SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PROFESSION CONDUCT COMMISSIONER v BROOK

[2015] SASCFC 128

Judgment of The Full Court
(The Honourable Acting Chief Justice Gray, The Honourable Justice Vanstone and The Honourable Justice Kelly)

9 September 2015

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - SOUTH AUSTRALIA - APPEALS

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT - GENERALLY

PROFESSIONS AND TRADES - LAWYERS - PRACTISING CERTIFICATES - CANCELLATION AND SUSPENSION

Appeal against orders made by Legal Practitioners Disciplinary Tribunal. In 2013 and 2014, the Legal Practitioners Conduct Board instituted three sets of proceedings against the practitioner, Robert Neil Brook, comprising eight charges of unprofessional conduct. The practitioner's unprofessional conduct extended over a period of more than three years. The relevant conduct commenced with the practitioner's breach of duty and unprofessional conduct in taking instructions from an adult child of a testatrix without having any direct contact with the testatrix and without satisfying himself as to her mental competence. This failure resulted in expensive litigation, during which the practitioner breached multiple professional obligations, including ongoing acting in conflict, breach of fiduciary duty and misuse of trust monies.

The practitioner admitted that his conduct involved substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute. However, the practitioner denied that any of his conduct was dishonest. At a disputed facts

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On Appeal from LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL (MS SASHI MAHARAJ QC, MS CANDIDA D'ARCY AND MR GREG BROWN) LPDT-13-17; LPDT-13-25; LPDT-14-3

Appellant: LEGAL PROFESSION CONDUCT COMMISSIONER Counsel: MR M RODER SC - Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER

Respondent: ROBERT NEIL BROOK Counsel: MR M HOILE - Solicitor: FINLAYSONS LAWYERS

Hearing Date/s: 06/08/2015

File No/s: SCCIV-15-581

hearing, the Tribunal found that the practitioner had acted dishonestly when he knowingly made a false and misleading representation to another practitioner.

Whether the Tribunal erred in making an order that the practitioner be subject to a condition of supervision on his practicing certificate for a period of two years. Whether the penalty was manifestly inadequate.

Held per Gray ACJ (Vanstone and Kelly JJ agreeing) (allowing the appeal):

1. The penalty imposed by the Tribunal is wholly insufficient to protect the public and uphold public confidence in the legal profession.

2. The Tribunal imposed a penalty that fell well short of an appropriate penalty to address the practitioner's ongoing and repeated unprofessional conduct.

3. The conduct of the practitioner required a referral to this Court. The Tribunal's decision not to do so has led to a manifestly inadequate penalty being imposed.

4. An order for supervision or suspension will not be appropriate for practitioners whose conduct establishes that the practitioner lacks the qualities of character and trustworthiness required from a legal practitioner.

5. The practitioner's name should be removed from the Roll of Practitioners.

Legal Practitioners Act 1981 (SA) s 5(1), s 82, s 86, s 31(1) and s 41, referred to.
The Estate of Tucker, Deceased [1962] SASR 99; *Law Society of South Australia v Murphy* (1999) 201 LSJS 456; *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401; *Re a Practitioner* (1984) 36 SASR 590; *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253, considered.

LEGAL PROFESSION CONDUCT COMMISSIONER v BROOK [2015] SASCFC 128

Full Court: Gray ACJ, Vanstone and Kelly JJ

GRAY ACJ.

1 This is an appeal against orders made by the Legal Practitioners Disciplinary Tribunal.

2 In 2013 and 2014, the Legal Practitioners Conduct Board, as the Legal Profession Conduct Commissioner then was, instituted three sets of proceedings against the practitioner, Robert Neil Brook, comprising eight charges of unprofessional conduct. The conduct the subject of the charges occurred over the period February 2008 to July 2011. During that time the practitioner carried on a legal practice as a director of a company trading as Robert Brook Solicitor. The practitioner did not maintain a solicitor's trust account.

3 The charges were brought pursuant to section 82 of the *Legal Practitioners Act 1981* (SA). That section, as it then was, provided:

> (1) A charge may be laid under this section alleging unprofessional or unsatisfactory conduct—
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> (a) on the part of any legal practitioner; or
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> (b) on the part of any former legal practitioner who was at the time of the alleged unprofessional or unsatisfactory conduct a legal practitioner.
>
> (2) A charge may be laid under this section by—
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> (a) the Attorney-General; or
>
> (b) the Board; or
>
> (c) the Society; or
>
> (d) a person claiming to be aggrieved by reason of the alleged unprofessional or unsatisfactory conduct.

