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Law Society

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Doyle CJ, Olsson and Duggan JJ)

LAW SOCIETY OF SA v UNKIN

Judgment of the Honourable Justice Duggan
(The Honourable the Chief Justice and the Honourable Justice Olsson concurring)

21 June 1996

PROCEDURE –

Application by practitioner to permanently stay proceedings brought by the Law Society for removal of his name from list of practitioners - practitioner claimed that proceedings were vexatious and oppressive and that delays had resulted in prejudice to him - application for stay refused.

LEGAL PRACTITIONERS – MISCONDUCT UNFITNESS AND DISCIPLINE

Application for order striking a legal practitioner's name from the roll of practitioner's - appropriations of monies from trust account in order to pay the practitioner's legal fees without the rendering of accounts - no fraudulent intent - failure of practitioner to co-operate with investigation by Law Society - practitioner's right to practise suspended until further order - no application to remove suspension to be made until expiration of at least 12 months.

Appellant THE LAW SOCIETY OF SOUTH AUSTRALIA: Counsel: MR T STANLEY - Solicitors: THE LAW SOCIETY OF SOUTH AUSTRALIA
Respondent VICTOR UNKIN: In Person

Hearing Date/s: 17/05/96.

File No/s: SCGRG-95-2699

Judgment No. S5673

LAW SOCIETY OF SA v UNKIN

Full Court
Duggan J

This is an application by the Law Society for an order that the practitioner, Victor Unkin, be struck off the roll of practitioners. The application follows a hearing before the Legal Practitioners Disciplinary Tribunal at which the practitioner was found guilty of unprofessional conduct in respect of various charges. The tribunal reached the view that it did not possess sufficient power to deal with the practitioner and recommended that disciplinary action be commenced against him in the Supreme Court pursuant to s82(6)(a)(v) of the Legal Practitioners Act, 1981.

When the matter was called on for hearing there was also an application by the practitioner to have the Law Society's application permanently stayed on the ground that it was vexatious, oppressive and constituted an abuse of the process of the court. After hearing the parties on this preliminary issue the practitoner's application was dismissed and it is convenient at this point to state my reasons for agreeing with that order.

The application was supported by an affidavit sworn by the practitioner. In it he referred to what he claimed were long and unnecessary delays by the Law Society and the Legal Practitioners Complaints Committee (the complaints committee). It is necessary to provide a short summary of the history of the matter in order to consider the practitioner's complaints.

The practitioner was in practice on his own account and the charges brought against him arose out of a complaint by one of his clients, Dr N T Wilson. In July 1988 Dr Wilson suffered personal injuries as a result of falling in a supermarket. She instructed the practitioner to claim damages on her behalf and the claim was eventually settled. Under the terms of settlement Dr Wilson was entitled to receive $25,000. This amount was paid into the practitioner's trust account in August, 1991. Prior to that the client had paid sums of money totalling $26,700 into the practitioner's trust account on account of costs. Further amounts totalling $2,345 were also paid into the trust account by Dr Wilson as were costs received from the other party totalling $41,289.59.

The tribunal found the practitioner guilty of a number of appropriations of the monies paid into his trust account on behalf of Dr Wilson. It was alleged by the Law Society that appropriations were made towards satisfaction of claims for legal costs by the practitioner against Dr Wilson without the practitioner first rendering a bill to his client. The tribunal found that appropriations totalling $27,675 were made without bills being rendered. These appropriations took place over a period from 10th December 1990 to 30th January 1992. There was no suggestion that the amounts were fraudulently appropriated.

The practitioner also was found guilty by the tribunal of failing to produce invoices and accounts in the matter when requested to do so by a trust account inspector appointed under the Legal Practitioners Act. Various requests

of this nature were made in May and June 1992. Finally the practitioner was found guilty of threatening Dr Wilson with legal action if she did not withdraw a statement made in her complaint to the Law Society that the practitioner had been guilty of "unethical behaviour". The alleged threat was made in a letter dated 14th October 1992.

