

# SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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## LEGAL PROFESSION CONDUCT COMMISSIONER v MOORE

[2022] SASCF 2

**Judgment of The Full Court**

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

**11 November 2022**

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE  
- PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL  
CONDUCT - TRUST MONEY**

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

The Legal Profession Conduct Commissioner applied for orders that the practitioner's name be struck from the roll of legal practitioners and that the practitioner pay the Commissioner's costs of the application.

The practitioner's misconduct concerned two retainers concerning the administration of two estates.

In relation to the first, the practitioner intermingled trust monies with the practitioner's own funds in the practitioner's personal accounts. The Tribunal found that the practitioner misappropriated thousands of dollars of trust monies. In relation to the second retainer, the Tribunal found that the practitioner was guilty of gross, unexplained delay.

The evidence before the Court was that the practitioner suffered from mental illness. There was no certainty as to when, if ever, the practitioner might recover.

Held (the Court):

1. In the circumstances, suspension would not be appropriate and an order should be made striking the practitioner's name from the roll; and

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**Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER**  
**Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER**

**Counsel: MR A KEANE -**

**Respondent: KIEREN FRANCIS MOORE No Attendance**

**Hearing Date/s: 11/11/2022**

**File No/s: CIV-21-013887**

**B**

2. the practitioner should pay the Commissioner's costs of the application fixed in the amount of \$2,000.

*Legal Practitioners Act 1981 (SA)* ss 5, 31, 82, 88A, 89; *Legal Practitioners Regulations 2009 (SA)*; *Legal Practitioners Regulations 2014 (SA)* r 19 and 40, referred to.

*Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32; *In re a practitioner* [1941] SASR 48; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; *Law Society of South Australia v Murphy* [1999] SASC 83; (1999) 201 LSJS 456; *Legal Profession Conduct Commissioner v Cleland* [2021] SASCA 10; *Legal Practitioners Conduct Board v Clisby* [2012] SASCF 43; *Legal Practitioners Conduct Board v Dudek* [2006] SASC 255; (2006) 245 LSJS 346; *Legal Practitioners Conduct Board v Fletcher* [2005] SASC 382; *Legal Profession Conduct Commissioner v Kaminski* [2021] SASCF 39; *Legal Profession Conduct Commissioner v Kassapis* [2015] SASCF 37; *Legal Practitioners Complaints Committee v Tomlinson* [2006] WASC 211; *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279; *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239, considered.

**LEGAL PROFESSION CONDUCT COMMISSIONER v MOORE**  
**[2022] SASCFC 2**

**Full Court: Livesey P, Doyle and David JJA**

**THE COURT:**

**Introduction**

1       The Legal Profession Conduct Commissioner applies for orders that the practitioner’s name be struck from the roll of legal practitioners and that the practitioner pay the Commissioner’s costs of the application.

2       The Commissioner’s application is made pursuant to ss 89(1) and 89(2) of the *Legal Practitioners Act 1981* (SA) (the **Act**) and, to the extent necessary, pursuant to this Court’s inherent jurisdiction which is recognised by s 88A(2) of the Act.

3       For the reasons that follow, an order should be made striking the practitioner’s name from the roll.

**The proceedings in overview**

4       The practitioner’s misconduct concerns two retainers. Both retainers concerned the administration of estates. In the first, the practitioner represented Ms Cassoudakis in connection with the administration of her parents’ estates. Monies due to Ms Cassoudakis which were found to be trust monies were not paid into a trust account. Instead, they were intermingled with the practitioner’s own funds in the practitioner’s personal accounts. The Tribunal found that the practitioner misappropriated thousands of dollars of trust monies.<sup>1</sup>

5       In relation to the second retainer, the practitioner represented Ms Lucia in connection with seeking probate for her father’s estate. The Tribunal found that the practitioner was guilty of gross, unexplained delay in connection with this retainer.<sup>2</sup>

6       After complaints were made, the Commissioner commenced investigation. Both the investigation and the conduct of the proceedings before the Tribunal were protracted because the practitioner was unable to provide prompt responses and, on a number of occasions, he failed to provide any responses at all. The practitioner was only sporadically represented by a legal practitioner.

7       By the time of the hearing before the Tribunal in February and April 2019, the practitioner was not represented and, following the first day of the hearing, he did not participate at all. Nonetheless, his mother remained in the courtroom.

