Counsel

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v PHILLIPS

Judgment of the Full Court
(The Honourable Justice Prior, the Honourable Justice Nyland and the Honourable Justice Gray)

8 March 2002

PROFESSIONS AND TRADES — LAWYERS — REMOVAL OF NAME FROM ROLL

Application for removal of a practitioner from Roll of Legal Practitioners - findings of unprofessional conduct with respect to four distinct matters by Legal Practitioners Disciplinary Tribunal - failure by practitioner to understand proper professional standards - practitioner continued to behave in a manner inappropriate despite warning from the Legal Practitioners Conduct Board - practice under supervision not appropriate - name of practitioner struck off.

Legal Practitioners Act 1981 s 86, s 89, referred to.
Law Society of South Australia v Jordan (1998)198 LSJS 434; *Legal Pracititioners Conduct Board v Hay* (2001) 215 LSJS 459; *Legal Practitioners Conduct Board v Le Poidevin* (2001) 214 LSJS 402; *Re Gruzmow; Ex parte The Prothonotary* (1967-1970) 70 SR (NSW) 316; *NSW Bar Association v Thomas (No 2)* (1989-1990)18 NSWLR 193; *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197; *Re R v a Practitioner* [1927] SASR 58, applied.

Applicant: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR P HEYWOOD-SMITH - Solicitors: ALEXANDRA RATHBONE
Defendant: WADE PHILLIPS Counsel: MS B POWELL QC, MR C CALDICOTT - Solicitors: CALDICOTT & CO

Hearing Date/s: 07/02/2002.

File No/s: SCCIV-01-859

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Judgment No. [2002] SASC 63

LEGAL PRACTITIONERS CONDUCT BOARD v PHILLIPS
[2002] SASC 63

FULL COURT: Prior, Nyland and Gray JJ

1 **PRIOR J:** The Legal Practitioners Disciplinary Tribunal has found the defendant guilty of unprofessional conduct and recommended that disciplinary proceedings be commenced against the practitioner in this court[1]. The Board seeks an order that the name of the practitioner be struck off the roll of legal practitioners. The practitioner opposes that order.

2 The charges before the Tribunal related to complaints of unprofessional conduct involving a single client. The practitioner had acted for this client in several different matters between April and December 1996. Before the Tribunal the practitioner admitted that his conduct overall constituted unprofessional conduct. However, the Board submitted that the practitioner was guilty of unprofessional conduct with respect to four distinct matters over the period referred to. The Tribunal found that each of the four courses of conduct referred to in the charge before the Tribunal constituted unprofessional conduct.

3 In January 1997 the practitioner signed judgment in proceedings for the recovery of outstanding legal fees. At that time the practitioner knew the client was overseas. Judgment was signed by the filing of an affidavit of service. In the affidavit the practitioner asserted that he had served the client by sending the summons by fax to the solicitors acting for his client. The fact was that the practitioner knew that that firm of solicitors was not acting for the client with respect to the practitioner's claim for legal fees. The solicitors had returned the summons to the practitioner the day after it was faxed to them informing him that that firm had never indicated that it had instructions to accept service. The practitioner swore his affidavit of service on 20 December 1996, the day after he had received the communication from the solicitors to whom he had faxed the summons. The evidence before the Tribunal was that the practitioner made no other attempt to bring the summons to the attention of his client. The Tribunal found that that conduct in itself constituted unprofessional conduct.

4 The client applied to set the judgment aside. This was done by an application lodged on 17 February. That application was dismissed for non-appearance later that month. On 2 June 1997, the practitioner was informed of the client's complaint to the Board. A further application to set aside the judgment was taken out on 24 June 1997. This came before the Magistrates Court on 10 July. The application was not heard that day. Settlement negotiations proceeded with the client agreeing to pay a lesser sum than the practitioner's original claim.

