

Our Ref: RR: 71020573

12 July 2021

***Private & Confidential***

Mr P Horwath  
20 Sanctuary Lane  
BOORAL QLD 4655

***BY EMAIL:peterhorwath03@gmail.com***

Dear Mr Horwath

**COMPLAINT AGAINST MELISSA GUILFOYLE**

I refer to the Commission's previous correspondence and advise that I have now had an opportunity to consider your complaint.

Ms Melissa Guilfoyle of McDuff & Guilfoyle Lawyers Pty Ltd (formerley known as McDuff & McDaniel Lawyers) represented Mr Kurt Yelds (a former employee) in an industrial relations matter against you and your business, Security 101.

**Complaint**

In essence, your complaint is:

1. Ms Guilfoyle filed documentation in the Court on behalf of her client which contained incorrect information. You believe that Ms Guilfoyle did not check the facts of the matter.
2. Ms Guilfoyle colluded with your legal representative, Carswell & Company and that the firm acted in a conflict of interest.
3. Ms Guilfoyle was colluding with Carswell & Company.

**Jurisdiction**

Chapter 4 of the *Legal Profession Act 2007* (Act) enables my office to investigate complaints about legal practitioners, law practice employees or unlawful operators. In particular, I may investigate complaints of professional misconduct or unsatisfactory professional conduct as defined in the Act.

*Unsatisfactory professional conduct* is limited to conduct by a practitioner which occurs in connection with the practice of law. That is, conduct which occurs during the course of work usually undertaken by legal practitioners.

*Professional misconduct* is defined more broadly and may include personal conduct by a practitioner which does not occur in connection with the practice of law, but only if that conduct is so serious that it demonstrates the practitioner is not a fit and proper person to continue as a member of the legal profession.



The Act is the governing legislation and the *Australian Solicitors Conduct Rules 2012 (ASCR)* forms part of the obligations on legal practitioners. Conduct found to be in breach of the ASCR is *capable* of amounting to unsatisfactory professional conduct or professional misconduct as defined in the Act but it is not automatic<sup>[1]</sup>.

As you may appreciate, I have an obligation to make my decisions according to the provisions of the Act.

### **Analysis of Complaint**

*Ms Guilfoyle does not act for you*

The role of a legal practitioner is to protect their own clients' interests, within the boundaries of professional conduct rules and standards. They advise their own clients on the best course of action for their client and act on their own clients' instructions.

A legal practitioner acting for one side has no responsibility for the interests of other parties. On the contrary, in certain circumstances legal practitioners can be expected to say or do things which go against the interests of other parties, even if this is distressing and seems unjust to the other parties. This is the nature of the adversarial system.

The Commission simply does not have the power to interfere in a proper practitioner-client professional relationship, even if the other parties disagree with the:

- advice that the opposing legal practitioner may be giving their own client, or
- instructions that the other party may be giving their legal representative, or
- how that party is conducting the litigation.

I can only proceed with a complaint about an opposing legal practitioner's course of action if there is evidence that they are not acting on instructions or are wrongfully acting on instructions that they know are untrue or unethical.

In order to substantiate this allegation, the investigation would need to establish to the requisite standard that the legal practitioners were unethical to act upon the instructions.

While I accept that this may be your view, at law this is extremely difficult to establish given solicitor and client confidentiality.

*Incorrect Information in client's material*

You assert that Ms Guilfoyle filed documentation in Court which contained incorrect information. You do not believe that Ms Guilfoyle checked the facts of the matter with her client. You assert that Ms Guilfoyle was in possession run / time sheets and she overlooked days claimed by her client when he was 'not clocked into work'.

You assert there is proof that Mr Yelds was paid above the award and that he was claiming some 8000 hours of work when in fact only 5,400 hours was payable work. You state that Ms Guilfoyle loudly professes her credentials of forensic accounting and was prepared to lie on her client's behalf.

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<sup>[1]</sup> Section 420 of the Act

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A lawyer is (subject to certain exceptions that are not relevant here) obliged to follow their client's instructions. That means, among other things, that any evidence (such as an affidavit) prepared on behalf of a client must reflect what the client says is the case. A lawyer is not obliged to "cross-examine" their own client or "check with" the other party before preparing such an affidavit. They are obliged to ensure that the evidence that the client instructs them is their version of events is included.

To establish a disciplinary breach, the evidence would have to show that Ms Guilfoyle actually knew that the evidence that the client wanted included in the affidavit was false but decided to include it anyway. That is extremely difficult to establish.

The job of assessing evidence and making findings of fact is squarely within the jurisdiction of the Court, not the Commission. I have no jurisdiction under the Act to determine whether the material filed by Ms Guilfoyle was truthful or not.

#### *Conflict of Interest*

You assert that there was a conflict of interest for McDuff & Daniel Lawyers to act for you and Mr Yelds at the same time. The fact that you were a client of McDuff & Daniel Lawyers Pty Ltd on or about 4 April 2016 and again on or about 5 April 2018 does not mean that you continued to be the firm's client after the work had been completed.

As you are aware, the law practice of McDuff & Daniel Lawyers ceased on 20 May 2018 and McDuff & Guilfoyle Lawyers Pty Ltd commenced 21 May 2018. You did not automatically become a client of McDuff & Guilfoyle Lawyers Pty Ltd because your files may have been transferred or that the firm's merged.

On review of your email dated 1 June 2021, the work you instructed the firm to undertake during 2016 and 2018 had nothing to do with the dispute you had with Mr Yelds.

You have not suggested that Mr Guilfoyle used confidential information that McDuff & Daniel Lawyers obtained from you in 2016 and 2018 to disadvantage you in your dispute with Mr Yelds.

I therefore do not intend to investigate this issue further.

#### *Alleged Collusion*

You assert that Ms Guilfoyle colluded with your legal representatives, Carswell & Company and caused disadvantage to you. However, despite requests from the Commission, you have not provided any evidence that supports your assertion that Ms Guilfoyle colluded with Carswell & Company to disadvantage you.

#### **Tests**

Section 432 (1) of the Act provides that a complaint may be dismissed for a number of reasons, including:

*"(b) the complaint does not disclose conduct that the commissioner considers may be—*

*(i) conduct to which this chapter applies; or*

- (ii) *unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner or misconduct of a law practice employee in relation to the relevant practice”*

**Decision**

For the reasons outlined above, your complaint does not disclose any conduct that I consider may amount to unsatisfactory professional conduct or professional misconduct by Ms Guilfoyle.

Accordingly, pursuant to section 432(1)(b)(ii) of the Act, I have decided to dismiss your complaint.

Yours sincerely



Megan Mahon  
**Legal Services Commissioner**