

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v CONDON (NO 2)

Judgment of The Full Court

(The Honourable Justice Mullighan, The Honourable Justice Gray and The Honourable Justice Vanstone)

3 November 2004

**PROFESSIONS AND TRADES - LAWYERS - MISCONDUCT, UNFITNESS
AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - INHERENT
JURISDICTION OF COURT - SOUTH AUSTRALIA**

**PROFESSIONS AND TRADES - LAWYERS - MISCONDUCT, UNFITNESS
AND DISCIPLINE - GROUNDS FOR DISCIPLINARY ORDERS -
IMPROPER DEALING WITH MONEY, SECURITIES OR PROPERTY**

Application by the Legal Practitioners Conduct Board to remove a legal practitioner from the Roll of Practitioners - respondent found guilty of unprofessional conduct - respondent challenged findings of fraud and dishonesty - respondent fraudulently appropriated funds from clients - respondent suffered from alcoholism and depression at time of misconduct - consideration of the court's powers under section 89 of the Legal Practitioners Act 1981 (SA) - need to protect public confidence in legal profession - gravity of conduct necessitates order of removal from Roll of Practitioners - application granted - respondent struck off Roll of Practitioners.

Legal Practitioners Act 1981 (SA) s 41(1), s 82, s 89; referred to.

Condon v The Legal Practitioners Conduct Board [2004] SASC 197; In Re a Practitioner (1982) 30 SASR 27; Legal Practitioners Conduct Board v Hannaford (2002) 83 SASR 277; In Re a Practitioner [1941] SASR 48; Law Society (SA) v Jordan (1998) 198 LSJS 434; Legal Practitioners Conduct Board v Phillips (2002) 83 SASR 467, considered.

**Applicant: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR A E SCHAPEL -
Solicitor: LAW SOCIETY OF SOUTH AUSTRALIA
Respondent: FRANK REGINALD CONDON Counsel: MR G BARRETT QC WITH HIM MS L
SAMPSON - Solicitor: ANDERSONS SOLICITORS**

Hearing Date/s: 04/03/2004, 24/09/2004

File No/s: SCCIV-03-1282

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[2004] SASC 346

LEGAL PRACTITIONERS CONDUCT BOARD v CONDON (NO 2)
[2004] SASC 346

Full Court: Mullighan, Gray and Vanstone JJ

1 **MULLIGHAN J:** I agree that the practitioner must be removed from the Roll of Practitioners for the reasons given by Gray J.

2 **GRAY J:** This is an application that the name of a legal practitioner be struck off the roll of legal practitioners maintained under the *Legal Practitioners Act 1981 (SA)*.

The History of the Proceedings

3 On 20 August 2003 the Legal Practitioners Disciplinary Tribunal found Frank Reginald Condon guilty of unprofessional conduct:

After a consideration of all the matters set out in these Reasons the Tribunal has found a consistent pattern in the practitioner's conduct. Over the period from August 1995 to the end of 1998 the practitioner has failed to keep his clients properly informed. He has taken liberties with the way in which he has appropriated money from his trust account without rendering bills. He has appropriated money to which the Tribunal has found he is not entitled and he has been unable to provide the Tribunal with any satisfactory explanation for these misappropriations. He has previously been warned on two occasions by the Law Society in relation to his method of using "reference bills". The Tribunal has found his conduct in relation to various appropriations has been fraudulent.

The Tribunal has taken into account the mental depression from which the practitioner suffered. It has taken into account the effect that this depression has had on the practitioner himself, his family and his work. The Tribunal has also taken into account the effects of the excess consumption of alcohol on his general well-being. It is the Tribunal's view that unfortunately the practitioner's financial circumstances caused him to depart from the normal standards of professional practice and caused him to act dishonestly.

4 The Tribunal recommended that disciplinary proceedings be commenced in the Supreme Court:

In these circumstances the Tribunal recommends that disciplinary proceedings be commenced against the practitioner in the Supreme Court pursuant to section 82(6)(v) of the *Legal Practitioners Act*¹.

