

**LEGAL PRACTITIONERS'
DISCIPLINARY TRIBUNAL
AT DARWIN**

CITATION: *Calabro v Law Society NT and Farmer*
2023-00440-SC

PARTIES: **TINDARO CALABRO**
Appellant
v
LAW SOCIETY NORTHERN TERRITORY
First Respondent
And
VANESSA FARMER
Second Respondent

FILE NUMBER 2023-00440-SC
HEARING DATE 9 November 2023
DELIVERED 18 December 2023

TRIBUNAL MEMBERS: MR ALASTAIR SHIELDS (CHAIRMAN)
MR JASMINDER ANAND (MEMBER)
MR DAVID ELDRIDGE (MEMBER)

REPRESENTATION:

APPELLANT: Self
FIRST RESPONDENT: Ms Fiona Kepert
SECOND RESPONDENT: Mr Stephen Robson SC

REASONS FOR DECISION

1. On 22 February 2023, the Appellant filed a notice of appeal from the decision of the Law Society Northern Territory (Law Society) dated 20 February 2023 (the decision), dismissing the Appellant's complaint against the Second Respondent pursuant to section 498 of the *Legal Profession Act 2006* (the Act).
2. An amended notice of appeal was subsequently filed on 23 March 2023, in accordance with an order made at a Directions Hearing on 16 March 2023.
3. The appeal was heard on 9 November 2023.

Background

4. The Appellant and Carol Anne Need (Former Partner) commenced a de facto relationship in around 2007. The relationship broke down in 2018, and they separated in January 2019. At about the time of the separation, they commenced discussions in order to reach a financial settlement.
5. During the course of the relationship, the Appellant carried on an air-conditioning and refrigeration services business, and the Former Partner carried on business as a real estate agent.
6. In 2014, the Appellant twice instructed Withnalls (the legal firm of which the Second Respondent is a Partner) in respect of two separate building disputes involving his business. The Second Respondent did not personally have carriage of either matter.
7. In 2016, the Appellant and his Former Partner instructed Withnalls in respect of two personal violence restraining orders, and in 2017 and 2018, the Appellant again instructed Withnalls, firstly seeking advice on a credit report naming the Appellant's business, and secondly seeking advice concerning a visit to the Darwin Correctional Centre. The Second Respondent did not personally have carriage of any of these matters.
8. The Second Respondent's firm was engaged by the Former Partner in late 2018 to advise her on the financial settlement between her and the Appellant. The Second Respondent initially had carriage of this matter, however in January 2019 another solicitor in the firm took it over.
9. Acting on instructions from the Former Partner, Withnalls prepared an application for consent orders and a minute of consent orders to effect a property settlement. The Former Partner received legal advice from Withnalls on the proposed consent orders. The Appellant did not, at that stage, seek legal advice.

10. On 25 March 2019, the Federal Circuit Court of Australia made orders by consent in the terms of the application prepared by Withnalls ("the property settlement orders"). On 9 September 2019, the Appellant sought a copy of the property settlement orders from Withnalls. The solicitor handling the matter was on leave, and the Second Respondent provided a copy of the orders to the Appellant on 10 September 2019.
11. On 13 May 2020, the Appellant filed an Initiating Application in the Federal Circuit Court to have the property settlement orders set aside. The Initiating Application raised, inter alia, the issue as to whether the Second Respondent had a conflict of interest in acting for the Former Partner. Withnalls acted for the former Partner in these proceedings, and the Second Respondent had carriage of the matter.
12. The Appellant's lawyer raised the conflict of interest issue directly with Withnalls on 13 October 2021, and Withnalls responded denying a conflict of interest, seeking particulars of the confidential information alleged to give rise to the conflict of interest and inviting the Appellant's lawyer to raise the issue in the Federal Circuit Court proceedings.
13. On 18 October 2021, the Appellant's lawyer filed an application in the Federal Circuit Court proceedings, seeking an order that Withnalls and the lawyers in that firm cease acting for the Former Partner.
14. In December 2021, the Federal Circuit Court dismissed the Appellant's application on the basis that the confidential information was not particularised by the Appellant. In his ruling on the matter, Justice Berman found that "it may well be the case that a conflict exists however, that is not able to be determined in the absence of the confidential information being identified".
15. On 31 March 2022, after commencement of the hearing into the matter, it was resolved by consent.

Complaint to the Law Society

16. The Appellant made a complaint to the Law Society concerning the Second Respondent on 7 April 2022, in accordance with section 471(1)(d) of the Act.
17. The grounds for the complaint as set out in the Appellant's complaint form dated 7 April 2022 are as follows:
 - a. "Conflict of Interest";
 - b. "Presenting alleged Evidence which was not admissible"; and
 - c. Accusing me of having Words with her prior to Trial Date".

