SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Application)

LEGAL PRACTITIONERS CONDUCT BOARD v WIGHT

Judgment of The Full Court (*ex tempore*)
(The Honourable Justice Debelle, The Honourable Justice Besanko and The Honourable Justice Vanstone)

10 December 2004

PROFESSIONS AND TRADES - LAWYERS - REMOVAL OF NAME FROM ROLL

Application by the Legal Practitioners Conduct Board to remove a legal practitioner from the Roll of Practitioners – respondent found guilty of unprofessional conduct – respondent acknowledged the unprofessional conduct – gravity of misconduct necessitates the order of removal from the Roll of Practitioners – application granted –respondent struck off the Roll of Practitioners

Legal Practitioners Act 1981 s 82(2), s 84; *Trustee Act* 1936 s 84B, referred to.
Re James (1949) SASR 143; *Law Society of New South Wales v Moulton* (1981) 2 NSWR 736, applied.

Applicant: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR J S RODER - Solicitor: MS R GEYER
Respondent: KEITH BERKELEY WIGHT Counsel: MR M A GRIFFIN - Solicitor: CARPENTER & ASSOCIATES
Hearing Date/s: 10/12/2004
File No/s: SCCIV-04-1139
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LEGAL PRACTITIONERS CONDUCT BOARD v WIGHT
[2004] SASC 429

Full Court: Debelle, Besanko and Vanstone JJ (ex tempore)

1 **DEBELLE J** This is an application made pursuant to s 89(1) of the *Legal Practitioners Act 1981* to strike the name of the defendant practitioner from the roll of legal practitioners.

2 The Legal Practitioners Conduct Board charged the practitioner with unprofessional conduct pursuant to s 82(2) of the *Legal Practitioners Act 1981* ("the Act"). The Legal Practitioners Disciplinary Tribunal ("the Tribunal") conducted an inquiry pursuant to s 84 of the Act. The charge was amended by consent at the hearing before the Tribunal. The amended charge alleged unprofessional conduct in that the practitioner

(a) personally and by companies with which he was associated had borrowed the sum of $235,600 from an estate, a company and a client in circumstances where it was improper to do so; and

(b) had caused Harold Helmer Nominees Pty Ltd to make loans totalling $265,000 to third parties without any or any adequate security.

The practitioner was found guilty of unprofessional conduct by the Tribunal on 10 June 2004. The unprofessional conduct found by the Tribunal extended beyond the conduct nominated in the charge. The practitioner admits the findings of unprofessional conduct as made by the Tribunal. The Tribunal recommended that disciplinary proceedings be commenced against the practitioner in this Court.

3 The relevant conduct occurred during the period 1992 to 1995. A charge relating to conduct by a legal practitioner must be laid before the Tribunal within five years of the conduct unless the charge is laid with the written consent of the Attorney-General: see s 82(2a) of the Act. The Attorney-General gave his consent on 7 May 2003.

4 The practitioner was instructed to act for Marie Helmer, the executrix and trustee of the will of Harold Helmer who had died in England on 25 December 1990 ("the deceased"). Marie Helmer was the mother of Harold Helmer. The deceased left his estate, after payment of debts, funeral and testamentary expenses, to his mother and to his sister, Roselyn Helmer. At all material times both Marie Helmer and Roselyn Helmer resided in Melbourne. The practitioner was also instructed to act for Marie Helmer and Roselyn Helmer as beneficiaries under the will of the deceased. The estate of the deceased mainly consisted of real estate in the United Kingdom and in Adelaide.

5 Neither Marie nor Roselyn Helmer had the capacity to understand complex financial matters. Marie's general medical practitioner Dr Gingold described her as "a fairly simple person who would have difficulty ... in grasping complex financial matters". Dr Gingold first diagnosed Alzheimer's disease in December 1996 and in his view Marie Helmer had probably suffered from that disease for several years before. Marie Helmer died on 11 January 1999, aged 81 years.

6 Roselyn Helmer was born in 1947. In 1969 she suffered an organic brain injury in a motor vehicle accident. Dr Gingold was also her general practitioner. He described her as "a simple woman and her capacity to understand financial matters was and would remain very limited". The Acquired Brain Injury Assessment Unit in Victoria reported on 7 October 1997 that she required assistance with complex domestic and community tasks and required an administrator to assist with budgeting and financial issues. The practitioner knew that Roselyn had been involved in a motor vehicle accident as a young woman and had permanent mental impairment. On 5 October 2001, Mr Barnett, a solicitor in Victoria, was appointed as the administrator of her estate.

7 The deceased died on 25 December 1990. The practitioner commenced acting on behalf of Marie as the executrix of the will of the deceased on 8 January 1991. During 1991 and early 1992, Marie gave the practitioner instructions in relation to the assets of the deceased held in the United Kingdom and in Australia. She instructed the practitioner to take all necessary steps to deal with the estate.