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<sup>1</sup> Reasons for decision of the Tribunal (comprising Ms Pyke QC, Professor Davis and Ms Hastwell), [55], [77] delivered 14 January 2021 and see also the determination on penalty delivered 4 August 2021.

<sup>2</sup> Reasons for decision, [133].

8 The Tribunal found that the practitioner generally failed to participate in any meaningful way in the proceedings before it, ultimately failing to file any written response or submission.<sup>3</sup> The Tribunal found that the practitioner had engaged in serious misconduct.<sup>4</sup> After the Tribunal published its reasons for decision, the practitioner appealed to this Court. Ultimately, that appeal was taken to be discontinued.

9 In its determination on penalty, the Tribunal found that the disciplinary powers available to it did not adequately reflect the seriousness of the practitioner's misconduct or the appropriate penalty and, accordingly, pursuant to s 82(6)(a)(v) of the Act it recommended that disciplinary proceedings be commenced against the practitioner in the Supreme Court.<sup>5</sup>

10 The proceedings in this Court have taken an unusual course. The practitioner appears to have been plagued by mental and other illness for some years. It may be that the practitioner was affected by illness at the time of the two retainers. When the Commissioner filed his application in this Court, he did so seeking orders for substituted service because of difficulties encountered locating the practitioner. Ultimately, orders were made permitting service on the practitioner's mother and uncle who had been in contact with the Commissioner and who had provided information about the practitioner from time to time.<sup>6</sup>

11 Despite substituted service and orders that the practitioner respond to the Commissioner's application and materials,<sup>7</sup> no appearance was ever made by the practitioner and no written response has been received. This hearing proceeds in the absence of the practitioner.<sup>8</sup>

### **The practitioner's circumstances**

12 Before addressing the conduct the subject of the Tribunal's misconduct findings, it is necessary to address the practitioner's personal circumstances.

13 The practitioner was born on 7 August 1979 and he is currently 43 years. He was admitted to practice on 8 October 2002 and was employed as a solicitor by the

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<sup>3</sup> Determination on penalty, 10.

<sup>4</sup> Reasons for decision, [136]-[137].

<sup>5</sup> Determination on penalty, 11.

<sup>6</sup> The order for substituted service was made on 8 July 2022, it also permitted service at the practitioner's last known place of practice and by informing the practitioner by telephone message that a copy of the originating documents were available for collection at the Commissioner's offices. Substituted service was proved by the affidavit of Sharon Hurren, a solicitor employed by the Commissioner, sworn on 31 August 2022 and the affidavit of Timothy Chambers, a process server engaged by the Commissioner, sworn on 31 August 2022.

<sup>7</sup> Orders for the practitioner to file a response to the charges were made throughout the proceeding: see Reasons for decision, [164], [174], [178].

<sup>8</sup> The Court, and the Commissioner have taken steps to notify the practitioner of this hearing. The Commissioner sent the practitioner four letters between 6 September 2022 and 4 November 2022 in connection with this hearing as well as emailing the practitioner's uncle to advise the date and time of the hearing. The Court sent an express post letter to the practitioner on 8 November 2022, which letter was delivered on 9 November 2022. The Court also sent emails to the practitioner's mother and uncle on 8 November 2022 notifying them of this hearing.

law firm Donaldson Walsh until mid-2013. Between mid-2013 and mid-2015, the practitioner traded in sole practice under the name KFM Legal, an incorporated legal practice, from premises in the city and later from his home.

14 Since mid-2015, the practitioner has ceased to hold a practising certificate. The practitioner did not renew his practising certificate after the complaints the subject of these proceedings commenced to be investigated by the Commissioner.

15 At various times, the Commissioner received information from the practitioner's mother and uncle that the practitioner was unable to assist with providing documents or other responses because of what appeared to be mental illness.

16 Before the Tribunal hearing commenced on 12 February 2019, on 8 February 2019 the Commissioner provided a written opening. This set out in considerable detail the information available to the Commissioner regarding the practitioner's mental and other illness.

17 The Tribunal had the benefit of a number of medical reports concerning the practitioner. Without being exhaustive, these included a medical report from Dr Chris Gillis referring to the development of a depressive illness four years earlier. The practitioner had thereafter consulted a psychologist, Dr Chris Hamilton, "on and off". Dr Gillis' report recorded that the practitioner was not keen to take medication. The practitioner had been referred to a psychiatrist, Dr Ivan Siklich.

