

CITATION: *Legal Services Commissioner v Sheehy* [2017] QCAT 276

PARTIES: **Legal Services Commissioner**
(Applicant/Appellant)
v
Rhonda Beryl Sheehy
(Respondent)

APPLICATION NUMBER: OCR125-14

MATTER TYPE: Occupational Regulation Matter

HEARING DATE: 23 May 2017

HEARD AT: Brisbane

DECISION OF: **Justice Carmody**
Assisted by:
Dr Julian Lamont, Lay Panel Member
Ms Megan Mahon, Practitioner Panel Member

DELIVERED ON: 8 August 2017

DELIVERED AT: Brisbane

ORDERS MADE: **IT IS THE DECISION OF THE TRIBUNAL THAT:**

1. **The discipline application is dismissed.**
2. **The parties are to exchange and file (with detailed supporting written submissions) any application for costs under s 462(2) or (4) Legal Profession Act 2007 (Qld) by 4pm on 10 October 2017.**
3. **In the time allowed for the exchange of submissions, the parties can, of course, discuss an agreed order.**
4. **As to the exchange of submissions, it is ordered that:**
 - (1) **The Legal Services Commissioner is to file**

in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs the Commissioner wishes to make, by: 4:00pm on 5 September 2017.

- (2) The respondents are to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs they wish to make, by: 4:00pm on 26 September 2017.
- (3) The Legal Services Commissioner is to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in reply, by: 4:00pm on 10 October 2017.
- (4) The application for costs will be determined by the Tribunal on the papers in Brisbane not before 13 October 2017, unless either party files an application for an oral hearing.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – GENERALLY – where land was being sold by court order to settle a matrimonial property dispute – where the land was co-owned by a husband and wife - where the Commissioner charged the respondent for engaging in unsatisfactory professional conduct on the basis she either knowingly or recklessly completed a contract of sale when the co-seller had not authorised it – whether the husband had a valid right to terminate the contract – whether completion of contract amounted to breach of any professional obligation or standard.

Legal Profession Act 2007 (Qld), s 462

Briginshaw v Briginshaw (1938) 60 CLR 336

Kennedy v Council of Incorporated Law Institute (1939) 13 ALJ 563

Legal Services Commissioner v Madden (No 2) [2008] QCA 301

Lion White Lead Ltd v Rogers (1918) 25 CLR 533

Peeke v Medical Board of Victoria, Unreported, Supreme Court of Victoria, No 10170 of 1993, 19 January 1994

APPEARANCES and REPRESENTATION:

APPLICANT: Mr M Nicolson of Counsel instructed by the Legal Services Commissioner

RESPONDENT Ms A Nicholas of Counsel instructed by Bartley Cohen Law

REASONS FOR DECISION

- [1] The Legal Services Commissioner (Commissioner) alleges that the practitioner should be fined up to \$1,000.00 as well as publicly reprimanded for engaging in unsatisfactory professional conduct on the basis that she either knowingly or recklessly “completed a contract of sale” when the co-seller was against it and/or by “instructing”, receiving and accepting payment of the balance of the proceeds into her trust account on the co-seller’s behalf when he had not authorised it.
- [2] Notably, neither negligence nor dishonesty is alleged.

The context

- [3] The practitioner acted for the wife in a court ordered sale of jointly owned vacant land at Caboolture to settle a matrimonial property dispute with her former husband. A contract was agreed with BRM Holdings Pty Ltd and a deposit direct credited to the practitioner’s trust account on 5 December 2008. The entire net proceeds of sale were to be applied to paying out a matrimonial debt with Suncorp bank, mortgaged over the wife’s home and another debt.
- [4] The husband was represented in the transaction by Welsh & Welsh (Welsh). BRM Holdings retained Windsor Craig (Windsor).
- [5] The contract was originally due for completion on 19 December 2008. On 10 December 2008, the buyer requested an extension of settlement until 24 December 2008. The practitioner advised Windsor that the wife did not

agree to the extension. The Commissioner submitted that the husband didn't agree either, but settlement was not effected on 19 December 2008, nor was it effected on 24 December 2008.

