

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Mullins* [2006] LPT 012

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
GERARD RAYMOND MULLINS
(respondent)

FILE NO/S: BS1876 of 2006

DIVISION: Legal Practice Tribunal

PROCEEDING: Application

ORIGINATING COURT: Legal Practice Tribunal at Brisbane

DELIVERED ON: 23 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2006

JUDGE: Byrne J

Mr K Dorney QC and Dr J Lamont assisting

ORDER: The Tribunal orders that the respondent:

- (1) is publicly reprimanded;
- (2) pay a penalty of \$20,000;
- (3) pay the applicant's costs of the application to be assessed.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – STATUTORY PROCEEDINGS – QUEENSLAND – where assumption forming the basis of experts' reports had become false to barrister's knowledge – where barrister deliberately relied on reports at mediation despite falsity of assumption – where other party settled case in the belief that the reports' assumptions were valid – whether barrister's actions in relying on reports constituted professional misconduct

COUNSEL: W Sofronoff QC (with him S McLean) for the applicant
R Douglas SC (with him D de Jersey) for the respondent

SOLICITORS: Legal Services Commission for the applicant
Gilshenan & Luton for the respondent

Discipline application

- [1] The Legal Services Commissioner contends that the respondent, a barrister, is guilty of professional misconduct in connection with negotiations for the compromise of a claim for compensation for personal injuries. Essentially, the complaint is that the respondent knowingly misled an insurer and its lawyers about his client's life expectancy.

Client's claim

- [2] In April 2001, Mr White was rendered quadriplegic in a motor vehicle accident. He retained solicitors to pursue a claim for damages. The insurer was Suncorp-Metway Insurance Limited ("Suncorp").
- [3] Mr White's solicitors supplied Suncorp with a report prepared by Evidex Pty Ltd ("Evidex"). The report included a comprehensive assessment by an occupational therapist, Ms Welshe, of the then 48 year old claimant's future care needs, and an accountant's evaluation of the cost of that care. Expressly, the report was based on an assumption that information in certain medical reports was correct.
- [4] In one such medical report, it was, it seems, Dr Davies who wrote that the injuries sustained in the accident had reduced Mr White's life expectancy by 20% of that of a normal male of his age. The assessment stated that Mr White would continue to require care, equipment and home modifications for the rest of his life. Calculations of future care costs were prefaced by a statement that the assessment reflected 80% of the life expectancy of a 48 year old male: 27 years 11 months.
- [5] Later, the claimant's solicitors provided Suncorp with a "Worklife Assessment" by Ms Welshe. This report recorded that Mr White had said that "[b]ut for his injury he had intended to continue working in his pre-injury occupation until retirement". It also restated the author's assumption that Mr White's otherwise normal life expectancy had been reduced by 20% through the injuries sustained in the accident.
- [6] Eventually, the claimant's solicitors provided Suncorp with an Evidex forensic accountant's report. This revealed that the assessment of the value of the claimant's future earning capacity – \$934,178 – was based on projected earnings to "normal retirement age of 65": 16 years, four months.

Cancer

- [7] By mid-September 2003, a mediation had been arranged in an attempt to negotiate a compromise of Mr White's claim. The claimant's solicitors had already retained the respondent to represent him at the mediation; and Suncorp's solicitors had engaged Mr Kent, also a barrister, to protect Suncorp's interests.

- [8] The mediation was set for 19 September 2003. In preparation for the event, on 16 September,¹ the respondent conferred with the claimant and his solicitor, Mr Garrett. One topic of discussion was a draft schedule of damages prepared by the respondent which was to be settled and presented to Suncorp.
- [9] At the conference, the claimant said that: he was to receive chemotherapy treatment for cancer; he had been advised by his doctor that he had cancer spots on his lungs and in other places throughout his body; the cancer was described as secondary cancer and the doctor had been unable to find the primary cancer; he had been treated by a general practitioner and subsequently by a specialist; these matters had been discovered, at the earliest, on or about 1 September 2003; and there were no medical reports dealing with the cancer or treatment (“the cancer facts”).
- [10] On hearing this, the respondent told his client that it was his preliminary view that the cancer facts had to be disclosed to Suncorp before the mediation, and that the mediation was likely to be adjourned so that the insurer could investigate the issues. Afterwards, Mr White instructed Mr Garrett and the respondent that he did not wish to reveal the cancer facts unless he was legally obliged to do so, and that he wished the mediation to proceed because he wanted his claim resolved.