18 In addition, the practitioner had been treated for Multiple Sclerosis.

19 Because of these issues, the Tribunal afforded the practitioner considerable latitude with respect to attending directions hearings and filing responses. From time to time the practitioner also mentioned problems with post-traumatic stress disorder. That diagnosis did not, however, feature in any of the medical reports.

20 At the time of the Tribunal hearing in April 2019, the practitioner's mother advised the Tribunal that the practitioner had been threatened by a person with a gun and, as a result, he had fled South Australia and was in New South Wales.

21 After the practitioner filed his appeal in this Court, the Commissioner arranged for independent psychiatric examination. The practitioner attended for assessment and Dr Michael Clarke, psychiatrist, provided a report dated 12 July 2021. It was Dr Clarke's opinion that the practitioner had suffered significant depressive illness since early 2015 and that this appeared to have developed in connection with a relationship breakdown. Dr Clarke recommended ongoing psychological and psychiatric treatment, but he noted that the practitioner was reluctant to engage in treatment.

22 Dr Clarke recorded that the practitioner had acknowledged to him that he was not fit to practise the profession of the law and Dr Clarke agreed with that

assessment. Dr Clarke expressed the opinion that improvement in the practitioner's mood and function was only likely in the medium to long-term and he could not express any review as to precisely when the practitioner would, if ever, likely regain fitness to practise the profession of the law.

23 As a result of the practitioner's failure to participate in these proceedings, this Court does not have the benefit of any current medical, psychiatric or other evidence concerning the practitioner's whereabouts, present functioning or activities.

### **The Tribunal's misconduct findings**

24 The Commissioner has invited this Court to accept and act on the findings of the Tribunal without further inquiry in accordance with s 89(5) of the Act. Given the way in which these proceedings have been conducted, it is appropriate to proceed on that basis.

25 On 20 March 2017, the Commissioner laid a charge against the practitioner alleging unprofessional conduct concerning conduct before 1 July 2014 and professional misconduct concerning conduct on or after 1 July 2014. The difference in terminology reflects the changes made to the Act as a result of amendments that came into effect on 1 July 2014. This charge concerned the retainer with Ms Cassoudakis.

26 On 16 November 2017, the Commissioner laid a further charge against the practitioner in the Tribunal concerning professional misconduct in connection with the retainer with Ms Lucia in connection with the administration of the estate of her father, Mr Pearson.

27 In broad terms, the first charge alleged breaches of ss 31(1) and 31(6)(a) of the Act (prior to the 1 July 2014 amendments) concerning the failure to deposit trust monies into a trust account and causing or permitting trust monies to be intermixed with other monies. In addition, it was alleged that the practitioner misappropriated trust monies belonging to Ms Cassoudakis.

28 It was also alleged that there were various breaches of the obligations to keep detailed accounts, provide trust account receipts and trust account statements as required by s 31(4)(b) of the Act (as it was prior to 1 July 2014) and in accordance with the *Legal Practitioners Regulations 2009* (SA). It was alleged that after 1 July 2014 there were various breaches of the requirements of Part 2 of Schedule 2 of the Act and regulations 19 and 40(6)(b) of the *Legal Practitioners Regulations 2014* (SA) concerning similar conduct.

29 The complaint concerning the retainer with Ms Cassoudakis was made by an accountant, Mr Con Markou, of CMA Chartered Accountants. The practitioner had accepted a retainer to assist Ms Cassoudakis concerning the estates of her late parents. These estates had not been administered for many years and a number of properties in these estates had accrued debts. A significant aspect of the retainer

was to assist in arranging finance to meet these debts. The practitioner arranged finance and, on 21 March 2014 just over \$141,000 was received on behalf of Ms Cassoudakis and paid into one of the practitioner's personal accounts.

30 The Commissioner contended that these monies were trust monies within the meaning of s 5 of the Act because they were monies to which the practitioner was not wholly entitled both at law and in equity and, in addition, they did not include monies received in the course of mortgage financing. At times, the practitioner appeared to dispute this contention but it was ultimately upheld by the Tribunal.

31 The practitioner disbursed certain of these funds on behalf of Ms Cassoudakis. However, other funds were disbursed to the benefit of the practitioner at a time when he had insufficient of his own funds in the relevant account. In very broad terms, those amounts exceeded \$30,000.

32 Between May 2014 and January 2015, a large number of enquiries and requests were made of the practitioner by Mr Markou's firm which were, largely, not addressed. Mr Markou made his complaint in January 2015. Ultimately, no accounting was ever provided by the practitioner. Later, it was determined that the practitioner was probably entitled to fees in the order of \$25,000.

