COUNSEL (L.P.C.B.)

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Application)

LEGAL PRACTITIONERS CONDUCT BOARD v FLETCHER

Reasons for Decision of The Full Court
(The Honourable Justice Debelle, The Honourable Justice Besanko and The Honourable Justice Vanstone)

30 September 2005

PROFESSIONS AND TRADES - LAWYERS - REMOVAL OF NAME FROM ROLL

Application for removal of practitioner's name from the Roll of Legal Practitioners – Legal Practitioners Disciplinary Tribunal had found practitioner guilty of unprofessional conduct – earlier finding of unprofessional conduct by the Tribunal – need to protect the public – application granted.

Incorporated Law Institute of New South Wales v Meagher (1909) 9 CLR 655; *In re a Practitioner* [1941] SASR 48; *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *Clyne v NSW Bar Association* (1960) 104 CLR 186; *Re Veron; Ex Parte Law Society of NSW* (1966) 84 WN (Pt 1) (NSW) 136; *In re a Practitioner* (1982) 30 SASR 27; *Johns v Law Society of NSW* [1982] 2 NSWLR 1; *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239; *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408; *Law Society of South Australia v Murphy* (1999) 201 LSJS 456; *Law Society of SA v Jordan* (1998) 198 LSJS 434; *Law Society of South Australia v Rodda* (2002) 83 SASR 541, considered.

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MS A BARNETT - Solicitor: P KOLAROVICH
Defendant: NEIL JEFFREY FLETCHER In Person
Hearing Date/s: 07/09/2005
File No/s: SCCIV-05-658
B

LEGAL PRACTITIONERS CONDUCT BOARD v FLETCHER
[2005] SASC 382

Full Court: Debelle, Besanko and Vanstone JJ

1 **DEBELLE J:** The Legal Practitioners Conduct Board ("the Board") has applied for an order striking the name of Neil Fletcher ("the practitioner") from the roll of legal practitioners. The application was heard on 7 September 2005. After hearing submissions, the Court stated that, for reasons to be published, it was satisfied that the practitioner's name should be removed from the roll of legal practitioners and made an order to that effect. These are the reasons for that decision.

2 The Board had laid two charges of unprofessional conduct against the practitioner before the Tribunal. The first was dated 23 April 2004 and the second 8 September 2004. They were amended during the hearing. The practitioner consented to both charges being heard at the same time. Both charges alleged that the practitioner had been guilty of unprofessional conduct which was constituted by a course of conduct. The two charges concerned eight separate complaints against the practitioner. The practitioner admitted all eight complaints of unprofessional conduct.

3 On 9 May 2005 the Tribunal delivered its report finding that the practitioner had been guilty of unprofessional conduct. It recommended that disciplinary proceedings be commenced against him.

4 I briefly summarise the facts the subject of each complaint.

The First Charge

5 The first complaint was that, in respect of his client A, the practitioner had failed properly to respond to enquiries and requests for payment over a period of three years by a physiotherapist in respect of services provided to A in 1995. In addition, he had failed properly to respond to two enquiries from the Board in relation to this matter over a period of almost 12 months. The account was ultimately paid on 18 May 2000 after the client and the physiotherapist had tried on many occasions to resolve the issue.

6 The second complaint was that, in respect of his client F, the practitioner had failed, despite repeated requests for payment, to pay a medical practitioner Dr Z Lukacs for a medico-legal report. The account for the fees was dated 13 October 1997. The practitioner received moneys into his trust account on 10 May 2000 to pay the fee but the practitioner did not do so until 2 May 2001. The money sat in his trust account for almost twelve months. The practitioner did not respond to repeated enquiries from the Board for a period of three months. The fees were ultimately paid.