4 Unprofessional conduct was defined in section 5(1) of the Act to mean:

> *unprofessional conduct*, in relation to a legal practitioner, means—
>
> (a) an offence of a dishonest or infamous nature committed by the legal practitioner in respect of which punishment by imprisonment is prescribed or authorised by law; or
>
> (b) any conduct in the course of, or in connection with, practice by the legal practitioner that involves substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute;

5 The practitioner admitted that his conduct fell within subsection (b) of the definition. The Board claimed that one count involved the practitioner knowingly making a false and misleading representation. However, the practitioner denied that any of his conduct was dishonest. The Tribunal agreed to hear the parties as to the contested issue prior to determining penalty.

6 On 8 October 2014, the Tribunal found that the practitioner engaged in the unprofessional conduct the subject of each of the eight charges. These findings had regard to the practitioner's acknowledgment that in each instance he acted unprofessionally. In respect of the contested matter, the practitioner admitted that his conduct involved a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute but denied that his conduct was dishonest. The Tribunal found that the practitioner had acted dishonestly when he knowingly made a false and misleading representation to another practitioner.

7 On 20 April 2015, the Tribunal made an order that the practitioner be subject to a condition of supervision on his practicing certificate for a period of two years. The Tribunal required the practitioner's consent to the condition pursuant to section 82(6)(iii)(A) of the *Legal Practitioners Act*. The Tribunal noted in its reasons that, if the practitioner had failed to consent to the condition of supervision, it would have recommended that disciplinary proceedings be commenced against the practitioner in this Court.

8 The Commissioner has appealed to this Court pursuant to section 86 of the *Legal Practitioners Act*. The Commissioner seeks an order setting aside the penalty imposed by the Tribunal and, in substitution, an order recommending that disciplinary proceedings be commenced against the practitioner in the Supreme Court.

The Facts

9 The practitioner's unprofessional conduct extended over a period of more than three years. The conduct commenced in 2008 when the practitioner took instructions to prepare a will for ZG. The instructions were taken from a daughter of ZG, BJ, who asserted that she was acting with the authority of ZG. At that time, ZG was 86 years of age and resident in a nursing home. At no time did the practitioner meet with, or speak to, ZG to satisfy himself that he was preparing a will in accordance with her wishes and that she had testamentary capacity.

10 A handwritten note was made by the practitioner when he took instructions from BJ on 14 February 2008. The note makes no reference to ZG having made any earlier will. The note made reference to KM, one of ZG's daughters, as having:

> ... already had money - borrowed for home extn and car $105K "given" (lent?) to [KM]. Wants [WG] & [TH] to get their share from [KM].
> (definitely a "loan", not a gift)

11 The practitioner's note records that he dictated the will in the presence of BJ and that BJ was "OK c̄ it". The note further records, "(upset re [KM] not paying Mum 'back')". On the same day the practitioner wrote two letters to ZG both enclosing the will for execution. One of the letters included the following:

> 1. The enclosed Will was prepared in accordance with your instructions as relayed to me by your daughter [BJ].
>
> 2. Please ensure that you understand the terms of the Will and that you agree with the contents of your Will.
>
> 3. If in any doubt about anything whatsoever please telephone me before you sign the Will. Ordinarily I would visit you to discuss your instructions but I note that you do not wish this to occur and you are content for me to draw the Will based on the instructions [BJ] gives to me on your behalf.
>
> 4. If you sign the Will then I assume you are totally satisfied with its contents and with the fact that you did not wish to discuss anything with me.

12 The practitioner acknowledged that taking instructions in the above manner constituted unprofessional conduct. In my view, it was a wholly inadequate way in which to take instructions. The Commissioner drew the Tribunal and this Court's attention to *The Estate of Tucker, Deceased*,[1] where Mayo J considered the duties of a solicitor preparing a will. Mayo J pointed out that instructions should be taken from the testatrix herself, not from third persons, and that full information should be obtained about the status and personal position of the intending testatrix. The practitioner should directly address the question as to whether the testatrix is capable in law of making a will. Mayo J referred to learned texts that set out these and other requirements.

13 It transpired that ZG had made a will in 1995, in which she appointed two of her daughters, KM and TH, as joint executrixes and trustees. The 1995 will provided for equal distribution of her estate among her seven children.

