Act* or from obtaining compensation under s 464(a). The Tribunal, generously to Mr Rosen, discounted the amount of this compensation by \$4,100.⁶⁵ Nothing in the *Legal Profession Act* or Rule 4 requires that, where a solicitor has been found guilty of unsatisfactory professional conduct arising from a breach of Rule 4, any application for compensation under the *Legal Profession Act* can be brought only by the legal practitioner’s original client, here Mr Mandel. The main purposes of the Act include “the regulation of legal practice in [Queensland] in the interests of the administration of justice, and for the protection of consumers of the services of the legal profession and the public generally.”⁶⁶ Ms Haber was a consumer of legal professional services who, as it turned out, needed protection from Mr Rosen. She was entitled to be a complainant under Part 4.10 *Legal*

⁶⁵ *Legal Services Commissioner v Rosen* [2015] QCAT 339, [8].

⁶⁶ *Legal Profession Act* s 3(a).

Profession Act. She suffered pecuniary loss from Mr Rosen's conduct, both in paying him legal fees he was not entitled to as he could not then ethically act for her, and in paying Mr Mandel's costs of his successful application for an injunction which he should never had to bring.

- [43] As Mr Rosen has not made out his grounds of appeal relating to the Tribunal's order of 3 September 2015, this appeal should be dismissed.

Summary

- [44] Mr Rosen has not demonstrated that his proposed appeal from the orders of the Tribunal of 3 August 2015 have any prospects of success. His application for an extension of time to appeal from those orders must be refused with costs. Nor has he made out his grounds of appeal from the orders of the Tribunal of 3 September 2015. That appeal must be dismissed with costs.

Orders

1. The application for an extension of time to appeal is refused with costs.
 2. The appeal is dismissed with costs.
- [45] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.
- [46] **BURNS J:** I agree with the reasons of the President and the orders that her Honour proposes.