Propounding the client’s case

- [11] On or about 16 September,² the respondent gave Mr Kent a two page document headed “Plaintiff’s Outline of Argument at Mediation”. This was a version of the schedule of damages settled at the conference with the claimant. There is no consensus about whether the Outline was delivered before or after the conference. But it is not expressed to be a draft, and nothing about it indicates that it is. So the probabilities are that it was delivered after the conference. As it happens, however, nothing turns on that.
- [12] The Outline proposed \$854,787.20 for future economic loss. A footnote records that the sum has been arrived at “as per the Evidex report, but reduced for contingencies by 20%, including the prospect that the plaintiff may not have worked to age 65”. Future out-of-pocket expenses of \$137,964 were said to have been calculated in accordance with the Evidex “report”. The costs of future care (\$595,211.76), medical attendances and pharmaceuticals were expressed to have been based on needs “for 24 years”.³
- [13] The respondent knew about the life expectancy assumption stated in the Evidex reports. No doubt he realized that it was founded on a medical report.

¹ An opinion written by the respondent on 19 September 2003 mentions different dates for this conference: 16 (p 1) and 15 September (p 6, twice). His fee note has 16 September as the date.

² See Agreed Fact 16.

³ There is no explanation for the 24 years. It is not, however, suggested that it allowed for the cancer facts.

- [14] As the respondent hoped, Mr Kent and representatives of Suncorp considered the Outline. The two barristers discussed it. Their conversation took place after Mr White had disclosed the cancer facts to the respondent.⁴ According to the Statement of Agreed Facts:

“Between 16 September 2003 and 18 September 2003, in a telephone conversation, the respondent stated to Mr Kent that:

The claim for future care set out in the [Outline] was very reasonable; and

The claim for future economic loss was based upon the [Evidex] reports.

As the respondent knew and intended, Mr Kent communicated the substance of the telephone representations to Suncorp”.

- [15] There is no suggestion that Suncorp or its lawyers had pertinent information on Mr White’s life expectancy other than the Evidex reports. So it is not surprising that it is agreed that:

“As a consequence of the statements and representations referred to above, Mr Kent and the representatives of Suncorp responsible for the claim each believed that, by reason of the injuries, the claimant had a life expectancy of 80% of that of a normal man of his age.”

- [16] The Outline identified the various components of the claim. Life expectancy was highly significant to many of them. On its face, the Outline sought to support some by invoking the Evidex reports. These references invited Mr Kent and Suncorp to rely on those reports. That is also true of the respondent’s assertion to Mr Kent that the future economic loss component was “based upon” the reports.

Respondent’s knowledge of changed circumstances

- [17] When that conversation occurred, the respondent had already inferred that Mr White’s longevity was at least “likely to be further reduced ... by the cancer facts”.⁵ In other words, he then believed, on substantial grounds, that the stated life expectancy that was critical to important parts of the claim was, very probably, no longer sound. But he did not disclaim⁶ the assumption. Instead, in effect, he asked Mr Kent to have regard to the Evidex reports on which the future economic loss claim was “based”.

- [18] From Mr White’s perspective, achieving a resolution at the mediation was desirable: a fortnight’s delay and Suncorp would have to be told of the cancer facts. Section 45(3) of the *Motor Accident Insurance Act* 1994 mandated disclosure to the insurer of any “significant change in ... medical condition” since the Notice of Claim had been given within a month after the claimant had become aware of the change.

⁴ Transcript: p 18.

⁵ Para 25 of the Submissions on Behalf of the Respondent dated 25 October 2006.

⁶ Cf *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605.

- [19] The respondent conducted some research and spoke to senior counsel about his situation. By 18 September, he had resiled from his initial impression that the cancer facts should be disclosed. Instead, he came to the view that for as long as the claimant's lawyers did not positively mislead Suncorp and its lawyers about the claimant's life expectancy, they would not be violating any professional ethical rules. He then sought his client's instructions.
- [20] He adverted to a risk that non-disclosure of the cancer facts might provoke a challenge to any compromise were Suncorp subsequently to discover the truth. Mr White did not wish to disclose the information unless legally obliged to do so. He wished to proceed with the mediation, and to finalise his claim as soon as possible. The respondent advised that the law did not oblige Mr White to disclose the diagnosis. He also told him and Mr Garrett that it was not appropriate to make positive assertions during the mediation that the facts were different from those they knew to be true, and that positive assertions could not be made that there were no impediments to the claimant's life expectancy.