14 It also transpired that there was a substantial body of evidence that raised serious issues concerning ZG's mental capacity. Solicitors acting for KM provided the practitioner with medical reports and advised that medical practitioners treating ZG during 2006 had recorded that she was suffering from confusion and depression. The solicitors further noted that, in December 2006, Dr Craig Whitehead, a geriatrician, expressed the opinion that ZG probably suffered from vascular dementia and that she suffered from short term memory impairment. During the year of 2007, a comprehensive assessment by an aged care assessment team noted that ZG was suffering from short term memory and

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[1] *The Estate of Tucker, Deceased* [1962] SASR 99.

long term memory problems. Medical practitioners and nursing staff noted increasing confusion, anxiety and depression. On a hospital admission in September 2007, it was noted that ZG suffered from dementia. In December 2007, the medical opinion was expressed that ZG did not have the mental capacity to approve a change in power of attorney as a consequence of her vascular dementia and confusion. It appears that there are repeated medical and residential care records, from the early months of 2008, confirming that ZG was suffering from dementia and cognitive deficiencies.

15 The practitioner admitted the alleged particulars as to his conduct but denied that ZG lacked testamentary capacity. The practitioner further noted that it was not the case where BJ's instructions were not genuine.

16 In my view, however, had the practitioner taken instructions directly from ZG and had he obtained all, or some of, the above history, it might be expected that he would have proceeded in a very different manner. At the very least, he would have sought an appropriate medical opinion, probably from a geriatrician, as to ZG's mental capacity, and in particular, whether she had testamentary capacity. Had all this occurred, it is highly probable, in my view, that the problems that followed would not have occurred. I consider that the practitioner's unprofessional conduct in the taking of instructions was, at the very least, one of the causes of the litigation that ensued, the cost of which exceeded the value of the estate.

17 The practitioner gave oral evidence that he had spoken with BJ, who had assured him that there was no issue as to testamentary capacity. Months after the death of ZG, the practitioner spoke with the director of the nursing home where ZG was residing in early 2008. He advised that ZG had scored 13 out of 30 on a Mini-Mental State Examination and that, in his opinion, ZG had testamentary capacity on the date BJ had given the practitioner instructions. In my view, BJ's assurance as to there being no issue as to testamentary capacity was of little value. The submission that the director had suggested that ZG had testamentary capacity stands in stark contrast to the history set out above. Again had the practitioner taken instructions directly from ZG, and had he properly addressed the question of testamentary capacity, the inadequacy of his instructions would have, in all probability, been self-evident.

18 The will prepared by the practitioner was executed on 18 February 2008 and named two of ZG's other children, EG and RG, as joint executors and trustees. The 2008 will provided that the loan in the amount of $105,000.00 made to KM be distributed among three of ZG's daughters; WG, KM and TH, in equal shares. The residual estate was distributed among the remaining four children; BJ, EG, VG and RG, in equal shares.

19 On 30 March 2008, ZG died. On 16 April 2008, the practitioner was advised by Ruciak Law that their client, KM, had instructed them that the 2008 will was invalid because of ZG's lack of testamentary capacity. Shortly

thereafter, on 29 April 2008, Ruciak Law advised the practitioner that he may be called as a witness in proceedings concerning the validity of the 2008 will, and that he had, as a consequence, a conflict of interest and should cease acting immediately. Ruciak Law pointed out that a diagnosis of dementia had been made and enquired whether the practitioner had obtained a medical report when obtaining instructions from ZG in connection with the 2008 will. Further questions were raised as to ZG's use of English and whether an interpreter had been present. On 1 May 2008, the practitioner responded, describing the firm's letter as "truly remarkable" and suggesting that matters raised were "misconceived and evince an unfamiliarity with issues in this jurisdiction".

20 On or about 22 April 2008, the practitioner received instructions from BJ, EG, VG and RG to apply for a grant of probate in respect of the 2008 will. Ruciak Law were instructed to lodge a caveat over ZG's estate on the grounds that ZG lacked testamentary capacity when she executed the 2008 will.

21 On 21 August 2008, proceedings were issued by the practitioner seeking that the Court pronounce the force and validity of the 2008 will. EG as executor and trustee of the 2008 will was named as plaintiff – RG having renounced her appointment. KM and TH were named as defendants. Treloar & Treloar, a firm experienced in probate and succession law matters, were instructed to act for the defendants.

22 On 5 September 2008, Treloar & Treloar wrote to the practitioner advising that they were acting and pointing out to the practitioner that he would be called as a witness in the proceedings and should cease acting for the executor. On 17 October 2008, Treloar & Treloar wrote again confirming their view that the practitioner was acting in conflict and should cease acting immediately. The practitioner was advised again that he would be called as a witness in the proceedings.

23 The practitioner wrote to BJ advising of the attempt to disqualify him from acting, suggesting that no conflict had been identified and stating that in his view, and the view of people he had consulted, the conflict did not exist. On 5 November 2008, the practitioner advised Treloar & Treloar that he had no conflict of interest. In a further letter to BJ of 27 January 2009, the practitioner claimed that he had thoroughly investigated the question of conflict and that there was no conflict. He asserted that the allegations were made for convenience rather than for any valid legal reason.

