

SUPREME COURT OF SOUTH AUSTRALIA
(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v BOYES

Judgment of the Full Court (ex tempore)

(The Honourable Justice Prior ACJ, the Honourable Justice Bleby and the Honourable Justice Gray)

4 September 2001

PROFESSIONS AND TRADES — LAWYERS

REMOVAL OF NAME FROM ROLL

Application for removal of a practitioner from Roll of Legal Practitioners - findings of unprofessional conduct in relation to seven separate matters by Legal Practitioners Disciplinary Tribunal - Tribunal noted a deficiency of about \$14000 in practitioner's trust account when practitioner ceased to practise - practitioner's conduct very serious involving wrongful conversion of clients' monies to the benefit of himself - name of practitioner struck off the Roll of Legal Practitioners.

Legal Practitioners Act 1981 s 31, Pt III, referred to.

In Re A Practitioner (1957) SASR 58; Law Society of South Australia v Murphy (1999) 201 LSJS 456, applied.

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MS A MCDONALD -
Solicitors: ALEXANDRA RATHBONE
Defendant: FRANK BOYES Counsel: MR M BOYLAN - Solicitors: ROBERT MCCRAE

Hearing Date/s: 04/09/2001.

File No/s: SCCIV-01-170

A1

Judgment No. [2001] SASC 319

LEGAL PRACTITIONERS CONDUCT BOARD v BOYES
[2001] SASC 319

Full Court: Prior ACJ, Bleby and Gray JJ

1 **PRIOR ACJ:** The Legal Practitioners Conduct Board seeks an order from this Court that the defendant's name be struck off the roll of Legal Practitioners. That order is not now opposed.

2 The Board has acted upon a recommendation of the Legal Practitioners Disciplinary Tribunal, that proceedings be commenced against the defendant in this Court consequent upon an inquiry conducted by the Tribunal into the conduct of the practitioner. The Tribunal found proved allegations of unprofessional conduct in relation to seven separate matters.

3 The first involved the practitioner's conduct when instructed to act for a person with respect to criminal charges during 1995 and 1996. The Tribunal found that between 11 October and 30 November 1995, the practitioner received \$592 as trust monies, converted them to his own use and benefit and failed to pay that money into his trust account in breach of s 31(1) of the *Legal Practitioners Act* 1981. That provision requires a practitioner to deposit money in a trust account as soon as practicable after its receipt and not to withdraw or permit it to be withdrawn except as authorised by Part III of the *Legal Practitioners Act*.

4 The sum of \$592 was part of the fee due to another practitioner who had been briefed by this practitioner to appear in criminal proceedings against the client. He never received it. The client was the subject of assistance from the Legal Services Commission. The Commission had paid to the defendant a proportion of his fees and the counsel fee.

5 The Tribunal found that, as counsel had not been paid on the date when the practitioner received a cheque from Legal Services Commission, the sum of \$592 due to be paid to the practitioner appearing as counsel was trust money and should have been placed in the practitioner's trust account. No explanation was offered to the Tribunal as to what has become of the money.

6 The second matter of complaint found proved by the Tribunal related to the appellant's conduct when instructed to administer an intestate estate. The Tribunal found that between 31 October 1994 and 16 May 1995 the practitioner converted five sums of money from his trust account to his own use and benefit when he had no claim against the estate for costs. Withdrawal of those five separate amounts was a breach of s 31(1) of the Act.

7 The total amount of money involved was \$11990.18. In finding this charge proved the Tribunal referred to the fact that the practitioner asserted that there were other files in relation to that client or his siblings and that the amounts said to have been converted were amounts to which he was entitled in relation to the

other files. The Tribunal said that, on all of the evidence before it, it was not prepared to accept that assertion. No other files were produced. No other files were identified with any precision in the evidence of the practitioner, nor was there any other evidence put forward identifying the other files. The Tribunal said that in rejecting the practitioner's assertion it also had regard to the findings made in other matters referred to in the charge and to the fact that these findings supported a finding of a pattern or course of conduct by the practitioner. These findings were entirely correct and appropriate.