7 The third complaint was that, in respect of his client E, the practitioner had failed to pay medical practitioners for medico-legal reports after he had received into his trust account moneys to pay for those reports. The practitioner failed to pay a fee of $520 to Dr Z Lukacs. The account was dated 17 August 1995. The practitioner also failed promptly to pay fees to Dr Hafner totalling $1,080. Moneys to pay those fees were paid into the practitioner's trust account on 16 March 1999. Through no fault of the practitioner only $340 was received to pay Dr Lukacs. The practitioner withdrew six separate amounts to pay his fees and disbursements and two amounts to pay his client. No funds remained to pay either Dr Lukacs or Dr Hafner. The practitioner failed to pay either medical practitioner despite repeated requests to do so by the medical practitioners and later by the Board over a period of two years. The practitioner paid Dr Lukacs $340 on 1 June 2001. Dr Hafner agreed to reduce his fees to $800 and that was paid on 1 June 2001. The sum of $180 remains due to Dr Lukacs.

8 The next complaints concerned instructions to act for Mrs Laskarin. His dealings with her are the subject of three complaints in the first charge and one in the second charge. The conduct the subject of the first charge was

(a) that the practitioner had failed to carry out his client's urgent instructions to convey real estate owned by a Mr Rajan to Mrs Laskarin and her husband before the death of Mr Rajan who was terminally ill at the time;

(b) the practitioner had failed to pay into his trust account the sum of $500 paid to him by Mrs Laskarin on account of the work to be done; and

(c) the practitioner had failed to account to Mrs Laskarin in respect of that sum of $500 despite repeated requests to do so.

The complaint in the second charge was that the practitioner had lied to Mrs Laskarin concerning the filing of probate documents.

9 On 31 March 2000 Mrs Laskarin had instructed the plaintiff urgently to transfer Mr Rajan's real estate before Mr Rajan died. Mrs Laskarin then paid $500 on account of the practitioner's fees. The practitioner did not pay the money into his trust account but into his office account. He did not keep appointments with Mrs Laskarin. The transfer was not arranged before Mr Rajan died.

10 Mrs Laskarin was the sole executrix of Mr Rajan's estate. The practitioner offered to obtain a grant of probate of Mr Rajan's estate and to allocate the sum of $500 to that work. Mrs Laskarin instructed him to do so. The practitioner prepared documents for the purpose of obtaining a grant, which were signed by Mrs Laskarin on 13 June 2000. The practitioner

informed her that the probate fees were to increase with effect from 1 July 2000. Mrs Laskarin instructed him to ensure the documents were lodged before that date. She gave the practitioner a cheque to pay the probate fees. The practitioner later told her that the probate documents had been filed. Mrs Laskarin did not subsequently hear from the practitioner. After a number of requests by telephone and in consequence of not receiving any satisfactory response to her calls, the practitioner informed Mrs Laskarin that he had lodged the application for probate. Mrs Laskarin made enquiries at the Registry and was informed that no such documents had been filed. The practitioner had not obtained the grant of probate but had lied to Mrs Laskarin in stating that he had done so. She contacted the practitioner, retrieved the documents and instructed another solicitor. The practitioner then failed to respond to three requests for information by the newly instructed practitioner.

11 At the hearing before the Tribunal the practitioner admitted that although he had done some work, Mrs Laskarin had not benefited from it and admitted that he had had the use of the sum of $500 since 31 March 2000. In its findings, the Tribunal stated that the sum of $500 should be returned to Mrs Laskarin as soon as possible. The practitioner has not done so. He informed this Court that he was willing to do so and said that he had overlooked the matter. The explanation is quite unconvincing. While he might have overlooked it in the events leading to the hearing in the Tribunal, the finding of the Tribunal expressly reminded him of his obligation to repay that sum.

12 The final complaint in the first charge was that the practitioner failed to pay a barrister the sum of $5,391 as counsel fees in respect of two matters. The fees were due in October 1999. Repeated requests were made for payment. They were not paid until 21 March 2005, and then only because of action taken by the Board.

The Second Charge

13 The first complaint in the second charge was that the practitioner, as the executor of the estate of one Skinner deceased, had failed, despite repeated requests to do so, to administer the estate of the deceased or to renounce the executorship. From 1999 until 29 October 2003 Public Trustee had repeatedly sought information from the practitioner relating to the administration of this estate. The practitioner failed to supply the information. On 14 January 2004 Public Trustee wrote a letter of complaint to the Law Society. On 23 January 2004 the Law Society sought information relating to the conduct of the administration. It followed up that request with a further letter on 17 February 2004. Neither letter was answered. The Law Society referred the matter to the Board, which on 16 April 2004 repeated the request for information. Ultimately, by letter dated 10 August 2004 the practitioner stated his willingness to renounce the executorship. Thus, for a period of some five

years the administration of this estate came to a standstill because of a complete lack of attention on the part of the practitioner.