24 As this point, the practitioner took steps to prefer his own interests to those of his clients. He arranged for his clients to indemnify him against any adverse costs order made against him in the proceedings. He also arranged for his clients to agree to meet any excess payable in respect of his professional indemnity insurance should a successful claim be made against him. This conduct was plainly unprofessional and represented a serious breach of fiduciary duty.

25 The proceedings were resolved on 17 November 2009, the first day of trial. By that time the legal costs of the parties exceeded the value of the estate. A resolution was reached pursuant to which the 1995 will was admitted to probate. The parties agreed that the costs of all parties would be paid out of the estate. As the estate was insufficient to meet those costs, there was to be a *pro rata* sharing of the estate.

26 On 3 December 2009, Treloar & Treloar wrote to the practitioner requesting that the practitioner provide his clients' tax invoice for the purpose of the *pro rata* distribution. On 7 December 2009, the practitioner responded and enclosed a bill of costs. The bill of costs stated the total amount to be $49,038.00 plus disbursements in the sum of $16,811.18. However, the bill materially misrepresented the position. The practitioner had only charged his clients the amount of $27,395.50 plus disbursements. The practitioner's misrepresentation resulted in his clients receiving a greater distribution from the estate than was their entitlement. The other parties suffered a shortfall.

27 It was this misrepresentation to Treloar & Treloar that was the subject of the disputed facts hearing. The Board alleged that the practitioner knowingly, falsely and misleadingly made the representation to Treloar & Treloar. The practitioner admitted to making the misrepresentation, but claimed that he did so on the mistaken understanding that he was able to claim costs which exceeded the costs his clients were obliged to pay him.

28 The practitioner had discounted BJ's invoices. He claimed he did so due to the small value of the estate. The practitioner set out the full value of the work in each bill of costs and then set out the discounted amount owed by the client following the words "but for you say". The practitioner asserted that the use of this term reserved his right to recover the full amount from his clients in the future at his discretion.

29 The Tribunal resolved the contested fact issues in the Board's favour. The Tribunal did not accept the practitioner's evidence and observed:

> The Tribunal found the overall evidence of the practitioner on the contested issue confusing, contradictory, lacking in logicality and contrary to the majority of the objective evidence before the Tribunal. The Tribunal did not find the practitioner's evidence credible. The Tribunal rejects the explanations given by the practitioner and accepts that the state of mind of the practitioner is as alleged in count 1 at the time of the relevant conduct.
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> The Tribunal finds in accord with the *Briginshaw* standard of proof that the practitioner knowingly, falsely and misleadingly represented to Treloar & Treloar the amount of the costs that had been incurred by his clients.
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> The Tribunal finds the practitioner guilty of unprofessional conduct as charged on the basis that he held a dishonest intent in the terms alleged in count 1, and that his conduct involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute within the meaning of s5 of the Act.

30 As the practitioner did not maintain a trust account, he deposited the settlement monies received from Treloar & Treloar, in the amount of $54,410.93, into his firm's bank account. This constituted a further act of unprofessional conduct.[2]

31 The only entitlement the practitioner had to the settlement monies was for the amount of $4,994.00, representing his unpaid legal fees. On 10 June 2010, the practitioner wrote to BJ enclosing a cheque drawn on the firm's bank account in the amount of $47,080.43. The remaining $2,336.50 was paid to counsel on account of fees incurred in respect of the proceedings. The act of depositing the cheque for $54,410.93 and the subsequent payment to BJ constituted a misappropriation of the costs settlement and was the subject of a further count of unprofessional conduct.[3]

32 To my mind it is significant that the practitioner has made no attempt to repay the monies received dishonestly from Treloar & Treloar. The monies were paid to the practitioner in 2010. It is to be accepted that the practitioner passed on the bulk of the monies to one of his clients, BJ, but this did not exonerate him from addressing the consequences of his dishonesty. It is difficult to accept the practitioner's assertions of contrition and remorse when he has done nothing for more than five years to address the consequences of his dishonesty.

33 The practitioner engaged in further unprofessional conduct. On several occasions during the period June to August 2010, EG requested the practitioner provide him with information as to the amount of the costs settlement monies received and their distribution. EG also requested a detailed account of the legal costs incurred in the Supreme Court litigation. The practitioner failed to respond to EG. He later asserted that he was under the impression that BJ acted for each of the four siblings he represented and that she would distribute the monies received from Treloar & Treloar.