- [6] At some point during this period, it was realised that the certificate of title to the property could not be located and steps were taken to make an application to the Titles Office to dispense with production of the title. The parties agreed to vary the time for settlement to 30 January 2009 so as to dispense with the sellers' obligation to tender the certificate of title.
- [7] The buyer then sought a further extension of settlement until 13 February 2009, which was agreed to by the husband but not agreed to by the wife. Settlement did not occur on 13 February 2009.
- [8] On 13 February 2009 the wife again agreed to postpone settlement to 5 pm on 17 February 2009 with time purportedly of the essence. The independent expert, Mr Purcell, notes at [4.27] of his report that the extension did not bind the husband. The practitioner did not prepare for settlement until after 13 February 2009. Whether time was of the essence and the husband was in fact ready, willing and able to settle on 13 February 2009 is conjectural. There is no evidence, for instance, that either seller or the buyer tendered for settlement. On 16 February 2009 Windsor proposed a variation to the contract (which was not accepted) and expressly required the authority of both sellers to pay Suncorp.
- [9] Early in the morning of the 17 February 2009 the wife was served with a notice to quit the former matrimonial home by Suncorp, being the mortgagee of the wife's home, the debt for which was to be paid out by the sale of the subject land sale, by court order.
- [10] At 11.37 am on 17 February 2009 Welsh advised Windsor for the first time that the husband had instructed the firm to refuse to enlarge time on 13 February 2009 and (purportedly) terminated earlier on 17 February 2009 for non-performance four days before hand.
- [11] At about 3.30 pm on 17 February 2009 Welsh informed the practitioner of his instructions to terminate for default only to be told that the wife took issue with the husband's asserted right to unilaterally defeat her settlement rights by an "erroneous" termination.
- [12] The practitioner sent Windsor (and a copy to Welsh) an email at 3.36 pm on 17 February 2009 stating that she was "agreeable to accepting the balance of purchase monies ... to be paid in this (her) ... Trust Account today". On the Commissioner's case this is the "smoking gun".
- [13] Settlement was effected by Windsor's depositing of the sale proceeds of \$129,500.00 into practitioner's trust account and lodgement of the transfer documents for registration with the Titles Office the same afternoon.
- [14] Welsh lodged a caveat on the husband's behalf at 4.20 pm on 17 February 2009.

- [15] The practitioner received notice of dispute on behalf of the husband of the proceeds she by then held in her trust account and rightly did not deal with them, pending resolution of the dispute.
- [16] Following a termination of the contract by court order the proceeds were promptly refunded to the buyer and the transfer documents withdrawn from registration with the Titles Office.
- [17] The formal charge reads:

Breach of professional obligations

1. On 17 February 2009, the respondent breached her professional obligations, in that:
 - (a) She completed a contract for sale of land when she knew, or ought to have known, that the joint owner of the property, Mr Leigh (sic) Brander, had terminated the contract and had not consented to settlement; and/or
 - (b) She received into her trust account on behalf of Mr Leigh (sic) Brander the sum of \$129,500 in circumstances where she knew or ought to have known that Mr Brander had not agreed to the settlement and had not authorised the transfer.

Particulars:

- 1.18 The respondent forwarded an email to Mr Windsor and Mr Welsh instructing the payment of the balance of the purchase price into her trust account upon settlement.
- 1.19 On 17 February 2009, notwithstanding the termination by the husband, and the lack of consent and authorisation by the husband, the respondent, in conjunction with Mr Windsor, and in breach of her professional obligations, effected settlement of the contract and accepted the balance of the purchase price of \$129,500 to her firm's trust account without the husband's authority.

The tribunal's role

- [18] Subject to the Supreme Court's inherent supervisory jurisdiction the tribunal is "the ultimate custodian of professional standards".¹
- [19] The tribunal's task is to conduct a hearing into the allegations made in the referral and make both culpability and penalty findings based on a comparison between the objective facts it accepts as satisfactorily proven and the statutory standard; that is to make a fully informed contextual assessment or value judgment about whether the practitioner's

¹ *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301, [84].

professional performance fell short of what a member of the public is entitled to expect of a reasonably competent Queensland lawyer in connection with the practice of law.