The practitioner complained that he had been prejudiced by reason of the delay in bringing the present proceedings against him. He placed considerable reliance on *Re Manion Trading Ltd* [1995] 4 All ER 14. In the light of the practitioner's emphasis on this case in his submissions it is appropriate to summarise its effect. Action was taken by the Official Receiver seeking an order to disqualify a company director who was a director of a company against which a compulsory winding-up order had been made. Relevant legislation provided that such an application was to be made within two years of the winding-up order. The Official Receiver commenced proceedings for disqualification on the last day of the two-year period. The allegations were denied by the director and the Official Receiver was directed to file and serve evidence by 13th May 1991. Various extensions to serve the evidence were granted but the last extension for a period of one week was granted on 11th November 1991. In fact the evidence was not served on the director until 24th January 1994. The director successfully applied for the proceedings to be struck out for want of prosecution. The Official Receiver unsuccessfully appealed to the Court of Appeal. The Court of Appeal's decision is summarised in the head note which, in so far as it is relevant, states:

> "**Held** - (1) The conventional approach to striking out for want of prosecution, which applied to all civil proceedings and required the court to inquire whether there had been inordinate and excusable delay giving rise to a substantial risk that a fair trial would not be possible or was such as was likely to cause or to have caused serious prejudice to the defendant, also applied to disqualification proceedings under the 1986 Act, but was modified by an additional consideration, namely the need to protect the public in whose interest the disqualification proceedings were brought. On that approach, if the court concluded that a fair trial was not possible owing to the delay, it should always strike out the proceedings. Where a fair trial was possible, the court should permit the case to proceed unless there was evidence of serious prejudice caused to the director by the delay, both in launching the proceedings and thereafter, which outweighed the public interest in obtaining a disqualification order. In laying down a two-year period within which proceedings were to be brought, Parliament had clearly indicated that expedition was required and if the Official Receiver delayed in launching proceedings until the end of that period, greater diligence was required of him. It was not the case that the public interest in obtaining the protection of a disqualification order diminished with the passage of time and the judge had erred in so holding. It followed that the judge had erred both in his approach

to disqualification proceedings and in his conclusion on adopting that approach.

(2) Given that any evidence of prejudice suffered by a director had to be set against the public interest in obtaining a disqualification order, a judge would rarely be justified in striking out on the sole ground of the prejudice inherent in the pendency of disqualification proceedings in the absence of evidence of other specific prejudice. On the judge's alternative approach, it was doubtful whether the inherent prejudice caused to A was sufficient to justify striking out in view of his earlier finding that a fair trial was possible and his rejection of the specific prejudice asserted by A. However, the substantial culpable delay on the part of the Official Receiver had clearly caused prejudice to A through its effect on the memories of the witnesses. It followed that such prejudice, together with the inherent prejudice on which the judge relied, amounted to prejudice which was sufficiently serious to outweigh the public interest in pursuing the disqualification proceedings and that the judge's conclusion that the proceedings should be struck out could therefore be supported on the facts."

The court further held that evidence of prejudice suffered by a director in these circumstances had to be set against the public interest in obtaining a disqualification order. The court stated that it would be exceptional for the proceedings to be struck out on the sole ground of the prejudice inherent in the pendency of disqualification proceedings in the absence of evidence of other specific prejudice. On the facts of the case it was held, however, that the delay had caused prejudice to the director through its effect on the memories of witnesses and it was relevant to take this into account in combination with prejudice inherent in the pendency of the proceedings. The latter category of prejudice arises from the practical disadvantages of a director attempting to engage in business throughout a period when his or her status and reputation is being called into question.

The practitioner conceded in argument that he was not relying on any submission that he was deprived of a fair trial on the relevant issues. However he did claim that he had suffered prejudice in his practice of the law by reason of the delay. There are a number of important distinguishing features between the present case and the case cited to us by the practitioner, not the least of which is the fact that in the present case there was no prejudice to a fair trial. It should also be pointed out that the Court of Appeal placed considerable reliance on the two-year limitation period provided for in the English legislation. It is my view that, although there were delays in the present case, they were not of such an inordinate or inexcusable character as to provide a basis for the plaintiff's application. In this respect it is appropriate to refer to a brief history of the events which took place from the time of the original complaint.