34 EG was forced to issue proceedings against BJ in an effort to ascertain what had happened to the settlement monies. On 16 February 2011, EG brought proceedings against BJ in the Magistrates Court claiming his share in the settlement monies received from Treloar & Treloar. The practitioner assisted BJ in defending the proceedings, including by preparing an affidavit on her behalf and by preparing her defence.

35 The practitioner's failure to provide proper information to EG was an act of unprofessional conduct. This conduct was compounded when the practitioner covertly acted for BJ in regard to the claim made against her by EG. This conduct was serious misconduct as the practitioner was professing to both EG and the Court that he would not act in the proceeding. Correspondence with BJ demonstrates that the practitioner was well aware that he should not act, would

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[2] *Legal Practitioners Act 1981* (SA) section 31(1).
[3] *Legal Practitioners Act 1981* (SA) section 41.

do so covertly and would render a bill to BJ in respect of his costs and disbursements. The practitioner wrote to BJ advising:

> ... I cannot purport to act for you or provide you with advice with respect to a claim by your brother who is also a former client of mine but I am able to discuss, assist and support you but I would be obliged, as you have invited me to do so in any event, to raise a (discounted) memorandum of costs and disbursements for time taken on the matter.

The Tribunal's Determination on Penalty

36 On 19 December 2014, the Tribunal heard the parties on the issues of penalty and costs. Counsel for the practitioner noted that the practitioner had no history of unprofessional conduct, had cooperated with the investigation and that he was not motivated by any desire for personal benefit. Counsel submitted that the purpose of imposing penalties on legal practitioners was protective, not punitive. In such circumstances, counsel contended for a penalty in terms of conditions on the practitioner's practicing certificate and noted that his client would be willing to consent to the same.

37 Counsel for the Board submitted that while the practitioner did not benefit personally, the Tribunal had made a finding of deliberate dishonesty. The Board contended that in such circumstances the matter should be referred to the Supreme Court for the imposition of penalty.

38 The Tribunal held that a finding of dishonesty did not necessarily mean that the matter should automatically be referred to the Supreme Court. The Tribunal reviewed authorities concerning dishonesty and noted that such a charge did not necessarily result in the Supreme Court striking the practitioner from the Roll of Practitioners. The Tribunal concluded:

> The Tribunal is of the view that the practitioner in the present case genuinely regrets his behaviour and has proper insight into the shortfalls in his conduct that led to the charge of unprofessional conduct. The Tribunal is also of the view that it is highly unlikely that the practitioner will repeat the type of conduct that resulted in the charge, in the event he is permitted to continue to practise law. The practitioner cooperated in the investigation by the Board. The practitioner admitted early in the proceedings the allegations in all counts of unprofessional conduct and pleaded guilty at an early stage of the Tribunal hearings. He confined the contest before this Tribunal to a narrow issue in count 1 in the terms noted in paragraph 1 of the previous report of the Tribunal dated 8 October 2014. The practitioner has a good disciplinary record. Further, some of the problems that led to the conduct that resulted in the charge appear to have arisen from lack of appropriate guidance and supervision being available to the practitioner— he appears to have been out of his depth while practising as sole practitioner on some basic billing practices. The practitioner did not personally benefit from the conduct found to be dishonest, but as correctly pointed out by senior counsel for the Commissioner, this is not a weighty consideration favouring the practitioner. The issue that led to the charges including the conduct that founded the dishonesty finding in the Tribunal's view can be remedied so that (a) the protective purposes behind the penalty powers of the Tribunal can be achieved, and (b) the confidence in the profession can be maintained.

> Having regard to the foregoing, and after careful consideration of all the circumstances, the Tribunal is of the view that the protective purposes of the Act are properly served by allowing the practitioner to continue to practice but under strict supervision for an appropriate time. The Tribunal is of the firm view that the protective purposes of the Act are best served by this approach. We do not consider the public interest is better served by referring the matter to the Supreme Court for possible imposition of higher sanctions including striking the practitioner's name off the roll of practitioners or a longer suspension of the legal practitioner's certificate. The Commissioner's submissions did not spell out the precise reasons why the matter should be referred to the Supreme Court, or why the matter is beyond the powers of this Tribunal.
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> Accordingly, the Tribunal makes an order that it be a condition of the practitioner's entitlement to practise the profession of the law that he do so under supervision for a period of two years. Given the nature of the finding of dishonesty that has been made the Tribunal is not satisfied that any lesser penalty or a lesser period of supervision will suffice to meet the clear protective aims of the Act. The supervisor is to be a legal practitioner approved by the Commissioner and the expense of supervision is to be met by the practitioner. The terms of supervision are to be endorsed in full on the practitioner's practising certificate.
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> [Footnote omitted.]

