



IN THE MATTER OF:
THE LEGAL PRACTITIONERS ACT 1981

ACTION Nos. 5 & 16 of 2017

and

IN THE MATTER OF:

KIEREN MOORE

DETERMINATION ON PENALTY

By determination dated 14 January 2021 with respect to Action Numbers 5 and 16 of 2017 (“the Determination”) the Tribunal determined that the practitioner’s conduct, the subject of the charge in Action No. 5 of 2017 (“the Cassoudakis complaint”) constituted unprofessional conduct for conduct prior to 30 June 2014 and professional misconduct for conduct after 1 July 2014. The Tribunal further determined that the practitioner’s conduct in Action No. 16 of 2017 (“the Lucia complaint”) constituted professional misconduct.

The hearing with respect to penalty was listed for 14 April 2021.

When the matter was called on, Mr Michael Barnett appeared for the Commissioner and Mr Stephen Ey appeared for the practitioner in a limited capacity.

The practitioner was in attendance in the body of the Court.

Mr Ey informed the Tribunal that his instructions were limited to making an application for an adjournment of the penalty hearing pending determination of the appeal which had been lodged by the practitioner against the determination.

We understand from exchanges between the Tribunal and Counsel that that appeal is listed for callover shortly with an anticipated hearing in the next month or two in the ordinary course.

We considered the submissions made by Mr Ey on behalf of the practitioner however determined that the application for an adjournment would not be granted and that we would proceed with the hearing as to penalty.

This matter has been before the Tribunal for some time now. In addition to the desirability of bringing the proceedings to a conclusion, if the practitioner is dissatisfied with the determination as to penalty, he may choose to bring an appeal with respect to that determination in the Supreme Court.

In declining to grant an adjournment, the Tribunal took into account the submission of Mr Ey that if the hearing as to penalty was to proceed to determination and the determination was to recommend the commencement of disciplinary proceedings to the Supreme Court, that may result in two separate processes or proceedings in the Supreme Court.

We consider however that there is potential for the Supreme Court to deal administratively and procedurally with the hearings, and if appropriate, hear the substantive appeal and any appeal against penalty (if filed).

Mr Ey himself identified that there was a potential that the appeal against the determination which would be listed before a single judge could be referred for hearing

to a panel of three judges if the penalty recommended that disciplinary proceedings be commenced in the Supreme Court.

Mr Ey tendered (Exhibit P1) a Psychologist's report from Christopher J Hamilton dated 14 April 2021.

There was no objection by Mr Barnett on behalf of the Commissioner to the Tribunal receiving that report.

Mr Barnett submitted however that there were extensive determinations and reference in the Reasons for Judgment concerning Mr Moore's mental and other health issues.

We note that paras [116] - [122], [69] – [72], and [11] – [13] of the Reasons for Judgment deal with the issues of Mr Moore's mental and other health issues.

Following the Tribunal's determination to refuse to adjourn the hearing as to penalty, Mr Ey did not seek leave to withdraw but remained at the Bar Table as a courtesy to the Tribunal.

An Outline of Submissions was provided by the Commissioner to the Tribunal and also to Mr Ey.

Mr Ey confirmed that the practitioner had been provided with a copy of the Outline of Submissions.

The Tribunal inquired whether the practitioner wished to sit at the Bar Table for the purpose of participating in the proceedings. The practitioner indicated through Mr Ey that he did not wish to do so.

In the Outline of Submissions, it was submitted on behalf of the Commissioner that the Tribunal should recommend that disciplinary proceedings be commenced against the practitioner in the Supreme Court.

Additionally, the Commissioner sought an order for his costs of the proceedings.

During the course of the hearing on 14 April 2021 Mr Barnett spoke briefly to the written submissions.

The practitioner does not currently have a practising certificate and has not held one since 2015 as deposed to in the affidavit of Sharon Hurren sworn 5 June 2018.

The Tribunal's powers, following an inquiry, and upon being satisfied that the practitioner is guilty of professional misconduct (or unprofessional conduct if the conduct was prior to 1 July 2014) are set out in Section 82(6) of the Legal Practitioners Act 1981 ("the Act").

The Powers of the Tribunal with respect to Penalty

Those powers include with respect to a legal practitioner, the power to reprimand, impose a fine not exceeding \$50,000, impose conditions upon a legal practitioner's practising certificate and the power to suspend the legal practitioner's practising certificate for a period of time.