Dr Wilson's complaint to the Law Society concerning the practitioner was dated 20th March 1992. The complaints committee brought it to the attention of the practitioner on 1st April 1992. On 21st May 1992 a trust account inspector was appointed by the Law Society. The inspector and the complaints committee made attempts from May to October 1992 to obtain invoices and accounts relating to Dr Wilson's claim from the practitioner. The evidence given before the tribunal leaves no doubt that the practitioner continually obstructed these attempts, thus delaying the enquiry. Certain of these events formed the basis of the charge in count 3 in the compliant.

In November 1992 the complaints committee resolved to lay charges against the practitioner. On 30th November 1992 a sequestration order was made against him in the Federal Court and the secretary of the complaints committee was appointed manager of his practice and the supervisor of his trust account. Throughout 1993 the practitioner's files were examined and counsel was asked to advise on the matter. Some delay took place while the Law Society awaited funding approval from the government for the investigation. The charges were eventually drafted, settled by counsel and approved by the committee. They were filed and served on 11th March 1994.

Direction hearings before the tribunal were listed for 25th March, 6th April and 17th May 1994. The practitioner did not attend on any of these occasions despite the fact that letters advising of the hearings were sent to him. Eventually the presiding member of the tribunal directed that there be personal service and this led to the appearance of the practitioner at a directions hearing on the 24th of June 1994. The practitioner failed to attend some directions hearings scheduled for the remainder of the year, but a trial date was fixed for the end of March 1995. The tribunal's decision was announced on 21st April 1995.

After the decision of the tribunal was handed down the Law Society Council considered the matter and eventually invited the practitioner to a council meeting on 26th June 1995. The practitioner attended and addressed the meeting. It was resolved by the council after the meeting that the society should move the Supreme Court for an order that the practitioner not be allowed to practise except under supervision and only after taking a course in trust accounting. The practitioner was advised of this decision by letter dated 27th July 1995 and he was asked whether he would support this approach to the matter. The practitioner did not respond to the letter and the notice of motion applying for the practitioner's name to be struck off the roll of practitioners was filed on 19th December 1995.

It would appear that at certain stages the Law Society officers should have progressed the matter more rapidly. I am not satisfied that sufficient explanation has been given for the delay between the complaints committee's decision to lay charges against the practitioner in November 1992 and the filing of the complaint on 11th March 1994. Furthermore I think that the matter was not

expedited sufficiently between the tribunal's finding on 21st April 1995 and the filing of the notice of motion in this court on 19th December 1995.

However it must be said that much of the delay was due to the practitioner's failure to co-operate adequately with the enquiry. In particular he failed to comply with frequent requests for documents, failed to attend a number of directions hearings and was unwilling to discuss the Law Society's proposals for supervised practise coupled with the suggestion that he undergo a course in trust accounting. I am satisfied that the circumstances justify the conclusion that, for the most part, the practitioner was the author of his own misfortune and could have substantially reduced the period of delay by co-operating with what appear to be genuine attempts on the part of the Law Society and its officers to investigate this matter and bring it to a just conclusion. It is also of significance that the practitioner was an undischarged bankrupt from 30th November 1992 to February 1996. Section 49 of the Legal Practitioners Act 1981 prevents a bankrupt from practising law without the authority of the Supreme Court and such an authority may be granted on conditions set by the court. No application was made to the court by the practitioner under this section and I am confident that approval to practise would not have been given while the practitioner maintained his unco-operative attitude towards the investigation of the complaint and the attempts made to resolve the matter.

In my view the practitioner failed to demonstrate that these proceedings should be permanently stayed. The proceedings are not vexatious or oppressive and were not brought with an improper motive; nor has any period of delay resulted in unfairness to the practitioner of the type which would override the public interest in investigating a matter such as this and justify a stay of proceedings. For the same reasons it is inappropriate to grant the relief sought by the practitioner by way of judicial review.