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1 *Legal Practitioners Act* 1981, s 89

5 The second matter upon which the Tribunal found the practitioner guilty of unprofessional conduct involved his response to the Board when it conveyed the terms of the client's complaint about his obtaining judgment in the manner found proved. In his response to the Board just three days after the second application to set aside judgment, the practitioner asserted that judgment was obtained in the Magistrates Court for outstanding fees with neither the complainant nor her solicitors filing a defence to the claim. In August 1997, the Board was advised that the claim for costs had been settled.

6 The Tribunal found that in making his response to the Board in his letter of 27 June, the practitioner had failed to be fully frank with the Board. The Tribunal said that a practitioner whose conduct is the subject of an enquiry by the Board has a duty to assist the Board in its enquiries[2] and found that the practitioner did not inform the Board of correspondence received from the client's solicitors informing him that they were not instructed to accept service of proceedings. Nor did he inform the Board that at the time he signed judgment he knew the client was overseas and that he knew she was therefore probably unaware of the summons when he signed judgment.

7 The Tribunal said that these were highly relevant matters, which in discharge of the practitioner's obligation to assist the Board in its initial enquiries, he should have disclosed to the Board.

8 The Tribunal rejected the practitioner's evidence that he was not attempting to mislead the Board. The Tribunal said it had no doubt that the practitioner "did in fact mislead the Board". The Tribunal found that as a result of the misleading information provided, the Board resolved, on 26 March 1998 to make no finding of unprofessional conduct against the practitioner. The Tribunal also found that it was "inevitable that (the practitioner) must have known his answer would mislead the Board". By giving the response the practitioner was attempting to and did in fact mislead the Board. This conduct was itself found to be unprofessional conduct.

9 Although the practitioner's claim for costs was settled in July 1997, the practitioner failed to withdraw a charge he had registered over his client's property to secure his judgment debt until 19 May 1999. A discharge of the charging order was prepared and delivered to the practitioner by his solicitor at the end of August 1997. Plainly the practitioner had taken no steps to discharge the charging order before the Board advised the practitioner of its preliminary view that there may be evidence of unprofessional conduct on his part.

10 The third matter considered by the Tribunal related to a letter written by the practitioner to his former client in October 1998. This correspondence resulted from a contact made with the practitioner by the former client's

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2 *Law Society of South Australia v Jordan* (1998) 198 LSJS 434 at 476

accountant, seeking a receipt for payment of the settlement sum accepted by the practitioner with respect to his claim for fees together with a statement that the sum had been paid, given that when the former client had applied that month for a telephone account, it had been refused against an adverse credit rating registered against the client as a result of the proceedings instituted by the practitioner and the charge remaining registered. Had the discharge received by the practitioner in August 1997 been registered promptly, no adverse credit would have been in existence when the client had sought the telephone contract.

11 By his letter of 8 October 1998, the practitioner said that he considered the client's complaint about him to the Conduct Board was 'malicious and defamatory and calculated to cause (him) maximum psychological harm and to illegally avoid paying the substantial legal fees (the client) owed (him) at the time". The practitioner said that details of the complaint made by the client and the firm of solicitors who acted for his client in other matters had been published to the legal profession in this State by the client deliberately making that false and malicious complaint. The practitioner said he had been "completely absolved of any unprofessional conduct by the Legal Practitioners Conduct Board". The letter then spoke of a requirement to settle a claim for defamation in the sum of $5,000 by bank cheque and upon condition with respect to the form of reference proposed by the practitioner being consented to by his former client. The practitioner provided an indication of what he would convey with respect to a credit reference. That was less than complimentary to the client. The practitioner said that his terms were not negotiable and that they had been brought to the attention of the Board. The agreed book of documents before the Tribunal does not confirm this as much as that the practitioner was told that if he thought he had been defamed by the complaint to the Board, he should seek his own advice in the matter.