14 The next complaint was that the practitioner had failed to pay a psychologist's fees of $572 for services to his client L after he had received funds with which to do so from the Legal Services Commission. The account had been outstanding since 6 November 2002. The account remained unpaid even after the commencement of the hearing in the Tribunal. The practitioner stated to the Tribunal that he did not realise that the money he had received was for payment of this account. The Tribunal did not accept that explanation. The account was ultimately paid on 21 March 2005, again only because of action taken by the Board.

15 The third complaint was that the practitioner had failed to pay a barrister for four separate accounts for counsel fees totalling $3,925. Those accounts were dated 6 September 2001, 25 July 2002, 10 September 2002 and 27 September 2003. Following service of the second charge the practitioner admitted liability to pay the fees and ultimately paid them on 21 March 2005 because of the Board's action. In each of those four matters the practitioner's client had received funds from the Legal Services Commission to pay the fees but the practitioner had failed to pay what was due to the barrister.

16 The final complaint in the second charge was that the practitioner had breached an undertaking given to the Tribunal on 25 June 2004. The practitioner had undertaken to the Tribunal that he would give a response to the Board in relation to allegations contained in the first charge by close of business on 16 July 2004. The practitioner failed to comply with that undertaking. Despite a subsequent request from the Board, he did not respond until 19 August 2004.

An Apology

17 The practitioner apologised to the Court for his misconduct, and through the Court to his clients and others affected by his misconduct. However, there was no evidence of any apology directly to the clients and other persons adversely affected by his misconduct. To his credit the practitioner recognises that he has acted in an unprofessional manner. At an early stage in the proceedings before the Tribunal he admitted the allegations made against him. However, that must be weighed against the gravity of his misconduct, his failure to answer the requests for information from the Board, and his failure to honour the undertaking given to the Tribunal.

18 The practitioner is aged 36 years. He is married and has children. Clearly, an order removing his name from the roll of practitioners will adversely affect him. He was admitted to practice on 14 December 1992. For about two and a half years he worked as an employed solicitor. In September 1995 he entered into partnership with another solicitor. The partnership

dissolved in May 1998. He practised as a sole practitioner until November 2002. Thereafter, he worked as an employed solicitor until January 2005 when that employment ceased. Since then he has been employed on a casual basis in the wine industry. He did not renew his practising certificate in 2005.

Previous Unprofessional Conduct

19 On 31 January 2000 the Board laid a charge of unprofessional conduct against the practitioner. That charge arose out of five complaints made by former clients. The practitioner admitted the allegations and admitted that he had been guilty of unprofessional conduct. On 8 June 2000, the Tribunal found the practitioner guilty of unprofessional conduct in that he had failed to prosecute matters in accordance with his instructions, he had failed to respond to requests of clients for information, he had failed to communicate adequately with a client, he had failed to appear at a court hearing on behalf of a client, he had deliberately lied to two clients, and that he had failed to respond to requests for information from the Board. In addition, he had failed to issue proceedings before a claim became statute barred.

20 On that occasion the Tribunal was satisfied that the circumstances of the matters complained of did not require a recommendation that disciplinary proceedings be instituted in this Court nor that it was necessary to suspend the practitioner from practice. The Board fined the practitioner $2,500 and imposed conditions upon his practising certificate, namely, that he be supervised for a period of 18 months by a senior legal practitioner, that he complete a risk management course, that he complete a trust account course and that he pay the costs of the Board before the Tribunal. The practitioner ultimately paid those costs.