I return then to the Law Society's application for the striking off of the practitioner's name. As I have pointed out the tribunal found that the practitioner appropriated $27,675 from trust account monies standing to the credit of Dr Wilson in or towards satisfaction of claims for legal costs without first forwarding a bill or bills in accordance with s41(1) of the Legal Practitioners Act. The appropriations can be summarised as follows:

DATE	AMOUNT
10/12/90	$ 8,500.00
26/02/91	$ 275.00
02/04/91	$ 4,000.00
04/06/91	$ 4,900.00
04/12/91	$ 5,000.00
30/01/92	$ 5,000.00
TOTAL	**$ 27,675.00**

Although the Law Society did not attempt to establish dishonesty in this course of conduct, the facts of the case bear eloquent testimony to one of the purposes for which the statutory requirement exists. The practitioner's client was placed in the position of not knowing precisely what her eventual entitlement was and she was given no real understanding as to how the cost of the litigation had been calculated.

The findings with respect to the third charge of failing to produce documents to the trust account inspector were summarised in the tribunal's report as follows:

> "On 21 May 1992 the Trust Account Inspector Mrs. Angus requested Mr. Unkin to produce to her the bills of costs relating to two appropriations of monies from the Trust Account by Mr. Unkin for costs, namely:-
>
> 4 December 1991 $5,000
>
> 30 January 1992 $5,000
>
> Mr Unkin. acknowledged in evidence that he did not raise a bill of costs in respect of the transaction for 4 December 1991 before making the appropriation.
>
> As regards the transaction on 30 January 1992, Mr. Unkin wrote to his client on that day (Exhibit D33) in the following terms:-
>
> > 'We discussed my withdrawing the sum of $5000 on account of fees ... and I indicate that I am withdrawing an interim sum of $5000.'
>
> It is the only written justification for the withdrawal and was put forward by Mr. Unkin as being tantamount to a bill.
>
> The practitioner's statement on 3 July 1992 to Mrs. Angus that he 'would send a copy' of these bills might reasonably be treated as an acknowledgment that a document existed to support each of the two withdrawals.
>
> However, Mr. Unkin has acknowledged in his evidence that no documentation exists with regard to the withdrawal of 4 December 1991.
>
> As no document existed relating to this transaction we would not be prepared to find that he 'failed' to produce it in response to the demand of the Trust Account Inspector. Mr. Unkin's statement that he 'would send a copy' was misleading; he was not in the position to do this. We consider that in the circumstances if he

said anything Mr. Unkin was required to inform Mrs. Angus of the true position namely his inability to comply with her request. We note the terms of Section 35(1)(b) of the Legal Practitioners Act which entitled the trust account inspector to 'all relevant information'. We consider that irrespective of the precise terms of the request of the trust account inspector (in fact made in accordance with Section 35(1)(a) of the Act) there is an overriding duty of general co-operation on a practitioner in his or her dealings with the inspector. Mr. Unkin was certainly not entitled to mislead.

On 30 November 1992 in anticipation of a Manager taking over his practice, Mr. Unkin made a copy of his letter of 30 January 1992 (Exhibit D33) and took it home. It is therefore apparent that Mr. Unkin had access to the document which he relies upon as his bill of costs supporting the transaction of 30 January 1992. We consider that Mr. Unkin failed to produce this document to the trust account inspector. Alternatively, if this document is not to be regarded as his bill of costs then his statement to the trust account inspector was misleading.

We find that Mr. Unkin failed to produce his 'bill of costs' in respect of the transaction of 30 January 1992 and failed to disclose the absence of a bill to support the transaction of 4 December 1991."

The fourth charge alleged that the practitoner had threatened Dr Wilson in a letter which he wrote to her about her complaint. In her letter to the complaints committee Dr Wilson had stated:

"To this date, I have made several phone calls, left messages and requested Mr. Unkin to reply to me, and release my money. He however has not bothered to return my calls. I have also sent him a letter, copy attached, requesting a reply. He had also ignored this completely. I am in business, and am now heavily in debt. I have had to use $35,000 of my housing loan to finance my business and am paying accrued interest, due to Mr. Unkin's unethical behaviour."