18. On 20 February 2023, the Law Society dismissed all three grounds of the Appellant's complaint pursuant to section 498(b) of the Act, on the basis that the Law Society was satisfied there is no reasonable likelihood that the Second Respondent would be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct.

The Appeal Grounds

19. It is apparent to the Tribunal, from the Appellant's amended notice of appeal, affidavit material and submissions and evidence tendered at the hearing, that the Appellant considers he has been let down by the legal system in his property settlement with his Former Partner and he considers that his Former Partner and various other parties, including other legal practitioners involved in the property settlement, have not acted appropriately. It is beyond the scope of this appeal for the Tribunal to consider these matters, except to the extent that they may be relevant to the appeal itself.

20. The Appellant's amended notice of appeal can be summarised as containing the following three grounds of appeal:

- a. Whether the Second Respondent had a conflict of interest in acting for the Former Partner in the proceedings concerning the property settlement;
- b. Whether the Law Society carried out its investigation properly; and
- c. Whether documents filed with the Federal Circuit Court in the property settlement were properly signed by the Appellant.

The Nature of Appeals from the Law Society to the Tribunal

21. This appeal to the Tribunal is by the Appellant under section 506 of the Act. The Tribunal is satisfied that the Appellant is an aggrieved person entitled to bring an appeal, and that the appeal was started within the 28-day period required by section 506(3) of the Act.

22. Section 507 of the Act provides that such appeals are by way of rehearing, and that the Tribunal is bound by the rules of evidence in conducting the hearing.

23. It is well accepted that the standard of proof in such appeals is the *Briginshaw* standard, namely the civil burden of proof on the balance of probabilities, but with due regard as to the seriousness of the allegations.

24. Section 511 of the Act provides that, on hearing the appeal, the Tribunal must:

- a. Affirm the Law Society's decision; or
- b. Set the Law Society's decision aside and direct the Law Society to commence disciplinary proceedings in the Tribunal in relation to the whole or part of the complaint; or

- c. Set aside the Law Society's decision and take action that the Law Society could take under section 499(2) of the Act.

25. The Tribunal's powers in response to an appeal are limited to those set out in Section 511 and, because the Law Society has no power to order compensation under section 499(2), the Tribunal has no power to award compensation or damages as an outcome of this appeal. The Tribunal can only order compensation in proceedings under Part 4.11 of the Act.

Findings on Appeal

26. In respect of each of the three grounds of appeal, the Tribunal makes the following findings and determinations:

Ground 1- Conflict of Interest

- i. Section 694 of the Act requires the Second Respondent to comply with the legal profession rules made pursuant to section 689 by the Law Society, entitled "Rules of Professional Conduct and Practice". Rule 3 deals with conflicts of interest:

"Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person -

(a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously; and

(b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and

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

- ii. It is not disputed that Withnalls, the legal firm of which the Second Respondent is a partner had, prior to the property settlement orders, acted for the Appellant.
- iii. It is therefore necessary to consider (a) whether the Second Respondent or her firm had information confidential to the Appellant and material to the proceedings, and (b) whether the Appellant might reasonably conclude that there was a real possibility that the information would be used to his detriment.

- iv. As noted above, the Federal Circuit Court dismissed an application by the Appellant that the Second Respondent and her firm cease acting for the Former Partner in the Federal Circuit Court proceedings to set aside the property settlement orders, finding that confidential information had not been specified by the Appellant.
- v. In the Appellant's complaint to the Law Society, he provided some further information to support his complaint. In particular he made reference to information that might have had a bearing on the valuation of the Appellant's business, information concerning the valuation of the Former Partner's business and information concerning his state of mind at the time the property consent orders were made in 2019.
- vi. During the hearing before the Tribunal, the Appellant also stated that the Second Respondent was well aware of the Appellant's state of mind because she had comforted him when he was unsuccessful in litigation conducted on his behalf by Withnalls, and that she was also aware of the true valuation of the Former Partner's business.
- vii. The Tribunal agrees with the finding of the Law Society that the information pertaining to the valuation of the Former Partner's business was not confidential information of the Appellant but was rather the Former Partner's information and, in any event, it was not confidential information in that the Appellant was aware of it.
- viii. The Tribunal agrees with the finding of the Law Society that, although the Second Respondent may have been aware the Appellant suffered stress and anxiety due to the litigation matters where Withnalls acted on his behalf, there is no evidence she was aware of his alleged mental incapacity until the issue was raised in the Federal Circuit Court Proceedings.
- ix. The Law Society also found that any information the Second Respondent may have obtained concerning the valuation of the Appellant's business when the firm acted for the Appellant in 2014 was not material to the proceedings, because there is insufficient nexus between the 2014 matters and the valuation of the Appellant's business in 2019. The Tribunal agrees with this finding.
- x. The Law Society also considered the nature of the information provided to Withnalls in respect of the other matters where the firm acted for the Appellant and concluded there was no information that was material to the proceedings. In evidence the Appellant submitted that a letter of 21 June 2016 from the Second Respondent at Withnalls to him was evidence of the extent of his instructions to her. Further, the Appellant submitted that, by noting in 12 September 2019 correspondence that "she no longer holds instructions", the Second Respondent was confirming she acted for him. The Tribunal finds it is more likely the