12 When the Board received a complaint from the client about the letter of 8 October 19898, it wrote to the practitioner expressing its concern and indicated that it would investigate this complaint as a matter of urgency. It requested the practitioner to provide the Board with a full report of the circumstances surrounding his October letter, the defamation claim referred to in it and all relevant copy documents. The Board informed the practitioner that it had no correspondence from the practitioner since the earlier complaint was finalised in April 1998 and that there was no information known to it which would cause it to share the practitioner's view that the complaint made by the client in 1997 was in any way malicious. Equally it pointed out to the practitioner that far from absolving the practitioner of any unprofessional conduct, the Board had advised the practitioner that it considered his conduct towards the client to be "less than satisfactory".

13 The practitioner responded to the Board's letter promptly asserting that he had discussed the matters contained in his October letter with an officer of the

Board before proceeding with it. Within a week the Director of the Board was advised that his present solicitors were instructed to act on the practitioner's behalf in respect of the second complaint. The solicitor for the practitioner indicated that the practitioner withdrew any claim as to damages for defamation against the client and a member of the firm of solicitors who had acted for the client in other matters and undertook not to institute any proceedings in the future. A further letter was forwarded to the Board eight days later. In December 1998 the Board requested further particulars. That was promptly responded to.

14 The Tribunal described the practitioner's letter of 8 October 1998, as intimidating in tone, found that it contained incorrect and misleading statements and that "this conduct in itself constituted unprofessional conduct".

15 In June 1999, the practitioner's solicitors were advised that the Board had resolved that there was evidence of unprofessional conduct by the practitioner. Charges of unprofessional conduct were first laid in October 1999. Amendments were made in the course of proceedings. Besides the three matters already referred to as found proved, the Tribunal found that the practitioner's failure to register a withdrawal of the charge following settlement of the claim constituted unprofessional conduct as well.

16 The practitioner did not pursue an appeal against the decision of the Tribunal[3] before this Court. The Board invited the court to accept and act on the findings of the Tribunal. However, counsel for the practitioner invited the court to closely consider what occurred in the course of evidence being given by the practitioner consistent with a "relatively contemporaneous psychiatric report". The practitioner's evidence was given early in June 2000. A psychiatric report was provided by Dr Raeside on 26 June after an interview with the practitioner on 23 June. In the report Dr Raeside believed that the practitioner then had a borderline personality disorder. That opinion was not shared by a psychologist who first saw the practitioner the following November. However, Dr Raeside's first opinion was that the practitioner did not appear to be suffering from a major depression at the time he appeared before the Tribunal. The doctor's view was that the practitioner's competence was not significantly impaired by the condition that he was in when giving evidence before the Tribunal. That being said, counsel for the respondent said that the practitioner's credibility before the Tribunal was an issue for this Court in determining what action this Court should take. The submission was that given that the practitioner had readily conceded disciplinary action was warranted by reason of the activity alleged against him, his evidence before the Tribunal had to be put in context. That context was that the practitioner "was giving evidence with some difficulty, not under a disability but with considerable difficulty".

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3 *Legal Practitioners Act* s 86

17 In its findings the Tribunal said that it had no option but to agree with the submission put by counsel for the Board that the practitioner was not a witness of credit. The Tribunal said that they found the practitioner "totally unreliable," contradicting himself many times. The Tribunal then said:-

> "Early on the second day of his evidence he indicated for the first time that he was having trouble giving evidence, and that some of the evidence he gave the day before may not be correct. He also said we could not totally rely on his answers given that morning. We adjourned shortly after that to allow the practitioner to read the transcript. Having done that he did not seek to change anything. He said he was content for us to act on his answers as both accurate and truthful. We feel unable to do so. By way of example only, we refer to the following:
>
> (a) The practitioner was asked several times whether he thought the client was aware of the summons before he signed judgement. At T41 he said he formed the belief that she was aware of it, at T42 he said he did not have a belief on that topic, but at T42 he said he believed she was aware because Carabelas & Co would have told her. He had not had any communication from Carabelas & Co to that effect.
>
> (b) The practitioner was asked whether he believed the client was overseas when he signed judgement. At T105 he said he believed she was away, but at T108 he said he did not know.
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> (c) As to his letter of 8 October 1998 he said at T81 that the letter was written on the spur of the moment, but at T82 he agreed he had been working on at least part of the letter for more than six days.
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> We are therefore in the position where we are unable to place reliance upon anything the practitioner has told us, unless it is easily accommodated within the balance of the evidence. Fortunately, many of the facts have been admitted by the practitioner. There are very few areas of contested fact."