The Appeal

39 The Commissioner has appealed against the decision of the Tribunal, claiming that the Tribunal's findings were erroneous and, in the alternative, that the condition of supervision was a manifestly inadequate penalty. The Commissioner claimed that the Tribunal failed to take into account the overall seriousness of the practitioner's conduct, instead giving excessive weight to subjective factors. The Commissioner submitted that the Tribunal failed to recognise the inconsistency between its findings on the practitioner's dishonesty and the practitioner's submission that his misrepresentation was unintentional. The Commissioner complained that, as a consequence, the Tribunal's findings as to the practitioner's insight and contrition were misconceived. The Commissioner further complained that the Tribunal failed to provide adequate reasons for its order of suspension. The Commissioner submitted that the appropriate course for the Tribunal to take was to refer the matter to this Court for consideration of the penalty to be imposed.

40 Counsel for the practitioner contended that the Tribunal is a specialist body specifically charged with the responsibility of maintaining professional standards. For this reason, an appellate court should only intervene if some error can be established and that error results in a penalty that is manifestly inadequate. Counsel for the practitioner submitted that there was no such error of law or fact and that the Tribunal considered all issues before it. Counsel further contended that the mere fact that there has been a finding of dishonesty does not automatically mean the matter should be referred to this Court.

The Jurisdiction of the Tribunal and the Supreme Court

41 The Tribunal has limited powers to impose penalty on practitioners for unprofessional conduct. Section 82(6) of the *Legal Practitioners Act* provided at the relevant time:

> If after conducting an inquiry under this section the Tribunal is satisfied—
>
> (a) that a legal practitioner is guilty of unprofessional or unsatisfactory conduct it may, subject to subsection (6a), exercise any one or more of the following powers:
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> (i) it may reprimand the legal practitioner;
>
> (ib) it may make orders with respect to the examination of the legal practitioner's files and records by a person approved by the Tribunal (at the expense of the legal practitioner) at the intervals, and for the period, specified in the order;
>
> (ii) it may order the legal practitioner to pay a fine not exceeding $10 000;
>
> (iii) it may make an order imposing conditions on the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate)—
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> (A) relating to the practitioner's legal practice (provided that, in the case of an order made without the consent of the practitioner, such conditions must not operate for a period exceeding 12 months); or
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> (B) requiring that the legal practitioner, within a specified time, complete further education or training, or receive counselling, of a specified type;
>
> (iv) it may make an order suspending the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate) until the end of the period specified in the order (not exceeding six months);
>
> (v) it may recommend that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court;

42 The rights of appeal against decisions of the Tribunal are set out in section 86 of the Act:

> (1) Subject to subsection (2), a right of appeal to the Supreme Court lies against a decision of the Tribunal made in the exercise or purported exercise of powers or functions under this Act.
>
> (2) An appeal must be instituted within one month of the date on which the appellant is notified of the decision unless the Supreme Court is satisfied that there is good reason to dispense with the requirement that the appeal should be so instituted.
>
> (3) The Supreme Court may, on the hearing of an appeal exercise any one or more of the following powers, as the case requires:

(a) affirm, vary, quash or reverse the decision subject to the appeal and administer any reprimand, or make any order, that should have been administered or made in the first instance;

(b) remit the subject matter of the appeal to the Tribunal for further hearing or consideration or for rehearing;

(c) make any further or other order as to costs or any other matter that the case requires.

Manifest Inadequacy

43 To my mind, the penalty imposed by the Tribunal is wholly insufficient to protect the public and uphold public confidence in the legal profession. The practitioner engaged in unprofessional conduct that breached multiple professional obligations.

44 It was incumbent on the Tribunal to consider the totality of the practitioner's conduct when determining an appropriate penalty. The relevant conduct commenced with the practitioner's breach of duty and unprofessional conduct in taking instructions when dealing with an adult child of a testatrix without having any direct contact with the testatrix. The practitioner was aware that the testatrix was elderly, being aged 86 years, and resident in a nursing home. Had instructions been taken in accordance with proper professional practice, the practitioner would have interviewed the testatrix and satisfied himself as to her mental competence and, in all probability, obtained appropriate medical advice on the topic. As the Tribunal concluded:

> The practitioner had a duty to personally and independently assess and advise the testatrix especially given the circumstances, including her age and the fact that instructions for the drawing of the [2008] Will came from a potential beneficiary of the said will and excluded one child of the testatrix. The practitioner's responsibilities in this regard are well established by authority. The failure of the practitioner to discharge his professional duties properly in this regard, in turn largely led to messy and expensive litigation between the children of the testatrix contesting the testamentary capacity of the of the testatrix and the terms of the will in question.

