

[Bain \(deceased\) & Bain \(No.3\) \[2016\] FamCA 662](#)

Background

The Respondent (a solicitor), in a family law litigation matter, gave a personal undertaking to the Court that monies paid out (\$457,786.00) from his deceased wife's life insurance policy would be deposited into his solicitor's trust account. This money was to be held pending further orders from the Court.¹

The Respondent instead used this money to settle matrimonial debts.² In failing to honour his undertaking the Court determined the Respondent's actions were a "flagrant challenge to the authority of the Court".³ Relying on provisions in the *Family Law Act 1975* (Cth) ('The Act') the Respondent was held to be in contempt.⁴

Issue

The Court was required to consider the Respondent's contravention of a personal undertaking given in court, where the Respondent is also an officer of the Court, and the extent to which punishment was necessary to maintain public confidence.

Consideration of the Issue

The Court:

- emphasised the overriding public interest in the administration of justice;⁵
- stated that as undertakings to the Court are in the public interest, non-compliance constitutes an interference with the administration of justice, even where the non-compliance is capable of being remedied;⁶ and
- that notwithstanding the possibility of rectification, such as the repayment of funds, primary weight ought to be given to maintaining confidence in the judicial system.⁷

As to the issue of mitigation, the Respondent submitted that he:

¹ *Bain (deceased) & Bain (No.3)* [2016] FamCA 662, [3].

² *Ibid* [35].

³ *Ibid* [3].

⁴ *Ibid* [4].

⁵ *Ibid* [8].

⁶ *Ibid* [9].

⁷ *Ibid* [13].

- had ongoing health issues which required hospitalisation and management by prescription medication;⁸
- was principal of his own firm and responsible for the employment of nine people,⁹ which included the likelihood that those people could lose their jobs should the Respondent be bankrupted or incarcerated;¹⁰
- had two adult children who had provided affidavits citing financial and emotional dependence on the Respondent; and¹¹
- would likely be made bankrupt depending on the penalty delivered.¹²

In weighing the above issues, the Court noted the Respondent's financial situation at the time of the proceedings meant that he was not able to financially rectify the situation.¹³ However, the Court considered that even where financial rectification was permissible, such rectification would risk elevating the wealthy to a level of impunity above those of lesser means.¹⁴

The Court emphasised that:

- the Respondent was a practising solicitor and officer of the Court; he had committed contempt in his personal litigation matter and simultaneously breached his duty to the Court;¹⁵
- the Respondent had obtained personal benefit from the contempt in the form of a reduction of debt for which he was personally liable after the his wife's death;¹⁶
- the details and terms of the undertaking were clear and unambiguous; and¹⁷
- the Respondent's conduct was deliberate.¹⁸

The Court noted that the penalty should enable members of the public to have confidence that the Court will act "authoritatively and robustly" in punishing those who conducted themselves in an identical or similar manner to the Respondent.¹⁹

⁸ Ibid [30].

⁹ *Bain (deceased) & Bain (No.3)* [2016] FamCA 662, [29].

¹⁰ Ibid [35].

¹¹ Ibid [31].

¹² Ibid [32].

¹³ Ibid [38].

¹⁴ Ibid [21].

¹⁵ Ibid [46].

¹⁶ Ibid [47].

¹⁷ Ibid [48].

¹⁸ Ibid [40].

¹⁹ Ibid [43].

The Court held that the only appropriate penalty to signify the gravity of the Respondent's contempt and to serve as a deterrent to others was the imposition of a custodial sentence.²⁰ This was in consideration with to the administration of justice, which outweighed all mitigating submissions. The Court emphasised its disapproval of the Respondent's conduct.²¹

The Court rejected the contention that a wholly or partly suspended period of imprisonment would be an adequate form of punishment.²² Instead, the mitigating factors resulted in the reduction of the Respondent's term of imprisonment by three months.²³

Orders

The Court ordered that the Respondent:

1. be imprisoned for a period of 6 months;²⁴ and
2. pay the Applicant's costs.²⁵

Matthew Parsons

Ethics Work Experience Student

As approved by Stafford Shepherd, Director, QLS Ethics Centre

²⁰ *Bain (deceased) & Bain (No.3)* [2016] FamCA 662 [66].

²¹ *Ibid* [74].

²² *Ibid* [71]-[72].

²³ *Ibid* [73].

²⁴ *Ibid* [1], [68].

²⁵ *Ibid* [3].