18 Counsel contended before this Court that a proper interpretation of the practitioner's evidence was that whilst he did not dispute his conduct was unprofessional, at the time he did those things, it did not occur to him that he was conducting himself in that way.

19 It was submitted that in so far as the Board now relied on the credibility finding, that finding had to be put into a context. This Court had to question whether the Tribunal was right or had a proper basis for making those findings. Counsel submitted that neither the Tribunal nor this Court could assume that

the practitioner was mendacious and consciously telling lies about his state of mind at relevant times.

20 Having taken into account all of the submissions put before this Court, I am not persuaded that there is any proper basis on which this Court could take any different view of the practitioner's credibility than that expressed by the Tribunal itself.

21 Counsel for the respondent relied upon the psychiatric reports of Dr Raeside and that of the psychologist. The psychologist did not share Dr Raeside's initial assessment of the practitioner as having a borderline personality disorder. The Tribunal had Dr Raeside's first report before it. He said that it was apparent that the practitioner was experiencing significant stress at the time he appeared before the Tribunal, and consistent with his personality disturbance, the practitioner would act in ways which were not putting himself in the best light and could be perceived as being self destructive. Dr Raeside's opinion was that he did not think the practitioner was consciously aware of this, nor that he was acting in a deliberate manner.

22 The Tribunal was entitled to reach the opinions it gave in its findings notwithstanding any contrary view properly deduced from the report of Dr Raeside.

23 The psychologist first gave a report in November 2000. It was her view that the practitioner would benefit from a period of professional supervision. She also said that the practitioner needed to be highly diligent by continuing to monitor anxiety and mood levels and apply cognitive exercises and communication techniques wherever possible. Ongoing counselling support would also assist with the maintenance of coping skills over a long term period. The practitioner has pursued assistance from the psychologist over some 11 months.

24 In his latest report, Dr Raeside is of the view that the practitioner presented "as markedly improved" since his first assessment. (This second report is dated 11 August 2001). Dr Raeside said there was no evidence of depression, anxiety or psychosis. He said that based on his earlier assessment of the practitioner having a history suggestive of a borderline personality disorder, which may have contributed to difficulties with which the Tribunal had to deal, the practitioner had made considerable overall improvement notwithstanding the stress of his ongoing legal matters.

25 However, Dr Raeside said that the practitioner's underlying personality disturbance was by definition likely to be longstanding, although it was possible that with ongoing therapy and consolidation of his gains, the practitioner might be able to learn appropriate skills and strategies to deal with stressful situations in his occupation and personal life.

26 The practitioner also called evidence from his current supervisor in a firm of solicitors. That practitioner spoke well of the practitioner's present work. He said that the practitioner presented himself favourably with respect to work practices and in his relationship with the firm.

27 Counsel submitted that this was not a proper case for striking the practitioner's name off the roll of legal practitioners. The court should simply make orders imposing conditions on the practitioner's practising certificate requiring him to work under supervision.

28 The circumstances before this Court indicate a failure by the practitioner to understand proper professional standards. In particular, the reality is that despite a warning from the Board, he continued to behave in a manner inappropriate for a legal practitioner. The circumstances found proved by the Tribunal demonstrate a disregard of the practitioner's professional obligations and a failure to meet them indicating that he is unfit to remain a practitioner. Whilst the disregard of professional obligations in this case might be seen as confined with respect to a single client, there was nonetheless a persistence and evasion from the truth that does not permit a conclusion other than that the practitioner is unfit to remain a practitioner.