The practitioner wrote to Dr Wilson on 14th October 1992 as follows:

"On the 20th March 1992, you wrote a letter to the Legal Practitioners Complaints Committee and on page two of that letter you used the following words 'I have had to use $35,000.00 of my housing loan to finance my business and paying accrued interest due to Mr Unkin's unethical behaviour'.

I view your allegation of unethical behaviour as defamatory and such allegation has been published to a third person, namely the Legal Practitioners Complaints Committee.

I accordingly require you to withdraw that allegation in a form and format suitable to myself and render an apology in respect of that allegation.

If you do not do so, I will institute proceedings for damages."

In the view of the committee the practitioner wrote the letter in an attempt to bluff Dr Wilson out of pursuing her complaint to the complaints committee.

The view which the tribunal took of the conduct which they found proved is summarised in the following extract from the report:

"Our finding is that Mr. Unkin has demonstrated his unfitness as a practitioner. Section 41(1) of the Legal Practitioners Act sets out the requirements which must be observed by a legal practitioner before the appropriation of money in or towards satisfaction of a claim for legal costs. Knowledge of these requirements is fundamental to the conduct of private legal practice. Mr. Unkin took money belonging to Dr. Wilson from his trust account on six occasions without having delivered a bill in proper form so as to describe the legal work to which the costs related.

Having failed to observe these requirements Mr. Unkin came before the Tribunal and advanced the argument that Section 31(3)(a) of the Legal Practitioners Act over-rode the requirements of Section 41 so as to allow a practitioner to make a withdrawal on account of costs with the consent of the client. Mr. Unkin's persistence with this view reinforces our conclusion as to his unfitness based on his unauthorised dealings with his trust account.

Superimposed on this, Mr. Unkin's actions in stalling or fobbing off the Trust Account Inspector and his threatening letter to Dr. Wilson reveal a person who is insufficiently aware of the way in which a legal practitioner is required to conduct his or her affairs and of professional standards.

In our view the Tribunal itself does not possess sufficient power to deal with Mr. Unkin in a way which will protect the public. Accordingly we have decided to recommend that disciplinary action be commenced against the practitioner in the Supreme Court. Mr. Unkin requires further training (particularly as to legal accounting) and a change in his attitude towards his obligations under the Legal Practitioners Act before his fitness as a practitioner can be assured."

The factual findings of the tribunal are amply supported by the evidence and I agree with its assessment of the practitioner's conduct as set out in the passages which I have just quoted.

The practitioner made submissions to this court. He stressed that he was admitted to practice in 1978 and that this was the first occasion on which one of his matters had been investigated by the Law Society. He said Dr Wilson was a friend and he told her informally from time to time how the matter was progressing and what costs had been incurred. He said that accounts were prepared but, for some reason which he could not really explain, not all of them were given to Dr Wilson. The practitioner stated that he wrote the letter dated 14th October 1992 to Dr Wilson in an attempt to get her to withdraw her allegation of unethical conduct, not her complaint. He said he was under stress at the time he sent this letter. He said he felt he could not co-operate with the Law Society as time went by because he was very apprehensive. He said the bickering had made him reluctant to deal with the Law Society officers.

Although the allegations in this matter were confined to one file, they disclose a series of breaches of a fundamental requirement of trust account procedure. No satisfactory reason was advanced for the failure to render the accounts and make clear to the client precisely where she stood following the settlement of her claim. But there is a further aspect which gives rise to considerable concern and that is the reaction of the practitioner to the well-founded complaint which was made against him. Not only did he write a threatening letter to the complainant, but he obstructed the Law Society's investigation into the matter. When an attempt was made by the society to suggest a resolution of the matter which was quite favourable and lenient to the practitioner in the light of the tribunal's findings, he failed to respond to the proposal. When pressed at the hearing before this court, the practitioner said he would co-operate with the Law Society from now on, but the reasons he gave for this change of attitude are unconvincing.