8 The third matter alleged against the practitioner and found proved by the Tribunal was that when instructed to act for a person in relation to proposed consent orders in the Family Court, the practitioner drew a cheque for \$500 against his trust account in the name of the client when there were no funds in the account to meet it and, having no claim against the client for legal costs, paid the sum of \$500 from his trust account to himself in breach of s 31(1) of the *Legal Practitioners Act*.

9 This matter involved a property settlement and the transfer of a property into the name of the practitioner's client. On 21 November 1995 the practitioner drew a cheque for \$500 on his trust account in favour of his office account. When the cheque was drawn there was a nil balance in the trust account for that client. The Tribunal found that no account for \$500 was ever sent to the client. That client received an account for \$843 after the practitioner received a single payment of trust money on 6 December 1995. The Tribunal found that, according to the practitioner's own records he had withdrawn funds when there was no positive balance in the trust account and when he was not entitled to funds given that no account had been sent. The Tribunal said that there was no evidence of a genuine clerical error, which was later corrected.

10 The fourth matter of complaint was related to a client who instructed the practitioner to act for her with respect to a Workers Compensation claim in January 1995. In September 1995 the client paid to the practitioner's trust account \$2500 on account of costs and disbursements. The practitioner acknowledged receipt of that amount by letter and enclosed a final account for the same amount of \$2500. That sum was transferred from the practitioner's trust account to his office account on 20 September 1995. By a cheque dated 21 November 1995, the practitioner transferred \$650 from his trust account to his office account when there was a nil balance in the trust account in the name of that client, the transfer being said to relate to that client.

11 The practitioner could not explain why the cheque for \$650 was drawn against that client's account. The Tribunal found no account for \$650 was ever sent to that client. The Tribunal properly found that the practitioner had improperly drawn \$650 from his trust account to himself when he had no claim against that client for legal costs in breach of s 31(1) of the *Legal Practitioners Act*. It properly found that the practitioner had drawn a cheque against his trust

account in the name of that client when there were no funds in the account to meet it.

12 The fifth matter before the Tribunal related to another client who instructed the practitioner with respect to a Workers Compensation claim. This occurred in about July 1992. The Board alleged that the practitioner had converted a sum of \$1137.46 to his own use and benefit and drawn a cheque against his trust account in the name of that client when there were insufficient funds in the account to meet it.

13 The evidence accepted by the Tribunal was that the client's claim being settled the practitioner sent a letter and an account to the client on 8 May 1995. That account was for \$1137.46. In July 1995 that sum was transferred from the practitioner's trust account to his office account. However, on 19 December 1995 the practitioner made another transfer of the same amount from the trust account to his office account with respect to the same client when, at that time, the balance in the trust account was for but \$16.29, \$1153.75 was received from WorkCover in June 1995; \$1137.46 was transferred from the trust account on 14 July 1995. The practitioner claimed to the Tribunal that the payment was an error.

14 In the sixth matter the complaint was that, again, the practitioner withdrew or permitted to be withdrawn monies from his trust account in circumstances in which he was not authorised to do so. The Tribunal permitted an amendment of the Board's charge and found that the practitioner was in breach of s 31(1) of the Act with respect to criminal injuries compensation claims pursued on behalf of three infants. \$3000 being received from the Crown Solicitor's office in December 1994 and being placed in the practitioner's trust account, \$750 was paid out from the trust account in the name of the children's next friend and paid to a practitioner previously employed by the defendant. The practitioner's trust account records describe the payment of \$750 as being to the practitioner's former employee as consultancy fees.

15 The Tribunal found that no account for \$750 was prepared or sent to the children's next friend or any member of that person's family. It was not prepared to find that no legal work had been done for which a bill might have been sent but said it was unable to make a finding that the value of the work for the children on the file, or files, totalled \$750.