33 The Tribunal found the charge concerning the Cassoudakis retainer proved on the basis that the practitioner's misappropriation of trust monies was committed either ignorantly or deliberately.<sup>9</sup> The Tribunal rejected the practitioner's assertion that he had been engaged in mortgage financing.<sup>10</sup> The Tribunal found that, even if it had been established that the practitioner was engaged in mortgage financing, he had failed to render any account to Ms Cassoudakis and, in consequence, he had no entitlement to apply or retain trust monies for his own purposes.<sup>11</sup>

34 The Tribunal found that the amounts retained by the practitioner exceeded "considerably" his reasonable charges.

35 The Tribunal held that it had no confidence that the practitioner was aware of the nature and extent of his duties and obligations as a solicitor when dealing with client funds, but it did not overlook the practitioner's serious and significant mental and physical health issues.<sup>12</sup> Whilst these provided some explanation for the practitioner's misconduct, they did not ameliorate the seriousness of the practitioner's failure to discharge his duties as a legal practitioner.<sup>13</sup>

36 In relation to the charge concerning the Lucia retainer, the practitioner and Ms Lucia had been appointed by Mr Peter Pearson as the executors and trustees of

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<sup>9</sup> Reasons for decision, [97].

<sup>10</sup> Reasons for decision, [52], [55], [58]; the Tribunal found that the practitioner brought the onus of establishing that monies were used for client purposes and that he had failed to meet that onus.

<sup>11</sup> Reasons for decision, [85].

<sup>12</sup> Reasons for decision, [100].

<sup>13</sup> Reasons for decision, [101].

his 2014 will. The practitioner had prepared that will on the instructions of Mr Pearson.

37 After Mr Pearson's death, it was necessary to obtain probate and administer the estate which included a farming property occupied by a grandson of the deceased which was subject to a "reverse" mortgage.

38 In March 2015, the practitioner accepted instructions from Ms Lucia to obtain a grant of probate and to administer the estate. However, in the year between March 2015 and March 2016, the practitioner simply failed to comply with any instructions or requests received from Ms Lucia. This included failing to deal with a final notice concerning the deceased's funeral account in an amount exceeding \$7,500.

39 By February 2016, Ms Lucia warned the practitioner that she would seek assistance with his removal as executor and to have all original documents returned to her. At the same time, she made a complaint to the Commissioner. In March 2016, the practitioner attended on the Commissioner and provided original documents concerning the estate. It was necessary for Ms Lucia to instruct different solicitors, Brown & Associates, to obtain probate in August 2016. It was not until December 2016 that the practitioner took the steps necessary to have himself removed as an executor and trustee.

40 As to this charge, the Tribunal found that the practitioner's gross delay in connection with the Lucia retainer was not explained.<sup>14</sup>

41 On 4 August 2021, in the course of its determination on penalty, the Tribunal found that the practitioner had shown limited insight into the seriousness of his misconduct.<sup>15</sup>

### **The determination of this application**

42 It is not necessary for the purposes of determining this application to address in any detail the relevant and applicable principles. These have been recently addressed by this Court.<sup>16</sup>

43 There are three features of importance in connection with the findings of misconduct made in this case.

44 The first concerns the serious breach of trust involved in failing properly to administer trust monies and in permitting their misappropriation.<sup>17</sup> Because trust monies and a trust account should, speaking generally, be managed with particular care by legal practitioners, where it is demonstrated that a practitioner has misused

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<sup>14</sup> Reasons for decision, [130]-[133].

<sup>15</sup> Determination on penalty, 9. See also, Reasons for decision at [99].

<sup>16</sup> *Legal Profession Conduct Commissioner v Cleland* [2021] SASCA 10, see also *Legal Profession Conduct Commissioner v Kaminski* [2021] SASCF 39.

<sup>17</sup> *In re a practitioner* [1941] SASR 48, 51; *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32, [118] (Ipp J).



trust monies for the practitioner's own benefit this Court will regard the breach of trust as particularly serious. That kind of breach usually entails a serious failure to adhere to the high standards expected of legal practitioners.