¹ *Legal Practitioners Act* section 82(6)(v) relevantly provides:

- (6) If after conducting an inquiry under this section the Tribunal is satisfied—
- (a) that a legal practitioner is guilty of unprofessional or unsatisfactory conduct it may, subject to subsection (6a), exercise any one or more of the following powers:

...

5 Mr Condon challenged the findings of fraud and dishonesty. His appeal
in respect of those matters was dismissed by this Court on 8 July 2004.²
Mr Condon did not challenge the other findings of the Tribunal.

6 This court's powers are provided by section 89 of the *Legal Practitioners
Act*:

- (2) In any disciplinary proceedings against a legal practitioner (whether instituted under this section or not) the Supreme Court may exercise any one or more of the following powers:
- (a) it may reprimand the legal practitioner;
 - (b) it may make an order imposing conditions on the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate)—
 - (i) relating to the practitioner's legal practice; or
 - (ii) requiring that the legal practitioner, within a specified time, complete further education or training, or receive counselling, of a specified type;
 - (c) it may make an order suspending the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate) until the end of the period specified in the order or until further order;
 - (d) it may order that the name of the legal practitioner be struck off the roll of legal practitioners maintained under this Act or the roll kept in a participating State that corresponds to the roll maintained under this Act;
 - (e) it may make any other order (including an order as to the costs of proceedings before the Court and the Tribunal) that it considers just.
- (3) This Part does not derogate from the inherent jurisdiction of the Supreme Court to discipline legal practitioners.

The Unprofessional Conduct

7 Mr Condon was found guilty by the Tribunal of unprofessional conduct during the period from August 1995 to December 1998.

8 The Tribunal found that Mr Condon made unauthorised appropriations from an investment that a client had with the National Australia Bank. Mr Condon arranged the investment and had authority with respect to the investment. On two occasions Mr Condon appropriated monies of about

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- (v) it may recommend that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court; or

² *Condon v The Legal Practitioners Conduct Board* [2004] SASC 197

\$20,000 and applied those monies to his own benefit. The first was used to repay a debt to a former client who was suing Mr Condon in respect of a loan. The second appropriation was used to meet a debt to the Commissioner for Taxation. Mr Condon's account that he acted with instructions was rejected. The appropriations occurred in circumstances of gross breach of trust. They were both dishonest and fraudulent.

9 The Tribunal concluded that with respect to another client, the practitioner falsely and dishonestly appropriated monies on five occasions from his trust account for purported costs. The Tribunal undertook a detailed analysis of the evidence and concluded that Mr Condon had no justification for the appropriations. His conduct was dishonest. In all \$6,750 was involved. Each appropriation involved a breach of section 41(1) of the *Legal Practitioners Act 1981* (SA).

10 A further fraudulent appropriation occurred. Mr Condon appropriated \$1,800 on account of purported costs from monies held in trust for another client. Mr Condon had taken the full amount of the agreed costs and had no entitlement to the further appropriation of \$1,800. The Tribunal concluded that Mr Condon had no genuine belief that he had any entitlement to further costs. His conduct was dishonest.

11 The conduct relating to fraud and dishonesty was reviewed extensively in this Court's earlier reasons for judgment. Those reasons are incorporated by way of reference into these reasons³. Following the dismissal of Mr Condon's appeal against the findings of fraud and dishonesty the disciplinary proceedings continued in this Court. During the course of submissions, counsel for Mr Condon informed this Court that his client had ultimately accepted the correctness of the fraud and dishonesty findings.

12 Mr Condon's fraudulent and dishonest conduct represented a gross departure from proper professional standards. His fraud and dishonesty was practised on unsuspecting and trusting clients. The proceeds were used to meet Mr Condon's personal needs.