Mediation

- [21] The mediation⁷ did proceed, attended, it seems, by Mr White, Mr Garrett, the respondent, Mr Kent and Suncorp representatives.
- [22] During the mediation, the respondent "[r]eferred to and relied upon aspects of" his Outline to support Mr White's compensation claim and "[r]epresented that, immediately prior to the injury, the claimant intended to continue working to normal retirement age".⁸ It is not said whether any of those "aspects" concerned an Evidex report. But those present will have recognized that life expectancy was critical to the worth of major components of the claim. In any event, the respondent realized the impact of the Evidex reports: in particular, that the information in them about the assumption had led Mr Kent and Suncorp to suppose that an otherwise normal life expectancy had been reduced by about 20% by the accident.
- [23] At the mediation, the claim was settled. However, had Suncorp been informed of the cancer facts, it would not have agreed to the compromise.
- [24] The mediation was conducted, and the compromise concluded, in circumstances where the respondent appreciated that:
- the Evidex reports his solicitors had supplied to Suncorp assumed a particular life expectancy in apparent reliance on expert medical opinion;

⁷ The pre-litigation mediation was not conducted under any statutory or other regulatory regime, such as the *Uniform Civil Procedure Rules* (with their requirement that the "parties must act reasonably and genuinely in the mediation": Rule 325). And it is not suggested that terms, express or implied, of the consensus to participate in the mediation have significance for this application.

⁸ Para 27 of the Statement of Agreed Facts.

- the reports had been furnished in the hope and expectation that they would influence a decision by Suncorp about compromising Mr White's claim;
- Mr Kent and Suncorp were persuaded by the reports of the accuracy of the life expectancy assumption and throughout the negotiations supposed that Mr White's life expectancy accorded with it;⁹
- that assumption, so fundamental to the value of the claim, was unsafe.

[25] The respondent argues that his conduct in continuing to rely on the Evidex reports without disclosing the cancer facts was not tantamount to some representation that he was not aware of facts that could deleteriously impact on longevity.¹⁰ His case characterizes the compromise negotiations as "commercial", conducted on a tacit, common assumption that, in deciding whether to settle, the parties would rely exclusively on their own resources and information. There would not, it is said, have been a reasonable expectation that influential information communicated during the negotiations would not knowingly be false.

[26] These, at first blush startling, contentions presuppose that neither the general law nor any more demanding ethical duty required disclosure of the cancer facts or else disavowal of the life expectancy assumption.

[27] Context influences the extent of legal and equitable obligations of disclosure.¹¹ The disclosure duties of a fiduciary, for example, ordinarily extend beyond those of parties dealing at arm's length in the pursuit of economic self-interest.¹² But that negotiations between a potential litigant and a tortfeasor's insurer for the compromise of a damages claim may be tinged with a commercial aspect serves rather to support the idea that the negotiants anticipate a measure of honesty from each other. After all, honesty promotes confidence in the process. As Lord Bingham of Cornhill puts it:¹³ "Parties entering into a commercial contract ... will assume the honesty ... of the other[s]; absent such an assumption they would not deal". And the common law enforces such an expectation through the tort of deceit, which "provides a legal remedy for harm suffered in consequence of dishonesty"¹⁴ in business contexts.

⁹ The respondent's submissions accept that he was "impressed with knowledge that Suncorp would probably have been proceeding on the factual foundation that there was no other specific health vicissitude or contingency which impacted on Mr White's damages assessment": para 37 (original emphasis).

¹⁰ cf *Westpac Banking Corporation v Robinson* (1993) 30 NSWLR 668, 687-689; *Halsbury's Laws of England*, 4th ed, 2003 reissue, Vol 31, para 748.

¹¹ *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QCA 481, [42]-[44]; *Magill v Magill* [2006] HCA 51, [48], [58], [156].

¹² See, generally, J. Cartwright, *Misrepresentation*, (2002), Chap. 11.

¹³ *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [15]; [2003] 2 Lloyd's Rep 61, 68.

¹⁴ *Magill v Magill* at [17].

- [28] Nor does the involvement of lawyers suggest that negotiations about settling a personal injuries claim are conducted in a shared expectation that legal consequences will not attach to intentional deception about material facts.¹⁵
- [29] When this mediation was held, Queensland barristers could not have approached the exercise on the basis that they were entering an honesty-free zone. For one thing,¹⁶ Rules adopted by the Bar Association of Queensland then included:¹⁷
- “51. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
 - 52. A barrister must take all necessary steps to correct any false statement unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.”¹⁸

Professional misconduct

- [30] By continuing to call the Evidex reports in aid as information supporting Mr White’s claim after learning the cancer facts and recognizing their significance for the validity of the life-expectancy assumption, the respondent intentionally deceived Mr Kent and Suncorp representatives about the accuracy of the assumption. He did so intending that Mr Kent and Suncorp would be influenced by the discredited assumption to compromise the claim: which happened.¹⁹

¹⁵ *Magill v Magill* at [140].