8 The practitioner obtained a grant of probate of the will of the deceased in the Supreme Court of South Australia on 24 September 1996. That was, in fact, a reseal of a grant obtained earlier in the United Kingdom.

9 The practitioner gave advice to Marie Helmer as to the formation of a discretionary trust into which the proceeds of the estate were to be placed. The practitioner caused a company called "Harold Helmer Nominees Pty Ltd" ("HH Nominees") to be incorporated for that purpose. The practitioner was a shareholder and a director of that company. The practitioner assumed responsibility for the management of the affairs of the company. As trustee, HH Nominees was to receive and manage the assets of the estate of the deceased with the intent that Marie and Roselyn Helmer were to continue to receive their pensions, notwithstanding their entitlements to share in the estate of the deceased. The practitioner stated that a trust deed was in existence but he was not able to locate it. He accepted responsibility for misplacing it. The practitioner did not advise either Marie or Roselyn to inform the Department of Social Security or the Australian Taxation Office of the arrangements concerning the assets held on their behalf by HH Nominees and the income it was receiving on their behalf.

10 The practitioner incorporated HH Nominees on 20 May 1992. At various times thereafter, the practitioner transferred assets of the estate to HH Nominees before obtaining a grant of probate and without treating the transfers as distributions either to Marie or to Roselyn. The proceeds of the estate in the United Kingdom were received by the practitioner on or about 23 November 1994.

11 The deceased had owned five home units in South Australia. The rent and interest derived from those units was paid directly to HH Nominees.

12 The practitioner failed to make or keep adequate records in relation to the administration of the estate. He failed to distinguish the amounts paid as loans or as distributions to Marie or to Roselyn.

13 In 1994 and 1995, while acting for Marie in her capacity as executrix and while a director of HH Nominees, the practitioner made 12 loans to himself personally and to companies with which he was associated. The loans totalled $235,600. They were interest-free loans. The practitioner said that the loans were made free of interest on the specific authority of Marie Helmer. The practitioner has repaid the principal in respect of the loans. There remains a question as to whether he is liable to pay interest on those loans.

14 Four loans totalling $265,000 were made to other persons. The practitioner asserts that those loans were authorised by Marie Helmer. There is no record of any authority executed by Marie Helmer in the files of the practitioner. Security was given for those loans. However, the securities were not registered and, therefore, failed adequately to protect the interests of the estate. Interest was paid on those loans and the principal has been repaid for each loan.

15 When Marie Helmer died in January 1999, the practitioner continued to assist Roselyn, since she was the sole beneficiary of the estate of Marie. The practitioner was aware that the administration of the estate of Harold Helmer deceased and the administration of the affairs of Marie and Roselyn had become "a huge mess", to use his words. He admitted that he was dreading the thought of trying to put their affairs into a proper order. He allowed matters, again to use his words, "to just drift along" until Mr Barnett, the solicitor in Melbourne appointed to act as administrator of Roselyn's affairs, contacted him in 2001 asking for details of the estate. The practitioner then sought legal advice and engaged an experienced practitioner to assist him.

16 The practitioner admits that he has acted in a manner which is below the appropriate standard but says that he has never acted dishonestly.

17 The Tribunal was hampered in its inquiry by reason of the absence of any evidence from Marie, who had died on 22 January 1999; the absence of any evidence from Roselyn, whose mental faculties were impaired; and by the

inadequacy of the practitioner's record-keeping. The trust deed of the trust of which HH Nominees was trustee cannot be found. No annual returns or financial statements were prepared on behalf of the company nor were returns of income tax prepared. No financial statements have been prepared for the company or for the trust.

18 In addition, the Tribunal was hampered by the fact that the practitioner was not able to give oral evidence before the Tribunal. The practitioner is suffering from depression and his general practitioner certified that it was critical to his future health that he not be asked questions about his previous professional misconduct.

19 The practitioner is aged 63 years. He was born on 26 April 1941. He left school at the age of 16 years. After pursuing other occupations, he returned to schooling and matriculated. In 1976, he commenced study for a law degree. During his time at university, the practitioner worked part-time to support his wife and three children. Upon being admitted, he went into practice with two other practitioners. Not long after, he commenced practice on his own account. The practitioner separated from his first wife. He remarried and had two further children. He worked long hours. By the late 1990s, his second marriage had virtually come to an end. He became depressed and attempted suicide on two occasions.

20 In January 1998, the practitioner was admitted to the Adelaide Clinic for 16 days and was treated by a psychiatrist. In the latter part of 1998, he found it increasingly difficult to continue to practise and, in 1999, he effectively ceased to practise law. He has not renewed his practising certificate since 2000. The practitioner states that he does not intend to practice law again. He has married a third time and now works in his wife's retail business.

21 In an affidavit sworn on 27 May 2004 and tendered before the Tribunal, the practitioner stated:

> "I am sorry for the poor manner in which I have handled this matter. It is a matter of great disappointment and shame that I have ended my legal career in disgrace. I regret that I did not have the ability to understand the seriousness of my mental condition throughout the 1990s and get help sooner. I apologise to all who have been adversely affected by my unprofessional conduct".