13 In *Re a Practitioner*⁴ King CJ addressed the gravity of a practitioner's dishonest dealings with trust moneys:

But it is important to bear in mind the truth which is expressed in the passage from the judgment of the Full Court in *In re a Practitioner*⁵ that the "trust account should be sacred, so that moneys paid into the account should only be paid out to the persons to whom the money belonged, or as they directed". In this case there was clearly an intentional misuse of trust moneys. The practitioner made use of moneys entrusted to

³ *Condon v The Legal Practitioners Conduct Board* [2004] SASR 197

⁴ (1982) 30 SASR 27 at 30-31. See also *Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277 at 279, 283-284

⁵ [1941] SASR 48, at 51

him for his clients' purposes for the purposes of the companies in which he had an interest. It is true that he intended to pay the money back and, in fact, did pay the money back in the sense of banking the cheques from the hospitals in due course and rectifying the irregularity in the Trust Account. His conduct nevertheless was an affront to the sanctity of a practitioner's Trust Account and this Court has a duty to vindicate the inviolability of the trust imposed upon a practitioner to treat his clients' money in all respects as their money and to use their money for their purposes and no other. The public can feel confidence in legal practitioners and their handling of their money only if they know that there is involved no element of judgment on the part of the practitioner, and that their money must remain in his Trust Account until it is disbursed in accordance with their direction; because no matter how good the intentions of a practitioner might be, no matter how confident he might be that the money can be made good, whenever a client's money is deliberately used for a purpose other than the purpose for which the client entrusts it to the practitioner, there is an act of dishonesty on the part of the practitioner and one which exposes the client to some element of risk as to his money. There are two aspects of such misuse of trust moneys held for clients: the clients are exposed to some risk, great or small, depending upon the situation, as to their money, and there is a dishonest misuse by the practitioner of money which does not belong to him for his own purposes and, of course, free of interest.

- 14 The findings of fraud and dishonesty were compounded by Mr Condon's conduct before the Tribunal. The Tribunal concluded that it had been misled by Mr Condon:

Clearly the practitioner was in a conflict of interest situation in borrowing money for his own purposes from a client's trust monies which he controlled. Even if he had approval of the client one would have thought a prudent and experienced practitioner in those circumstances would at the very least have documented and then confirmed details of the agreement. It is also of note that the practitioner gave evidence to the effect that he told Mrs Grant that the funds would be utilised by "*an interest associated with myself*". Why any such description would be used is not easy to understand. Why wouldn't the practitioner simply say that he was borrowing the money? The practitioner did not adequately explain this. We reject his evidence that he had any discussion with Mrs Grant about the topic of his borrowing and we further reject his evidence that Mrs Grant approved the borrowing. The Tribunal finds that there were no such discussions. In this respect the practitioner's evidence has been an attempt to mislead the Tribunal. The Tribunal finds that the practitioner acted fraudulently.

- 15 The Tribunal also concluded that Mr Condon was not frank in his evidence about his financial position at relevant times.

The Tribunal has already dealt with its assessment of the practitioner's financial position at the relevant times and has rejected the practitioner's evidence in relation to his financial position. The practitioner asserted that he was not personally in financial difficulty at the time he alleges that he obtained Mrs Grant's consent to borrow funds from her investment. The Tribunal finds that the practitioner was not being frank with the Tribunal as to his financial position at that time. The objective facts indicate that he was under severe financial pressure.

16 In *Re a Practitioner*⁶ where similar circumstances arose King CJ observed:

There is a further matter for which the practitioner has to answer. When he was called upon for an explanation by the Master, he gave an explanation by letter which amounted to a representation that the irregularity was simply due to an innocent mistake on the part of a member of his staff. The truth is, as he admitted to the auditor some two or three months later and as he now admits to this Court, that the cheques were not banked because he expressly instructed a member of his staff not to bank them, and there can be no escape from the conclusion that he deliberately sought to mislead the Master as to the nature of the irregularity, representing it as a simple mistake on the part of the member of staff, whereas it was an act of conscious dishonesty on his own part.