29 The material before this Court, does not satisfy me that the behaviour can be seen to be behind the practitioner, isolated and unlikely to recur. Indeed, the psychiatric evidence and that from the psychologist does little to mitigate the adverse conclusions drawn by both the Tribunal and this Court. Further rehabilitation and therapy is required rather than that rehabilitation has occurred and counselling support is no longer necessary. Of particular seriousness is the practitioner's deception of the Board and the circumstances surrounding the sending of the October 1998 letter with all its unwarranted abuse and threats.

30 This Court acts in the public interest and not to punish the practitioner. The public interest is understandably demanding of proper behaviour and accountability from members of the profession. The conduct admitted and the interpretation placed upon it by the Tribunal demonstrates that the practitioner is not fit to remain a member of the profession. Thus, the ordinary course is the order sought by the Board. Absent such an order, public confidence in the profession could well be eroded. Only those who have observed the required standards expected of the profession are permitted to remain members of it.

31 The totality of circumstances before the Court indicate that the practitioner lacks the quality of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.[4] Neither suspension nor supervision is appropriate. The responses to the Board's inquiries and the circumstances surrounding his letter

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[4] *Legal Practitioners Conduct Board v Hay* (2001) 215 LSJS 459 at 472

of October 1998 are particularly serious and indicative of a weakness of character of a disqualifying nature.[5]

32 I would therefore order that the name of the practitioner be struck off the roll of legal practitioners maintained under the Act.

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5 *Legal Practitioners Conduct Board v Le Poidevin* (2001) LSJS 402 at 407

33 **NYLAND J:** I agree with the reasons of Prior and Gray JJ. The practitioner has been guilty of serious misconduct. The protection of the public leaves this court with no choice but to order that the name of the practitioner be removed from the roll of legal practitioners.

34 **Gray J** Legal practitioners must act honestly at all times. As an officer of the court a practitioner is under an obligation to provide accurate information and to ensure as far as possible that the court is not misled. This obligation has been described as an obligation of candour and frankness[6]. A practitioner whose conduct is the subject of an inquiry by the Legal Practitioners Board ("the Board") or the Legal Practitioners Tribunal ("the Tribunal") must also uphold this obligation and additionally has a duty to assist any such inquiry[7]. Attendance to these obligations is an essential part of proper professional conduct.

35 As Prior J has observed, the practitioner in this matter breached his obligations to the Court, to the Board and to his client. I agree with the reasons of Prior J and the orders proposed.

36 Different aspects of the practitioner's conduct gave rise to separate incidents of unprofessional conduct. However the gravamen of the conduct can only be assessed properly when considered in its entirety. The totality of the conduct leads to the conclusion that the only appropriate order is that the practitioner be removed from the roll of legal practitioners.

37 The practitioner's conduct can be summarised as follows:

- Whilst suing a client for unpaid fees, the practitioner misled the court. He swore and filed an affidavit that was inaccurate. He became aware that his affidavit was inaccurate but did nothing to correct the false impression created. He allowed the court to act on the false information. This led to judgment being entered in his favour.

- When the client made application to set aside the judgment the practitioner allowed his false affidavit to have continued currency.

- When the client complained the practitioner misled the Board by failing to disclose the true circumstances in which he had obtained judgment. He maintained that the judgment had been regularly obtained. As a result of the practitioner's misleading conduct, the Board made no finding against him of unprofessional conduct.

- The practitioner then used the Board's finding to take further advantage over his client. He had taken a charge over her property with respect to his claim for fees. He retained the charge despite the fact that the fees had been settled and paid. As a result of the debt proceedings, his former client suffered an adverse credit rating.

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6 *Re Gruzman; Ex parte The Prothonotary* (1967-70) 70 SR (NSW) 316; *New South Wales Bar Association v Thomas [No 2]* (1989-1990) 18 NSWLR 193 at 204-5;

7 *The Law Society of South Australia v Jordan* (1998) 198 LSJS 434 at 476

- The practitioner sought damages for defamation from his client over her allegations of unprofessional conduct. He used the Board's findings, which as earlier observed were based on his false information, in an attempt to settle these proceedings.