It is apparent that, in this apology, the practitioner admits his unprofessional conduct.

22 The Tribunal found that the practitioner had been guilty of unprofessional conduct. That finding was plainly correct and, as I have already mentioned, the findings as to unprofessional conduct by the Tribunal are admitted by the practitioner. The practitioner has been guilty of a number of gross derelictions

of his duty as a solicitor and has been guilty of a number of instances of unprofessional conduct. They include the following:

1. He dealt with the proceeds of the sale of the assets of the estate in a manner not authorised by the will of Harold Helmer deceased. Although Marie Helmer and Roselyn Helmer were in a position to authorise the disposition of the proceeds of the estate, there is no evidence that either sister authorised the dealings, save and except the suggestion by the practitioner that Marie Helmer gave oral authorisation. There are doubts as to the capacity of both Marie Helmer and Roselyn Helmer to give such authorisation. There is no authority in writing for any of the dispositions and there is no evidence that Roselyn Helmer ever gave any authority.

2. As a director of HH Nominees, the trustee company, and as the person responsible for the management of HH Nominees, the practitioner failed to cause the company to keep proper records and so is in breach of his obligation to do so as provided in s 84B of the *Trustee Act, 1936.* A company which acts as a trustee must discharge the duties provided in s84B. A director of a trustee company, acting as trustee, may himself be deemed by virtue of his office to be involved in the duties and responsibilities of a trustee. The duties which the company owes as trustee are imposed on the directors as the agents of the company whose office it is to carry out the duties of the company: *re James* (1949) SASR 143 at 146. Given the absence of such records,

   (a) the practitioner cannot properly account to the beneficiaries;

   (b) the practitioner cannot provide any evidence to corroborate his assertions that particular transactions were approved by his clients;

   (c) the beneficiaries are unable properly to establish their position with respect to their obligations to Centrelink and to the Australian Taxation Office; and

   (d) there is a severe restriction upon the capacity to make proper investigation of the accounts.

3. The practitioner failed to advise Marie Helmer as to her obligation as executrix and trustee of the estate of the deceased.

4. The practitioner borrowed money, both personally and through his companies. The loans were free of interest. The practitioner had a manifest conflict of duty and interest. Although the practitioner asserts that, in the first instance, he advised Marie Helmer to obtain

independent legal advice and also asserts that she did not wish to do so and that he did not insist upon it, the practitioner nevertheless had a manifest conflict of duty and interest. He could not possibly resolve that conflict of interest without ensuring that the beneficiary received independent advice. If a solicitor borrows his client's money, it is almost impossible to see how that client could be adequately protected and advised without insisting that the client gets independent advice: *Law Society of New South Wales v Moulton* (1981) 2 NSWLR 736 at 740.

5. Although the practitioner provided security for three of the four loans made to third parties, in no instance was the security registered. There was, therefore, no adequate security for the loans.

6. The practitioner failed to cause income tax returns to be prepared and lodged with the Australian Taxation Office. This may well have financial consequences for the estate.

7. The practitioner failed to cause the financial statements of HH Nominees to be prepared as required by the companies legislation in force from time to time.

The above instances of unprofessional conduct might be incomplete because the lack of records prevented a thorough assessment of the practitioner's conduct when advising the Helmers. They do, however, constitute such grave misconduct and such serious departures from the proper standards of professional conduct that it is necessary to make an order removing the practitioner's name from the roll of practitioners.

23 It appears that the practitioner acknowledges that he is not fit to practise. He has not held a practising certificate since 1 January 2000. As already mentioned, the practitioner states that he does not intend to resume the practice of the law. He occupies himself in his wife's retail business.

24 The practitioner has been guilty on an earlier occasion of unprofessional conduct. On that occasion, he had acted for both a husband and a wife in a matrimonial dispute. Both had been friends of the practitioner over a long period of time. On 26 June 1996, the Legal Practitioners Conduct Board resolved that the practitioner had been guilty of unprofessional conduct but decided a penalty of admonition was appropriate. It is unnecessary to rely on that previous finding. The unprofessional conduct in this instance is so grave as to warrant an order removing the practitioner's name from the roll of legal practitioners. The practitioner has acted in manner which is wholly inconsistent with the proper discharge of his duties to his clients. It is manifestly apparent that the practitioner does not have the necessary attributes properly to discharge the responsibilities of a legal practitioner.

25 There will be an order striking the name of Keith Berkeley Wight from the roll of legal practitioners.

26 **BESANKO J** I agree with the order proposed by Debelle J. I agree with his reasons.

27 **VANSTONE J** I too agree.

28 The orders of the court will be:

1. Strike the name of Keith Berkeley Wight from the roll of legal practitioners.

2. The defendant shall pay the plaintiff's costs of and incidental to the application as taxed or agreed.