That misleading of the Master is, in itself, an act of unprofessional conduct.

17 Mr Condon's acknowledgement to this Court that he accepted that his conduct was fraudulent and dishonest although important in terms of rehabilitation, necessarily carries with it an acceptance that he misled the Tribunal.

18 Public confidence in the legal profession necessarily requires confidence in the integrity of the disciplinary process. Mr Condon's lack of candour and frankness had the tendency to undermine that public confidence. Mr Condon's conduct before the Board and Tribunal involving a lack of candour and frankness amounted to serious unprofessional conduct.

19 Another important Tribunal finding was that Mr Condon breached section 41 of the *Legal Practitioners Act*. This occurred notwithstanding repeated warnings.

20 Section 41(1) of the *Legal Practitioners Act* provides:

A person cannot bring an action for the recovery of legal costs or appropriate money in or towards satisfaction of a claim for legal costs unless a bill specifying the total amount of those costs, and describing the legal work to which the costs relate, has been delivered to the person liable to the costs either personally, or by post addressed to the person at the person's last known place of business or residence.

A failure to comply with section 41(1) does not in itself allow any conclusion to be drawn as to dishonesty. However, a practitioner's failure to comply with the subsection removes an important safeguard designed to protect clients from unauthorised appropriations. Mr Condon had been given repeated prior warnings of his obligation to comply with section 41. His breaches, the subject of the current proceedings, were aggravated as they occurred against the background of prior warnings.

⁶ (1982) 30 SASR 27 at 31. See also *Law Society (SA) v Jordan* (1998) 198 LSJS 434, *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467 at 473, 475

21 The other findings of professional misconduct made by the Tribunal included the appropriation of costs in breach of an order of the Court, acting in conflict, failure to communicate effectively or properly with one or more clients, gross delay, knowingly making false statements to other practitioners, failing to treat another practitioner with courtesy and fairness, deliberately misleading clients in relation to the use of trust moneys, and failing to carry out the terms of retainers.

22 In view of the gravity of the fraud and dishonesty findings, the other findings of professional conduct do not need to be discussed in detail. Importantly, however, the further unprofessional conduct of Mr Condon concerning clients and other practitioners demonstrates that Mr Condon appeared to have put to one side the maintenance of professional standards.

An Explanation

23 Counsel for Mr Condon drew the Court's attention to his client's personal circumstances. It would appear that his dishonest and unprofessional conduct occurred at a time when he suffered from alcoholism and depression. It was said that full reparation had been made. Evidence was placed before this Court detailing his personal medical history. Mr Condon has made efforts to rehabilitate. However, he remains in need of psychiatric care. These personal circumstances offer some explanation for Mr Condon's conduct. They provide no excuse⁷.

24 Counsel led evidence before this court about Mr Condon's general reputation and legal competence. Counsel outlined Mr Condon's ongoing employment as a legal consultant to a firm. It was suggested that Mr Condon has performed satisfactorily as a legal practitioner subject to supervision and direction. However he has had no access to the particular firm's trust account or its general account.

Conclusion

25 Mr Condon's conduct in this case represented a gross departure from proper professional standards. His sustained unprofessional conduct amounted to an abuse of the privileges which accompany a practitioner's admission to this Court. His treatment of his clients was dishonest, disgraceful and dishonourable. Mr Condon has shown a disregard for his obligations of candour and frankness.

26 In *Legal Practitioners Conduct Board v Phillips*⁸, Prior J observed:

⁷ *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467 at 475

⁸ (2002) 83 SASR 467 at 473

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.

If conduct such as Mr Condon's were tolerated it would bring the legal profession into disrepute. Its nature is such as to erode public confidence in the legal profession. The public should be protected from legal practitioners who are dishonest and indifferent to rudimentary professional requirements and the basic rules of proper professional practice. The gravity of Mr Condon's conduct necessitates his removal from the Roll of Practitioners.

27 **VANSTONE J** I agree with the order proposed by Gray J and with the reasons advanced.