These conclusions are significant when it is understood that the legal costs of the litigation exceeded the value of the assets in the estate.

45 As discussed earlier, the practitioner acknowledged before the Tribunal that he had acted with a conflict of interest in the proceedings and that in that respect the allegations of Ruciak Law and Treloar & Treloar were correct. The practitioner acknowledged that acting in conflict was unprofessional conduct. It may well be the case that had the practitioner ceased to act in April 2008, when his position of conflict was pointed out to him, and had a practitioner competent in the area of succession and probate law been instructed, the entire dispute may have been resolved before the assets in the estate were substantially depleted or wholly exhausted in the meeting of legal costs.

46 It is against the background of the above matters that the practitioner's unprofessional conduct in dealing with the apportionment of costs and the payment of those monies should be addressed. As noted earlier, the Tribunal concluded that the practitioner acted dishonestly, in that he knowingly falsely represented to Treloar & Treloar the amount of the costs that had been incurred by his clients. The Commissioner submitted that as a consequence of the practitioner's dishonesty, Treloar & Treloar were induced to pay the practitioner more than $12,000.00 in excess of what should have been paid. The practitioner received a total of approximately $54,000.00 when he should have in fact received about $42,000.00. The practitioner's dishonesty was compounded by the way in which treated the receipt of those monies. The monies were not paid into a trust account but were dealt with through the practitioner's firm account. The practitioner acknowledged his unprofessional conduct in failing to deal with trust monies through a trust account.

47 The above discussion allows the extent of the practitioner's unprofessional conduct to be properly understood. The practitioner's failure to properly take instructions from ZG was directly causative of the complex proceedings that were before the Court. The practitioner's failure to accept and acknowledge that he was acting in conflict was also causative of the complexity of the proceedings. The practitioner's breaches of fiduciary duty to his clients in the course of those proceedings compounded his earlier breaches of professional duty. Any evidence of contrition or remorse on the part of the practitioner is seriously eroded by his failure to take steps to address the losses occasioned by his dishonest conduct over the past five years.

48 In *Law Society of South Australia v Murphy*,[4] Doyle CJ, Millhouse and Prior JJ agreeing, considered the approach to be taken when a practitioner has engaged in ongoing and multiple breaches of professional obligations. His Honour said:[5]

> There emerges from these matters a picture of persistent neglect of the affairs of the clients in question, causing at the least delay and inconvenience, and in some cases prejudice, although perhaps not irretrievable prejudice. There also emerges a picture of the persistent disregard of [the practitioner's] basic professional obligation in dealing with his clients, in responding to their questions and in acting in their interests. [The practitioner] has also failed to meet basic professional obligations in relation to the charging of clients and accounting to clients. Finally, there is a pattern of prolonged and persistent disregard of enquiries from the Legal Practitioners Complaints Committee. There can be no doubt about the obligation of a practitioner to assist that body with its enquiries.
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> **Considered as a whole, in my opinion the conduct of the practitioner demonstrates a disregard of his professional obligations, or a failure to meet them, and indicates (subject to any explanation) that he is unfit to remain a practitioner.** The disregard of professional obligations is too frequent and too lengthy to permit of any other conclusion,

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4 *Law Society of South Australia v Murphy* (1999) 201 LSJS 456.

5 *Law Society of South Australia v Murphy* (1999) 201 LSJS 456, 458.

> even though any one of these matters in isolation, or even some taken together, might not lead to that conclusion.
>
> [Emphasis added.]

49 In the present proceeding there is the added fact that the practitioner has been found to have engaged in dishonest conduct. In *Legal Practitioners Conduct Board v Morel*, in a joint judgment with Bleby J, I noted the following when considering a practitioner's dishonest conduct:[6]

> ... such conduct has a tendency to bring the profession into disrepute and to undermine the confidence of the public in the legal profession. Suspension is not an appropriate order with respect to a practitioner whose conduct establishes that the practitioner lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.[7]

50 In my view, the Tribunal imposed a penalty that fell well short of an appropriate penalty to address the practitioner's ongoing and repeated unprofessional conduct. In the Tribunal's remarks on penalty, there is no indication that the Tribunal had regard to the ongoing and cumulative nature of the practitioner's misconduct. The Tribunal's conclusions on contrition and remorse appear to overlook entirely the fact that the practitioner had failed to take any step to repay the monies obtained through his dishonesty. The conduct of the practitioner required a referral to this Court. The Tribunal's decision not to do so has led to a manifestly inadequate penalty being imposed. The Tribunal's decision to simply impose supervision for two years did not address the need for the protection of the public.