The Law Society is given statutory recognition by the Legal Practitioners Act which also bestows upon it and the complaints committee, which is established under the Act, a central role in the supervision of the legal profession. The legitimate exercise by the society of its statutory powers, particularly in matters affecting the protection of the public, calls for the respect and co-operation of the profession. The gravamen of the practitioner's conduct in the present case is that he breached the trust account provisions on a number of occasions, albeit in the same matter, and then thwarted the investigation which was rendered necessary by reason of these breaches. The hostile attitude which he adopted in relation to the Law Society investigation seems not to have abated.

Although the circumstances of this case give rise to serious consideration of the application to remove the practitioner's name from the roll of practitioners, it is my view that, in the unusual circumstances of the case, it would be more appropriate to suspend the right of the practitioner to practise the

profession of the law until further order of this court. Although the present quorum cannot bind future courts, it is also my view that the suspension should not be removed until such time as the practitioner clearly demonstrates to the court that he understands and is prepared to observe the requirements of the Legal Practitioners Act and that he is willing to co-operate with the Law Society in the proper exercise of its powers under the Act. He should also be able to satisfy the court that he has undergone, or is prepared to undergo, such training in trust account procedure as is deemed necessary by the society and that he is willing to submit to such supervision as might be approved by the court. Finally I am of the view that the court should direct that no application can be made to remove the suspension until a period of at least 12 months has elapsed.

DOYLE CJ

For the reasons given by Duggan J, to which reasons I have nothing to add, I agree that an order should be made suspending the right of the practitioner to practise the profession of the law until further order, and that a further order should be made that no application be made to remove the suspension until a period of at least 12 months from the date of judgment has elapsed.

Olsson J

I agree.

DUPLICATE

SOUTH AUSTRALIA
IN THE SUPREME COURT
No 2699 of 1995

IN THE MATTER of
VICTOR UNKIN
a legal practitioner
- and -
IN THE MATTER of the
LEGAL PRACTITIONERS ACT, 1981.
Between:
LAW SOCIETY OF SOUTH AUSTRALIA

Appellant

-and-

VICTOR UNKIN

Respondent

BEFORE THE CHIEF JUSTICE THE HONOURABLE JUSTICE DOYLE
THE HONOURABLE JUSTICE OLSSON AND
THE HONOURABLE JUSTICE DUGGAN
FRIDAY THE 21ST DAY OF JUNE 1996

UPON APPLICATION of The Law Society of South Australia by notice of motion dated the 19th day of December 1995 and UPON APPLICATIONS by Victor Unkin to permanently stay proceedings brought by The Law Society of South Australia and for judicial review dated the 1st day of February 1996 UPON READING the affidavits filed herein AND UPON HEARING Mr Stanley of counsel for The Law Society of South Australia and the respondent in person on the 17th day of May 1996 there being no attendance by or on behalf of the respondent ~~this day~~ the 21st day of June 1996 IT IS ORDERED:

1. That VICTOR UNKIN be suspended from practise of the profession of the law until further order of the Supreme Court.

2. That no application be made to remove the suspension until a period of at least twelve (12) months has elapsed from the date hereof.

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3. That the respondent VICTOR UNKIN pay to The Law Society of South Australia its costs of application including the costs of the adjournment herein on the 13th day of May 1996 to be taxed.

4. That pursuant to Section 89(2)(e) of the Legal Practitioners Act 1981 the respondent do pay to The Law Society of South Australia its costs of proceedings before the Legal Practitioners Disciplinary Tribunal to be taxed with liberty to the respondent to apply hereon within the 14 days if so advised.

AND IT IS FURTHER ORDERED upon the application filed by the respondent for a permanent stay:

5. That the application be dismissed.

6. That the respondent do pay to The Law Society of South Australia its costs of the application to be taxed.

7. That the application for judicial review be refused.

8. That the respondent do pay to The Law Society of South Australia its costs of the application for judicial review to be taxed.

SUPREME COURT

BY THE COURT

A/CHIEF CLERK

THIS ORDER is lodged by **SUSAN REMFRY BISHOP** of 124 Waymouth Street ADELAIDE SA 5000 Solicitor for The Law Society of South Australia, Phone 229 0229.