

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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LEGAL PROFESSION CONDUCT COMMISSIONER v KAMINSKI

[2021] SASCFC 39

Judgment of The Full Court (*ex tempore*)

(The Honourable President Livesey, the Honourable Justice Bleby and the Honourable Justice S David)

21 September 2021

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - GENERALLY

The Commissioner seeks an order that the respondent's name be struck off the roll of practitioners pursuant to s 89(1b) or s 88A of the Legal Practitioners Act 1981 (SA). While the respondent retired from practice on 30 June 2017, his name remains on the roll of practitioners.

The application is made with the consent of the respondent on the basis of medical evidence which demonstrates that the respondent is no longer fit to practise the profession of the law. The medical evidence was provided to the Commissioner in support of the respondent's application to stay disciplinary proceedings brought against him by the Commissioner in the Legal Profession Disciplinary Tribunal.

Held (by the Court), allowing the application and striking the respondent's name from the roll of practitioners:

1. Whilst this Court retains a discretion to proceed on the papers in private, striking off is a matter of public interest and transparency in the Court's determination of matters such as these is important.
2. While the Court possesses an inherent jurisdiction to strike a legal practitioner's name from the roll on a practitioner's own application, the Court may decline to make that order where the public interest requires that the Court exercise its disciplinary jurisdiction.
3. It is undesirable to proceed on a practitioner's application for removal where there remain unresolved proceedings in the Legal Practitioners Disciplinary Tribunal.

Legal Practitioners Act 1981 (SA) s 89(1b), s 88A; Uniform Civil Rules 2020 (SA) r 261.2, r 261.3, referred to.

Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER

Counsel: MS F NELSON QC

Respondent: JANUSZ KAMINSKI No Attendance

Hearing Date/s: 21/09/2021

File No/s: CIV-21-8968

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In the matter of an application by Thong Sum Lee (2015) 35 NTLR 82; *In the matter of Lisa Jane Barrett (No 2)* [2021] SASCFC 38; *Legal Practitioners Conduct Board v Pertl* [2014] SASCFC 88; *Legal Profession Conduct Commissioner v Davey* [2021] SASCA 2; *Re B (a Solicitor)* [1986] VR 695, considered.

LEGAL PROFESSION CONDUCT COMMISSIONER v KAMINSKI
[2021] SASCF 39

Full Court: Livesey P, Bleby and David JJ

THE COURT (*ex tempore*):

1 The Commissioner seeks an order that the name of the practitioner,
Janusz Kaminski, be struck off the roll of legal practitioners pursuant to ss 89(1b)
or 88A of the *Legal Practitioners Act 1981* (SA).

2 The application is made with the consent of the practitioner on the basis of
medical evidence which demonstrates that the practitioner is no longer fit to
practise the profession of the law.

3 The Court convenes today as the Full Court rather than the Court of Appeal
pursuant to r 11.1(6)(b) of the *Uniform Civil Rules 2020* (SA).¹

4 This application arises out of various Tribunal proceedings which
commenced in 2016 in which allegations were made to the effect that the
practitioner had misappropriated trust monies. In one of those matters, the
practitioner admitted certain facts and accepted that the conduct constituted
unsatisfactory professional conduct, but not professional misconduct. Speaking
generally, however, the Tribunal has not conducted an inquiry into any of these
matters and no findings have been made.

5 During 2019, the practitioner sought an order permanently staying
the Tribunal proceedings on the basis of medical evidence which demonstrated
very severe impairment of general intellectual functioning, likely the result of
moderately advanced Parkinson's dementia, described as a progressive disorder
possibly associated with concurrent vascular dementia. Further deterioration is
expected. In response to this evidence, the Commissioner questioned the
practitioner's fitness to practice.

6 During the latter part of 2019, the practitioner's then solicitors advised
the Commissioner that the practitioner would be prepared to consent to his name
being struck from the roll of legal practitioners on the basis of the medical
evidence. There were then further delays whilst the practitioner's instructions
were formalised and, earlier this year, medical evidence was obtained to
demonstrate that the practitioner retained the capacity to consent to his name
being struck from the roll of legal practitioners. The practitioner is no longer
represented.

7 The practitioner is now 73 years of age and was first admitted to practice in
South Australia on 1 May 1989. He retired from practice on 30 June 2017 and
now resides in Victoria.

¹ *Legal Profession Conduct Commissioner v Davey* [2021] SASCA 2, [13]-[21].

8 Whether a disciplinary proceeding under s 89 of the Act, or the exercise of the Court's inherent jurisdiction recognised by s 88A of the Act, proceedings such as these are commenced pursuant to r 261 of the *Uniform Civil Rules 2020* (SA). By r 261.2, the Court has a discretion to determine an application and make orders in chambers on the basis of affidavit evidence and written submissions. Alternatively, it may convene a hearing. By r 261.3(4), a similar procedure applies where a strike off order is by consent.²

9 Whilst this Court retains a discretion to proceed on the papers in private, striking off is a matter of public interest. Transparency in the Court's consideration and determination of matters such as these is important.³

10 In our view, it is not appropriate to proceed with this matter in private.

11 A legal practitioner's name may be struck from the roll for reasons other than proved misconduct. Where a practitioner is suffering from a mental illness or has lost intellectual faculties by reason of age,⁴ or physical infirmity,⁵ it may be appropriate to strike a practitioner's name from the roll if the practitioner is no longer fit to practise.

12 The primary objective of the Commissioner and of this Court is the protection of the public. For so long as the practitioner's name remains on the roll, he is effectively held out as being fit to practise the profession of the law. Though he has retired, he is *prima facie* entitled to re-apply to obtain a practising certificate.

13 Whilst the Court possesses an inherent jurisdiction to strike a legal practitioner's name from the roll on a practitioner's own application, for example because the practitioner wishes to retire,⁶ the Court may decline to make that order if the public interest requires that the Court exercise its disciplinary jurisdiction, particularly where this may result in additional or other orders.⁷ In addition, it is, in our view, undesirable to proceed on a practitioner's application where there remain unresolved Tribunal proceedings, as in this case.

14 Having considered the affidavit material and submissions, we are satisfied that the practitioner is no longer fit to practise the profession of the law. The interests of the public and the administration of justice will best be served by acceding to the Commissioner's application and by this Court making an order. As mentioned, the practitioner does not oppose the making of an order.

² *Legal Profession Conduct Commissioner v Davey* [2021] SASCA 2, [11]-[12].

³ *In the matter of Lisa Jane Barrett (No 2)* [2021] SASCF 38.

⁴ *Re B (a Solicitor)* [1986] VR 695, 699-702 (Brooking J).

⁵ *In the matter of an application by Thong Sum Lee* (2015) 35 NTLR 82.

⁶ *Legal Practitioners Conduct Board v Pertl* [2014] SASCF 88.

⁷ *Legal Practitioners Conduct Board v Pertl* [2014] SASCF 88, [11] (Kourakis CJ, with whom Gray and Vanstone JJ agreed).

15 Accordingly, the practitioner's name will be struck from the roll of legal practitioners kept by this Court. The Commissioner is to have costs in the amount of \$3,000.