- The practitioner wrote to his client as follows:

> "I refer to my recent telephone discussions with your accountant. I am only willing to 'whitewash' your Credit Rating on the following conditions:
>
> I consider you and [your solicitor's] complaint about me to the LPCB to have been malicious and defamatory and calculated to cause me maximum psychological harm and to illegally avoid paying the substantial legal fees you owed me at the time. The details of that complaint have been 'published' in the legal profession in South Australia by you deliberately making that false and malicious complaint.
>
> I further note that I was completely absolved of any unprofessional conduct by the LCPB.
>
> Accordingly, you are required to settle my claim for defamation against you in the sum of $5000.00 by bank cheque made payable to 'Wade Andrew Phillips' and provide your consent in writing to me giving the reference set out below before I prepare the letter to the Credit Reference Association of Australia.
>
> My letter will basically state that:
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> 'Due to her ill health [the client] made some poor business decisions, the results of which were exacerbated by the haphazard manner in which she carried these decisions out due to her failing health. This resulted in her becoming involved in complex and expensive litigation and her making a malicious and defamatory complaint against me to the LPCB (which was later proved to be completely false) to avoid paying the substantial legal fees were owed me at the time and because she was unable to take responsibility for her legal and financial problems which were caused by her own actions due to her illness.

> However, I assume that [the client] is back on track both financially and in health as she has been working in Sydney for some time.'
>
> The above matters are not negotiable and have been brought to the attention of the LPCB.
>
> I reserve all my rights against [your solicitor]."

38 Medical and other expert reports were put before the Tribunal in an attempt to explain the practitioner's conduct. This material established that the practitioner suffered from a permanent borderline personality disorder. The effects of this disorder have been ameliorated by treatment[8].

39 Such a disorder may explain but does not excuse the practitioner's inappropriate attitude toward his client. The evidence provided did nothing to explain other aspects of the practitioner's misconduct, namely his dishonesty and lack of candour and frankness with the tribunal and the court. It does not explain his manipulation of the court process to obtain a personal advantage. It does little to explain why he retained a charge over his client's property when he was not entitled to do so. The practitioner's conduct at best results from a fundamental misunderstanding of his obligations as a practitioner and at worst a deliberate breach of those obligations.

40 Evidence was put before this court which suggested that the practitioner had taken steps to overcome the effects of his personality disorder. However the evidence did not address aspects of his unprofessional conduct. It did not address his dishonesty and lack of candour and frankness. It provided no explanation for his dishonest attempt to obtain defamation damages.

41 Evidence disclosed that the practitioner was apparently competent in the areas of law which he practised. The practitioner may be technically competent but this evidence did not address the departures from professional standards that have occurred.

42 The practitioner's conduct represented a gross departure from proper professional standards.[9] The conduct amounted to an abuse of the privileges which accompany a practitioner's admission to this Court. His treatment of, and conduct towards, his client was disgraceful and dishonourable. The practitioner has shown a complete disregard for his obligations of candour and fairness.

43 The practitioner's conduct is of such a kind that, if tolerated, would bring the legal profession into disrepute. It is of a nature that would erode public confidence in the legal profession. There is a need to protect the public from

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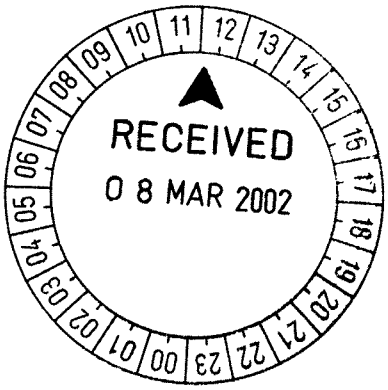
8 Prior J has addressed these issues in detail.

9 *Re R a Practitioner* [1927] SASR 58 at 61

unprofessional and dishonest practitioners. The public must be protected from legal practitioners who are ignorant of the basic rules of proper professional practice or indifferent to rudimentary professional requirements.[10]

44 The gravity of the practitioner's conduct necessitates his removal from the roll of practitioners.

10 *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 at 201



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