Appropriate Penalty

51 On the appeal, the Commissioner submitted that this Court should make an order, *in lieu* of the Tribunal's decision, recommending that the Commissioner commence disciplinary proceedings against the practitioner in the Supreme Court. In my view, it is more appropriate that this Court, now apprised of the facts, make a determination as to the penalty to be imposed pursuant to section 86(3)(a) of the *Legal Practitioners Act*. The parties were provided with the opportunity to make submissions as to the appropriate penalty to be imposed in the event that the Court was minded to allow the appeal. The Commissioner submitted that the practitioner should be struck off.

52 The practitioner filed an affidavit detailing with his personal and financial circumstances. The practitioner supports his wife and two adult daughters, who are studying at University, through modest wages drawn from his practice. The practitioner deposed that if he were suspended, or struck off, he would default on financial commitments.

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6 *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401, 417.

7 *Re a Practitioner* (1984) 36 SASR 590.

53 The practitioner has a good record. He has been in practice for some decades and for the last 20 years has been in practice of his own account. He has chosen to practise without a trust account. He claimed inexperience in regard to probate and succession law matters, in regard to litigation and in regard to costs orders. This may be accepted but the unprofessional conduct of the practitioner is not limited to these matters. The practitioner has demonstrated a failure to comply with many basic duties of a lawyer. Ongoing acting in conflict, breach of fiduciary duty, misuse of trust monies and dishonest dealings permeate his conduct.

54 The Court's attention was drawn to the practitioner's conduct since being placed under supervision by the Tribunal. It is to be accepted that the practitioner has conducted himself properly while under supervision. However, I do not consider that this militates against the serious nature of his unprofessional conduct.

55 The practitioner offered, in response to an enquiry from this Court on the hearing of the appeal as to restitution, to repay the estate the sum of $12,000.00 in the event that he is not struck off or suspended. This restitution would be made by monthly payments of $750.00 for a period of 16 months. A further condition of the offer was that the Commissioner delay recovery of his costs for that period. In my view, the conditions placed on the offer do little to support the practitioner's claim that he recognises the seriousness of his behaviour. I also note that the practitioner has not made any attempt to offer such restitution to the estate until prompted by this Court.

56 In *A Solicitor v Law Society (NSW)*, the High Court observed:[8]

> ... Where an order for removal from the Roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court upon whose roll the practitioner's name presently appears.

The practitioner's affidavit discloses that the practitioner will suffer financial hardship if he is struck off or suspended, and it might be said that considering the fact that the practitioner did not personally benefit from the conduct, something less than an order preventing the practitioner from practice would be adequate punishment. However, the Court's primary concern is the public interest. In *Law Society of South Australia v Murphy*, Doyle CJ explained:[9]

> ... I do not say that considerations of the practitioner's personal circumstances, and consideration of extenuating circumstances, are to be put to one side entirely. I merely emphasise the point that the court acts in the public interest and not with a view to punishment of the practitioner.

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[8] *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253, 265-6.

[9] *Law Society of South Australia v Murphy* (1999) 201 LSJS 456, 461.

57 As earlier discussed, suspension will not be appropriate for practitioners whose conduct establishes that the practitioner lacks the qualities of character and trustworthiness required from a legal practitioner. An order of suspension or supervision, would amount to this Court holding the practitioner out as a fit and proper person to practice, subject to that order. The practitioner's conduct is of such a kind that, if tolerated, would bring the legal profession into disrepute. It is of a nature that would erode public confidence in the legal profession. There is a need for the Court to protect, and to be seen to protect, the public from unprofessional and dishonest practitioners. The public are to be protected from legal practitioners who are ignorant of the basic rules of proper professional practice or indifferent to rudimentary professional requirements. The practitioner is, in my view, unfit to practise law. Having regard to the nature and sustained course of misconduct, the only measure that will afford adequate protection to the public and maintain public confidence in the profession is the striking off of the practitioner.

58 The gravity of the practitioner's conduct necessitates his removal from the Roll of Practitioners.

Conclusion

59 I would allow the appeal. I would set aside the penalty imposed by the Legal Practitioners Disciplinary Tribunal. I would order that the practitioner's name be removed from the Roll of Practitioners.

60 **VANSTONE J:** In my view this practitioner's conduct over a significant period shows a serious departure from the standards expected of legal practitioners.

61 I agree with the disposition of the appeal proposed by Gray ACJ and with his reasons.

62 **KELLY J:** I agree with the orders proposed by Gray ACJ and with his reasons.