Second Respondent is referring to her dealings with the Former Partner. The Tribunal agrees with the Law Society's finding.

- xi. The Tribunal has no evidence that the Second Respondent was aware of any of the other matters raised by the Appellant as being material to the proceedings and which he claims was confidential information.
- xii. The Tribunal therefore affirms the Law Society's decision to dismiss that part of his complaint that relates to conflict of interest.

Ground 2 - Whether the Law Society carried out its investigation properly

- i. The Appellant has made some very serious allegations to the effect that the application for proposed property settlement dated 8 March 2019 was not signed by him, and that it was presented to the Federal Circuit Court on 28 March 2022 on the basis that it had been properly signed. If these allegations are true, they are very serious and could warrant criminal charges being laid.
- ii. There is, however, no evidence before the Tribunal to suggest that, if the document was improperly signed, the Second Respondent was aware or should have been aware of this. It should also be noted that the Second Respondent did not have carriage of the file when the document was signed on 8 March 2019.
- iii. In his evidence the Appellant seemed to submit that, because the Second Respondent witnessed an affidavit by the Former Partner that referenced the document, the Second Respondent was aware of the statements within the affidavit, including a statement to the effect that the Appellant had signed the application for consent orders dated 8 April 2019.
- iv. A witness to an affidavit is not required to verify the truth or otherwise of the statements made in the affidavit. The role of a witness is limited to verifying the identity of the person swearing or affirming the affidavit, administering the oath or affirmation, and witnessing the signature of the person swearing or affirming the affidavit.
- v. In the absence of any evidence to suggest the Second Respondent was, or ought to have been, aware of any irregularity in a signature on the application for proposed property settlement, the Tribunal finds the Law Society's decision not to undertake enquiries as to the legitimacy of the signed document, including the decision not to seek original signed documentation, was reasonable.
- vi. Accordingly, the Tribunal dismisses this ground of the appeal.

Ground 3 - Whether documents filed with the Federal Circuit Court in the property settlement were properly signed by the Appellant

- i. This appeal ground is very similar to Ground 2, discussed above. As noted above, there is no evidence suggesting that, if the document was improperly signed, the Second Respondent was, or should have been, aware of this.
- ii. It follows that the Law Society's decision not to further investigate this aspect of the Appellant's complaint to the Law Society was reasonable.
- iii. Accordingly, the Tribunal dismisses this ground of appeal.

Comments by the Law Society

27. Counsel for the Second Respondent argued that the Law Society's comment in its reasons for decision dated 20 February 2023 that "a prudent practitioner may have elected not to act against a former client in these circumstances" was "irrelevant and unhelpful", given that the Law Society found there was no reasonable likelihood that the Second Respondent would be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct.
28. The Law Society submitted it was appropriate for the Law Society to make the statement, on the basis that there may well be different views within the legal profession as to which work should or should not be accepted by a practitioner, even if accepting the work does not result in a finding of unsatisfactory professional conduct or professional misconduct.
29. Noting the issue is not strictly part of this appeal, the Tribunal has carefully considered the submissions made by both parties and finds it is appropriate for the Law Society to express its views on such issues. In giving reasons for decisions about matters that come before it, it is part of the Law Society's role to provide guidance to NT legal practitioners.
30. The Tribunal confirms it does not criticise the Second Respondent for, having had dealings with the Appellant in previous years, acting for his Former Partner in family law matters against him. In a relatively small region such as the NT it is not surprising that a legal practitioner may have prior knowledge of or have acted for a party against whom they are now instructed to act. It is apparent the Second Respondent applied her professional judgement, weighing the risks against the commercial exigencies of legal practise and her duty to serve the Courts and clients. Although the Tribunal might not have made comments in the same terms, the Tribunal is satisfied that it was appropriate for the Law Society to express the view that it did.

Orders

31. The Tribunal affirms the decision of the Law Society dated 20 February 2023,
and the Appeal is dismissed.

32. The parties have liberty to apply.



Alastair Shields (Chair)



Jasminder Anand (Member)



David Eldridge (Member)