45 Secondly, though the evidence regarding the practitioner's mental illness and ill health more generally cannot be regarded as complete, it is sufficient to demonstrate that mental illness alone renders the practitioner unfit to practise the profession of the law. On the current state of the evidence, it cannot be determined when, if ever, the practitioner will regain the mental capacity to practise the profession of the law. Whilst the practitioner has seen fit to cease practice and not apply for any further practising certificate, for so long as he remains on the roll of legal practitioners he is effectively being held out by this Court as someone who is fit and proper to practise the profession of the law.<sup>18</sup>

46 Third and finally, the practitioner's conduct during the course of the Commissioner's investigations, as well as during the course of the proceedings before the Tribunal and before this Court, demonstrates two matters of some importance. The first is that the practitioner has generally been unable to participate meaningfully in the investigation or the proceedings and, in addition, he appears to lack insight into the importance and seriousness of his misconduct and the need for it to be effectively investigated by the Commissioner and properly inquired into by the Tribunal. The practitioner's poor participation and lack of insight may or may not be the product of his mental illness. The precise cause is probably immaterial in the sense that, whatever the cause, the practitioner's poor participation and inability to recognise and adhere to his obligations as a legal practitioner are both serious and of longstanding.

47 Whatever might be said about these matters taken in isolation, when they are considered in combination they demonstrate that no order short of strike off would, in the circumstances of this case, be appropriate.

48 The purpose of this Court exercising disciplinary powers in relation to a practitioner is to protect the public rather than to punish the practitioner.<sup>19</sup> In order to protect the public, this Court must consider both the specific deterrence of the legal practitioner concerned, as well as the general deterrence of other members of the legal profession. The orders made by the Court must demonstrate that misconduct of the kind which was found to have occurred in this case will not be tolerated by the Court.<sup>20</sup>

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<sup>18</sup> *Legal Profession Conduct Commissioner v Kaminski* [2021] SASCF 39, [12].

<sup>19</sup> *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239, 250 – 251 (Deane, Dawson, Toohey and Gaudron JJ); *Law Society of South Australia v Murphy* [1999] SASC 83, at [30]; (1999) 201 LSJS 456, 460 – 461 (Doyle CJ, with whom Milhouse and Prior JJ agreed); *Legal Practitioners Conduct Board v Fletcher* [2005] SASC 382 at [21] (DeBelle J, with whom Besanko and Vanstone JJ agreed).

<sup>20</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 471 (Giles AJA).

49 By deterring misconduct, this Court maintains professional standards and public confidence in the legal profession. That is also achieved by establishing and enforcing appropriate professional regulation.<sup>21</sup>

50 In this case, it is particularly important that the public be protected from a legal practitioner who is ignorant of the basic rules concerning proper professional practice and the minimum requirements for handling trust monies and client instructions, matters which are indispensable to the proper practice of the profession of the law.<sup>22</sup>

51 On the evidence available to the Tribunal and to this Court, it cannot be said that the practitioner's integrity has not been undermined or that his misconduct is merely temporary and likely to be appropriately addressed by proper medical or psychiatric treatment.<sup>23</sup> In these circumstances, suspension would not be appropriate, particularly given the uncertainty as to when, if ever, the practitioner might recover from mental illness. That latter consideration is underscored by the practitioner's unwillingness to actively engage in appropriate treatment.<sup>24</sup>

52 In these circumstances, it is clear that the practitioner is not fit to remain a member of the legal profession. His misconduct concerning trust monies and his failure to appropriately use a trust account is particularly serious. Even if that were not so, the practitioner's mental illness renders him unable to properly practise the profession of the law.

### Conclusion

53 In all of these circumstances, it is necessary to conclude that no sanction short of striking off would be appropriate.

54 Accordingly, an order must be made striking the practitioner's name from the roll of legal practitioners kept by this Court.

55 Having heard from the Commissioner, there will be an order that the practitioner pay the Commissioner's costs of the application, fixed in an amount of \$2,000.

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<sup>21</sup> *Legal Practitioners Conduct Board v Clisby* [2012] SASFC 43, [9] (Doyle CJ and Stanley J, with whom Anderson J agreed); *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279, [22] (Spigelman CJ, with whom Mason P and Handley JA agreed).

<sup>22</sup> *Legal Practitioners Conduct Board v Clisby* [2012] SASFC 43, [8] (Doyle CJ and Stanley J, with whom Anderson J agreed).

<sup>23</sup> Contrast *Legal Practitioners Conduct Board v Dudek* [2006] SASC 255; (2006) 245 LSJS 346, [15].

<sup>24</sup> *Legal Profession Conduct Commissioner v Kassapis* [2015] SASFC 37, [37]; *Legal Practitioners Complaints Committee v Tomlinson* [2006] WASC 211 [17]-[21].