The rival contentions

- [20] The Commissioner contends, in effect, that any variations to a contract for the sale of land requires unanimous consent and neither co-owner can unilaterally alter the accrued rights of the other. This submission derives by analogy from the High Court dicta in *Lion White Lead Ltd v Rogers*² to the effect that in ordinary circumstances a co-seller has a right to refuse to proceed further with the contract after (but not in anticipation of) a breach by the buyer of a fundamental term of the contract notwithstanding that all the other parties want to affirm and perform the agreement.
- [21] However, unless they were both ready willing and able to settle on 13 February 2009 which is not conclusively established the buyer's default did not go to the root of the contract and the husband could not terminate (so as to prejudice the wife's settlement rights) without her assent and from her point of view nothing she did could detrimentally allow termination rights the husband did not have.
- [22] This is a case where the land was being sold up to settle a matrimonial property dispute where the only asset was being sold by court order to pay out the mortgage with no residue for the parties to share. A sale was imperative and neither of the sellers had much choice about who to or for how much as long as it was in the range of reasonableness.
- [23] The practitioner denies that she did anything professionally blameworthy in all of the circumstances but, if she did lapse, her culpability is not sufficiently substantial or significant enough to warrant an unfavourable disciplinary finding or a sanction.
- [24] Her counsel argues that the Commissioner has failed to satisfactorily prove that the husband had a valid right to terminate or, if he did, that the practitioner enabled or assisted Windsor to frustrate it by wrongfully transferring title against his express wishes. Moreover, she says, the Commissioner has failed to assert the counterfactual; that is, what a reasonably competent practitioner is expected to do in the same situation.

The expert view

- [25] Mr Purcell says at [4.34] that as BRM Holdings was obliged to pay the balance of the purchase price on 13 February 2009 whether the transfer documents were tendered by the sellers or not and provided "the sellers were ready, willing and able to settle (and it appears they were), (the husband) would have been entitled to terminate the contract or, to put it another way (the wife) and BRM Holdings would not have been entitled to insist that settlement occur without (the husband's) consent" and in his

² (1918) 25 CLR 533, 551.

opinion a competent and careful lawyer would have known or ascertained that to be the law.

- [26] Mr Purcell's opinion depends on (a) the assumed (but uncertain) fact that the sellers were ready willing and able to settle on 13 February 2009 and (b) the correct interpretation and application of the high Court dicta in *Lion White Lead Ltd v Rogers*³ quoted at [4.33] of his report.
- [27] As even a reprimand to a professional person may have serious adverse implications⁴ reasonable satisfaction of liability facts is "... not be produced by inexact proofs, indefinite testimony, or indirect inferences"⁵.
- [28] Even logical assumptions are insufficient without enough evidence to put it beyond more speculation.
- [29] I am not persuaded that the sellers were ready willing and able to settle on 13 February 2009 or that time was, at that juncture, of the essence of the contract.
- [30] What was said in *Lion White Lead* (which was decided on another ground) is that a right to terminate accrues under the terms of a contract where there is "an actual breach going, to the root of the bargain" and in those circumstances one a co-seller can refuse to proceed notwithstanding the others "desire to waiver (his) rights".
- [31] Even, on this basis the contract of sale arguably remained on foot, at least, until the husband gave notice of termination on 17 February 2009, at about six hours before the wife believed settlement had been extended to that same day.
- [32] However, there is no compelling evidence that any breach by BRM Holdings on 13 February 2009 was fundamental enough to give rise to enforceable termination rights and serious unresolved waiver issues.
- [33] At [4.57] Mr Purcell says in these circumstances the practitioner should have advised the wife "... that, whether or not the contract had been terminated validly, she could not take it upon herself to vary the contract by extending time and "of the steps which were available to her if she wished to dispute (the husband's) purported termination".
- [34] He goes on at [5.1] to say that after 11.37 am on 17 February 2009 the practitioner should have known that either because the husband did not agree to extend or had purported to terminate it was not lawful for either BRM Holdings or the wife to require completion by 5 pm.
- [35] The proper professional response in Mr Purcell's view was for the practitioner to deal with all the other parties in good faith, honesty and fairness and refrained from arranging from participating "in a settlement or

³ (1918) 25 CLR 533, 551.

⁴ *Peeke v Medical Board of Victoria*, Unreported, Supreme Court of Victoria, No 10170 of 1993, 19 January 1994.

⁵ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.

in steps leading to receipt of the transfer of the settlement money or lodgement of the transfer documents”.