The Tribunal may recommend disciplinary proceedings be commenced against the legal practitioner in the Supreme Court.

With respect to a former legal practitioner, the Tribunal may order the former legal practitioner to pay a fine not exceeding \$50,000.

In *Legal Profession Conduct Commissioner v. Cleland* [2021] SASCA 10 (17 March 2021) at para. 36, Livesey JA (with whom Kelly P and Bleby JA agreed) held [36] –

“In my opinion the Court’s power to strike off, suspend or impose conditions is not necessarily dependent on the existence of a current practising certificate. That view is reflected in the orders made at the conclusion of the hearing of this matter on 22 February 2021. Even if it could be said that the powers conferred by Section 89(2) of the Act assume the existence of a current practising certificate, Section 88A preserves this Court’s inherent jurisdiction. The exercise of that power includes a power to suspend.”

The purposes of disciplinary action were reaffirmed in *Cleland* in the following terms :

Principles applicable to the exercise of the disciplinary jurisdiction

- [41] *The purpose of exercising the disciplinary powers reposed in this Court are to protect the public rather than to punish a legal practitioner. The object of protecting the public includes deterring a practitioner and, importantly, giving notice to all other practitioners that professional misconduct is not acceptable and will not be tolerated.*
- [42] *Accordingly, one object of exercising disciplinary powers is to provide both specific and general deterrence. By deterring professional misconduct, the Court maintains professional standards and public confidence in the legal profession. Indeed public confidence in the legal profession can only be established and maintained by appropriate professional regulation and enforcement.*
- [43] *As might be expected, another important purpose of disciplinary action is to protect the public from legal practitioners who are ignorant of the basic rules of proper professional practice, or who are indifferent to rudimentary professional requirements.*
- [44] *Because the Court acts in the public interest rather than with a view to punishment, the personal circumstances of a legal practitioner and any extenuating circumstances are of comparatively lesser importance.*
- [45] *In those cases where an order for removal of the practitioner’s name from the Roll of Practitioners is in contemplation, the ultimate issue is whether the practitioner is fit to remain a member of the legal profession.*

We do not propose to repeat our findings however in summary, we refer in particular to [97] - [101] wherein we found in summary with respect to the Cassoudakis complaint:

- The practitioner either in ignorance or deliberately used the client's funds for his own purposes and dealt with those funds in contravention of the Act, Rules and Regulations with respect to the application of trust funds.
- It was particularly concerning to the Tribunal that the practitioner, after the event, maintained and has consistently maintained that he was engaging in mortgage financing and thus not subject to the provisions of the Act, Rules and Regulations with respect to trust monies.
- Even if the practitioner was engaged in mortgage financing, he was in breach of the Act and the Regulations with respect to mortgage financing.
- The practitioner appeared to have no insight that in whatever way he conducted his practice with respect to the client, he was in substantial breach of his professional obligations.
- The Tribunal had no confidence that the practitioner was cognisant of the nature and extent of his duties and obligations as a solicitor when dealing with client funds.
- We did not overlook the serious and significant mental and physical health issues suffered by the practitioner from time to time.
- The physical and mental health issues of the practitioner did not ameliorate the seriousness of the practitioner's failure to discharge his duties as a practitioner.
- The practitioner's conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

With respect to the Lucia complaint, we refer to the Tribunal's findings at [108]-[114] where the nature of the charge was summarised.

As we observed at [115], the practitioner did not appear to have taken issue with the substance of the complaint which was substantially supported by the documents in BOD 2.

We concluded at [22] -

- that there was a period of some 17 months from the time of instructions taken by the practitioner in March 2015 with respect to the administration of the estate of Mrs Lucia until the grant of probate.
- On 26 March the practitioner received \$4,530.72 being the proceeds of an insurance policy.
- Thereafter, despite numerous communications from Ms Lucia to which the practitioner did not respond, Ms Lucia was required to pay the funeral account from her own funds, the balance from a Bankwest account.
- The practitioner was advised in writing by Ms Lucia on 2 February 2016 that she would seek assistance to remove the practitioner from acting in the estate.
- Thereafter, despite multiple communications and attempts by Ms Lucia, her solicitors and the Commissioner, it was not until December 2016 that the practitioner executed appropriate documents.
- The delay of the practitioner, both in the period March 2015 to early 2016 and the period from March 2016 until December 2016 both individually and collectively amounted to gross delay.