¹⁶ Much has been written, especially in the United States, about the candour and accuracy to be expected of lawyers in negotiation: for example, Barry R Temkin, “Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbour?”, (2004) 18 *The Georgetown Journal of Legal Ethics*, 179, http://www.findarticles.com/p/articles/mi_qa3975/is_200410/ai_n9466379/pg_1; American Bar Association Standing Committee on Ethics and Professional Responsibility, *Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation*, Formal Opinion 06-439, 12 April 2006 <http://www.bna.com/bnabooks/ababna/annual/2006/42.pdf>; Scott R Peppet, “Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism”, (2005) 90 *Iowa Law Review* 475, <http://lawweb.colorado.edu/profiles/pubpdfs/peppet/iowa.pdf>; John Lande, “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs”, (2002) 50 *UCLA Law Review* 69, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=358420; Carrie Menkel-Meadow and Michael Wheeler, *What’s Fair: Ethics for Negotiators* (2004) Jossey-Bass, San Francisco; in New Zealand, Selene Mize, “Is Deception in Negotiating Unprofessional”, [2005] *The New Zealand Law Journal* 245. The literature need not be canvassed now.

¹⁷ The Rules are not unique to Queensland: G.E. Dal Pont, *Lawyers’ Professional Responsibility*, 3rd ed, (2006) p. 483.

¹⁸ See also Rule 21, which provides that a barrister must not knowingly make a misleading statement to a court on any matter. “Court” is defined to include a “mediation”: Rule 15.

¹⁹ The express adoption at the mediation of the Evidex reports makes it unnecessary to consider the “principle that the maker of a representation believed to be, or actually true when made, but which the maker later discovers to be false, but refrains from correcting, well knowing that the representee is acting upon the representation, and intends the representee to do so, will be guilty of fraud”: *Permanent Trustee Australia Limited v FAI General Insurance Company Limited (in Liquidation)* (2003) 214 CLR 514, 534; cf *Macquarie Generation v Peabody Resources Ltd* [2000] NSWCA 361.

- [31] The fraudulent deception the respondent practised on Mr Kent and Suncorp involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to constitute professional misconduct.²⁰

Penalty

- [32] The financial consequences for Suncorp were serious, potentially at any rate. After the deception was discovered, Suncorp commenced proceedings to recover the settlement sum. The case settled on confidential terms. So the extent of Suncorp's loss is unknown.
- [33] In mitigation, there are many references from senior practitioners attesting to the respondent's competence and good character. Despite the stance adopted in resisting this application, the references indicate that there is good reason for optimism that the respondent will not set about deceiving a colleague again. And his misconduct was not designed to derive a personal advantage: an anxiety to advance his client's interests accounts for his grave misjudgement.
- [34] The respondent also points to investigations he made before advising Mr White that there was no obligation to disclose the cancer facts. He conducted research. He asked senior counsel about his predicament, which was prudent. These efforts are to his credit even though, unfortunately, in both pursuits, he posed the wrong questions. Supposing that no more candour was to be expected of him at this mediation than of an advocate in court, the respondent inquired of a senior colleague whether, at a trial, a plaintiff's barrister had to lead evidence of contingencies that adversely affect the client's claim – missing the significance of his continuing reliance on the life expectancy assumption. His research was similarly misdirected: legal difficulties involved in what he had in mind were overlooked.
- [35] The misconduct warrants a public reprimand and a substantial²¹ fine. The reprimand publicly signifies disapproval of his misconduct. It and the fine should also deter similar misbehaviour, by the respondent and others. The protection of the public does not require more severe sanctions.

Disposition

- [36] The Tribunal orders that the respondent:

²⁰ cf. *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498, 507, 508; *Baker v Legal Services Commissioner* [2006] QCA 145, at [46]. The conduct having occurred before the *Legal Profession Act 2004* ("LPA") came into force on 1 July 2004, whether it amounts to professional misconduct is to be assessed by the standards at the time: s. 614(4) LPA.

²¹ This fine exceeds the fees derived in connection with the mediation, which amounted to \$9,100 (excluding GST).

- (1) is publicly reprimanded;²²
- (2) pay a penalty of \$20,000;²³
- (3) pay the applicant's costs of the application to be assessed.²⁴

²² Section 280(2)(e) *LPA*.

²³ Section 280(4)(a) *LPA*.

²⁴ Section 286(1) *LPA*.