16 The seventh matter found proved by the Tribunal related to the conversion of \$500 to his own use and benefit and payment of that amount from his trust account to himself in breach of s 31(1) of the *Legal Practitioners Act*. The practitioner's client in this matter was a man against whom charges were laid for breaches of the *Road Traffic Act* and the *Summary Offences Act*. That client paid \$500 to the practitioner on 25 September 1995. The money was placed in the practitioner's trust account and identified as having been received on account of costs and disbursements. On 9 October 1995 the practitioner transferred the sum

of \$500 from his trust account to his office account. On 9 February 1996 the client paid \$700 to the practitioner. This money was placed in the practitioner's trust account, apparently for costs and disbursements. The Tribunal found that the client was never given an account for \$500 and that the practitioner did not do legal work for that client to the value of \$500. The Tribunal found that no account of \$500 was prepared or sent to the client. The charges being found proved the Tribunal acknowledged that some work might have been done for which an account could have been sent. It also acknowledged that this might well be relevant to the question of penalty.

17 In making its findings the Tribunal first referred to four important matters. They were first, that in early 1995 the practitioner had been the subject of an assault. This resulted in psychiatric problems for which he received treatment. Three medical reports were in evidence before the Tribunal with respect to the assault and its consequences. The Tribunal said that the fact of the assault and its consequences might explain the practitioner's inability to remember some of the events referred to in the charges. Secondly, the practitioner suffered some amnesia after being involved in a head-on motor vehicle collision in about October 1995. The Tribunal said that this might have affected his ability to cope with the demands of his practice at that time. However, the Tribunal did not think that circumstance relevant in terms of explaining or justifying the conduct referred to in the second and third matters the subject of charges with respect to conduct at about that time.

18 Thirdly, the Tribunal referred to the fact that some of the documents, or files, relevant to some of the charges were missing. The Tribunal indicated that the evidence as a whole did not enable it to make clear and precise findings as to what documents or files were once in existence but were now missing.

19 Finally, the Tribunal noted that when the practitioner ceased practice in February or early March 1996, there was a deficiency in his trust account of about \$14000. Whilst acknowledging that in four of the matters then before it, particular clients did not suffer a loss given the nil balance in the trust account on behalf of those persons, it had to be a real possibility that another client's money was ultimately lost as a result of those monies being withdrawn. The Tribunal said that it did not think a practitioner could avoid the consequence of his actions by saying that no money of a particular client was taken because the trust account balance with respect to that client was nil at the time of withdrawal. The fact remained that on the cessation of practice there was a substantial deficiency in the practitioner's trust account. So, the Tribunal said,

“even if it cannot be established which particular client suffered at the time of withdrawal the deficiency on the cessation of the practitioner's practice must have resulted from the improper withdrawal of funds.”

20 It is appropriate for this Court to accept and act on the findings of the Tribunal. I agree with the Tribunal that the practitioner's conduct is very serious

“in that it involves the practitioner removing monies from his trust account to which he was not entitled”. This conduct was not isolated. The practitioner was unable to explain much of his conduct. The conduct is conduct, which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency¹.

21 The issue for this Court is whether, in view of the conduct found proved, the practitioner is fit to remain a member of the legal profession. If the established conduct demonstrates that he is not, the ordinary course is an order that his name be removed from the roll, even if something less would be an adequate punishment for him or even if something less is likely to ensure that he would not be able to practise as a practitioner². Whilst the Court acts in the public interest and not with a view to punishment of a practitioner, the practitioner’s personal circumstances are not to be ignored. Even making full allowance for those circumstances, this is a clear case for the order sought. It involves a course of conduct over more than two years, no sufficient explanation for what occurred and the stark reality that when the practitioner ceased to practise there was a shortfall in his trust account in excess of \$14000.

22 All practitioners must take very seriously the obligations imposed upon them with respect to trust accounts. The wrongful conversion of clients’ monies to the benefit of a practitioner marks a departure from the required standard in this case too serious and too persistent to avoid the conclusion that the practitioner is unfit to remain a practitioner. Maintaining a trust account is a basic professional obligation in relation to the charging of clients and accounting to them³. That obligation must be strictly adhered to and enforced. I would therefore order that the name of the practitioner be struck off the Roll of Legal Practitioners.

23 **BLEBY J:** I agree, and I agree with the reasons now given by the acting Chief Justice.

24 **GRAY J:** I agree.

¹ *In Re A Practitioner* (1927) SASR 58 at 60

² Doyle CJ in *Law Society of South Australia v Murphy* (1999) 201 LSJS 456 at 460 - 461

³ *Law Society of South Australia v Murphy*(1999) 201 LSJS 456 at 458