DETERMINATION OF PENALTY

If our powers with respect to the practitioner are confined to Section 82(6)(b) of the Act), he being a former practitioner, the powers of the Tribunal are limited to the imposition of a fine not exceeding \$50,000.

We do not consider that the ambit of those powers adequately reflects the seriousness of the practitioner's conduct and an appropriate penalty.

If the powers of the Tribunal are the more extensive powers contained within Section 82(6)(a) of the Act, we consider, given the seriousness of the conduct and the practitioner's lack of insight, that such powers do not adequately reflect an appropriate range of penalties.

The Tribunal recommends that disciplinary proceedings be commenced against the practitioner in the Supreme Court.

The Commissioner's Application for an Order for his Costs of the Inquiry

Section 85(1) of the Act provides the Tribunal with a discretion to make such orders as to costs against any legal practitioner or former legal practitioner whose conduct has been subject to inquiry as the Tribunal considers just and reasonable.

Notwithstanding that Mr Ey appeared on limited instructions, the Tribunal provided him with the opportunity to take some instructions from the practitioner about whether he wished to put matters to the Tribunal on the issue of costs.

Mr Barnett submitted in essence that the Commissioner was entirely successful and that the Tribunal had found the charges proved.

It is clear from its determination that the Tribunal viewed the practitioner's conduct very seriously and that the practitioner showed limited insight into the seriousness of his conduct.

Mr Ey took some instructions from the practitioner.

The Tribunal was informed by Mr Ey that the practitioner was in receipt of a New Start Allowance, that he was impecunious and that he had very limited assets.

In response, Mr Barnett intimated that he would accept that information at face value however would wish to test it if of relevance.

Mr Barnett submitted that the financial circumstances of the practitioner were not factors to be brought to account.

Whilst the Tribunal accepts that the practitioner has had significant health issues during the course of the proceedings, notwithstanding the provision of the report from Christopher Hamilton, Psychologist, it is a matter of concern and ongoing concern that there has been, during the course of these proceedings, a reluctance or refusal by the practitioner to engage in any independent psychiatric assessment.

As we observed in our judgement, the practitioner has never filed any response in these proceedings, even at times when he has been represented by a legal practitioner.

Mr Ey who attended today, was clear that he had limited instructions namely to simply seek an adjournment.

The Tribunal is grateful to Mr Ey for his preparedness to remain and to take some further instructions on the costs issue.

Whilst the practitioner was in attendance at the penalty hearing, his failure to engage in the process in a meaningful way is symptomatic of the practitioner's approach over the 3 plus years that this matter has been before the Tribunal.

Pursuant to Rule 194.3 of the Uniform Civil Rules 2020 (the Rules) the Court may order that costs be awarded on the standard costs basis, solicitor/client basis or indemnity basis or another basis specified by the Court.

Rule 194.5 (2) of the Rules (which relates to General Cost Principles) provides that costs follow the event.

In making an order for costs, the discretionary factors to be brought to account are enumerated in Rule 194.6 of the Rules and include, relevantly, that the Court may have regard to any factors it considers relevant including any misconduct or unreasonable conduct of a party in connection with the proceedings, any breach by a party of overriding obligations to the Rules or an order of the Court, any public interest in the subject matter of the proceeding or public benefit from the prosecution or defence of the proceedings and whether costs awarded are to be met by a person or out of a fund.

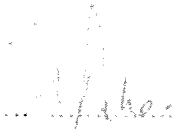
We refer to our determination and in particular the practitioner's failure to participate in a meaningful way in the proceedings before the Tribunal including his failure to file any Response or documentation and his failure to attend upon hearings.

We also refer to our findings that the Commissioner, on numerous occasions, squarely put his case to the practitioner with particular reference to the claim by the practitioner that he was acting as or providing mortgage finance and was not subject to the Rules.

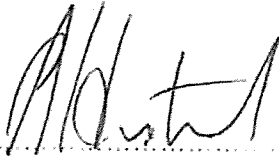
In the circumstances, we propose to make an order that the practitioner pay the Commissioner's costs of and incidental to the proceedings on a standard costs basis.

CONCLUSION

1. The Tribunal recommends that disciplinary proceedings be commenced against the practitioner in the Supreme Court.
2. The Tribunal orders that the practitioner pay the Commissioner's costs of and incidental to these proceedings on a standard costs basis to be agreed or taxed.



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Ms M Pyke QC



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Ms L Hastwell



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Professor G Davis