Findings

- [36] I am greatly assisted by what Mr Purcell considers was needed to meet the professional standard of competence and the reasonable expectations of the public but, in the end, the application of the test is a facts sensitive question of law and cannot be delegated to an expert.
- [37] My assessment of what the practitioner should have done based on what she knew or should have known respectfully differs from the Commissioner’s and Mr Purcell’s.
- [38] I am not satisfied that the facts are capable of supporting the allegation that based on what she actually or constructively knew that the practitioner acted in breach of any professional obligation or standard.
- [39] The sellers owed each other reciprocal duties of good faith and fair dealing not to do anything unreasonable to scuttle a genuine sale transaction. Fundamental breach or not, the husband could not unilaterally jeopardise the sale without good cause.
- [40] I find, regardless of the validity of the termination notice, the practitioner probably knew that for some unexplained reason the husband did not consent to settlement but proceeded anyway because she honestly (and reasonably) believed that her duty was to protect the wife’s contract rights and her interest in discharging the mortgage debt.
- [41] The practitioner did not give Windsor any information he didn’t already have except “permission” or “authority” he didn’t really need to deposit the proceeds of sale into her trust account. Although, the facts of charge 1(b) are proven they do not suffice for unprofessional conduct. Particular 1.18, by contrast, is factually inaccurate. Even if telling Windsor that she was “agreeable” to the money transfer was interpreted by him as encouragement it was not an “instruction” in the sense of an enforceable order or compulsory direction. The practitioner was simply taking all steps to ensure that her client was not in breach of the contract and displaying that the wife was ready, willing and able to settle; which would have been required for settlement to proceed in the event that the husband’s solicitors held similar instructions.
- [42] Nor is it correct to say as the charge does that what she did was to “complete” the settlement. The two acts of completing settlement were the deposit of the sale proceeds to the trust account of the practitioner and dealing with the transfer by lodgement of it with the Titles Office for registration – both acts which were performed by Windsor and not the practitioner. The tribunal notes that Windsor has been the subject of separate disciplinary charges in that respect.
- [43] The husbands asserted termination rights were weaker or, or at least, no stronger, in my opinion, than the wife’s right to settle. There is no

compelling evidence supporting the assumption that time was of the essence at any material time after the initial variation in December 2008 or that the sellers were both ready willing and able to settle on the 13 February 2009. If they weren't, the buyer's default in not tendering on the 13 February 2009 was not fundamental enough to justify termination. *Lion White Lead* provided the husband with a shield against the buyer not a weapon against the wife.

- [44] The practitioner was faced with a dilemma. She had to quickly choose between imperfect solutions none of which was demonstrably right or manifestly wrong. Instead of acting in the hope that settlement would be effected and the mortgage discharged she could have advised the wife to waive her rights contrary to her interests and legitimate expectations, risked a specific performance suit or inducing breach of contract action or suggested going to yet another court for an urgent (but not a guaranteed final or conclusive) legal ruling.
- [45] Practitioners are defined by the legality and ethical (not moral) virtue of the choices they reasonably make in the hurly-burly of professional life. They are allowed to make reasonable contestable or contentious even questionable decisions without their conduct being branded unprofessional or substandard. They are accountable for their actions or failures in performing professional roles according to reasonably acceptable and achievable (not arbitrary or impossible) standards of behaviour.
- [46] Tested objectively and measured against the statutory standard, the practitioner did not act illegally, unprofessionally, unethically, or in breach of any duty to the husband, another practitioner, the profession or the public in sending the email to Windsor at 3:47 pm on 17 February 2009 even though it had the intention or likely effect of facilitating Windsor's disreputable plans to transfer title despite the husband's opposition. She might have breached her professional duty if she failed to protect her client's interests against what was honestly and reasonably believed to be an ineffective attempt by the husband to terminate at the last minute for no apparently good, or even valid, reason.
- [47] Accepting that it is open to valid expert criticism and that there were probably more prudent options available to her, what the practitioner did, in my view, is no more or less than what a member of the public is entitled to expect of a reasonably competent lawyer faced with the same intractable problem; that is, to resolve it in the overall best interests of the client (and the mortgagee) consistently with the intention of the family court order and a reasonable interpretation of the legal position and without causing or risking any likely or practical detriment to another party.
- [48] Nothing she did or failed to do is indicative of a misunderstanding or misapplication of "the precepts of honesty and fair dealing"⁶ in relation to the public interest or demands of practical justice.

⁶ *Kennedy v Council of Incorporated Law Institute* (1939) 13 ALJ 563.

[49] The tribunal finds that the alleged conduct did not amount to unsatisfactory professional conduct.

Orders

[50] The discipline application is dismissed.

Costs

[51] The parties are to exchange and file (with detailed supporting written submissions) any application for costs under s 462(2) or (4) *Legal Profession Act 2007* (Qld) by 4pm on **10 October 2017**.

[52] In the time allowed for the exchange of submissions, the parties can, of course, discuss an agreed order.

[53] As to the exchange of submissions, it is ordered that:

1. The Legal Services Commissioner is to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs the Commissioner wishes to make, by:

4:00pm on 5 September 2017.

2. The respondents are to file in the Tribunal four (4) copies and serve one (1) copy of any submissions in relation to costs they wish to make, by:

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4. The application for costs will be determined by the Tribunal on the papers in Brisbane not before **13 October 2017**, unless either party files an application for an oral hearing.