Relevant Principles

21 When disciplinary proceedings are commenced against a legal practitioner, the Court is acting in the public interest and is primarily concerned to protect the public: *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239 at 250 – 251; *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456 at 460 – 461. The Court must carefully consider the nature and circumstances of the unprofessional conduct. The question which the Court has to determine is whether it has been shown that the practitioner is not a fit and proper person to practise: *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 297 – 298; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 189; *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408; *Law Society of South Australia v Rodda* (2002) 83 SASR 541 at 545. The orders to be made by the Court are directed to ensuring that, to the extent that the practitioner is not fit to practise, the entitlement to practise is either restricted or denied: *Foreman's* case per Mahoney JA at 441.

Grave Misconduct

22 When the practitioner's conduct the subject of the report from the Tribunal dated 9 May 2005 is compared with the matters the subject of the Tribunal's previous report, it is readily apparent that the practitioner completely lacks an appreciation of the duties and responsibilities of a legal practitioner. His conduct demonstrates a lack of proper management of his practice and, significantly, a failure to comply with the obligations as to moneys received on trust. He candidly admitted to the Tribunal that he did not have an adequate understanding of the obligations of a trust account and that he had no proper accounting procedures. He admitted that he was not a good manager. He admitted to this Court that his management practices were bad and had been so for many years. He admitted that "things had got out of control".

23 The practitioner's lack of proper accounting procedures, his lack of a proper understanding of the obligations concerning his trust account and his failure to pay moneys into the trust account and properly to apply those moneys are especially grave. Legal practitioners must constantly bear in mind that the "trust account should be sacred, so that moneys paid into the account should only be paid out to whom the money belongs, or as they are directed": *In re a Practitioner* [1941] SASR 48 at 51; *In re a Practitioner* (1982) 30 SASR 27 at 30. Equally sacred are moneys handed to a practitioner on trust. They should immediately be paid into the trust account and paid out in accordance with the principle just stated. In addition, money held on trust must not be treated as the property of the legal practitioner or used for his personal benefit. This practitioner has on at least four occasions not paid trust moneys into his trust account and has had the benefit of those moneys for a period of time until he arranged for payments to be made to those entitled to the trust moneys. The practitioner denied an intention to act dishonestly but the Tribunal did not accept that evidence.

24 The amounts which either were not paid into the practitioner's trust account or which were paid into the account but not properly applied are not large sums. They total no more than some $5,000 to $6,000. However, there were at least four instances of that conduct. This conduct does not constitute the most serious offending of this kind. However, any failure to comply with the obligations in respect of trust moneys constitutes grave professional misconduct. As King CJ said in *In re a Practitioner* (1982) 30 SASR 27 at 31:

> [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 others. 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 monies held for clients: (1) the clients are exposed to some risk, great or small, depending upon the situation, as to their money; and (2) 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.

The gravity of these breaches of the practitioner's obligations in respect of his trust account is compounded by his admitted failure to implement proper accounting procedures and his admitted lack of understanding as to the proper disposition of trust moneys. Both are so fundamental to the fitness of a practitioner to conduct a legal practice that these breaches and the practitioner's admissions disentitle him to practise.

25 Another very serious aspect of the practitioner's unprofessional conduct is his failure to be frank in his dealings with his clients. That is a manifest breach of his fiduciary obligation to his clients. Fitness to practise requires honesty as well as knowledge and ability: *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655 at 682; *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408 at 412. Another obligation of a practitioner is to answer requests from the Board in respect of the affairs of his clients. A practitioner whose conduct is the subject of an inquiry by the Board has a duty to assist the Board in its inquiries: *Johns v Law Society of NSW* [1982] 2 NSWLR 1 at 6, *Re Veron; Ex Parte Law Society of NSW* (1966) 84 WN (Pt 1) (NSW) 136 at 141 – 142; *Law Society of SA v Jordan* (1998) 198 LSJS 434 per Doyle CJ at 476. Doyle CJ continued:

> That does not mean that the solicitor must disregard his own interests. But it does mean that there is an obligation upon the solicitor to respond to reasonable requests for information, particularly when one takes into account the fact that often the solicitor will have a better knowledge and understanding of the matter, the subject of the complaint, than will the client who complains.

The practitioner failed in a number of instances to answer requests for information made by the Board and that failure constitutes unprofessional conduct. In addition, the practitioner was guilty of unprofessional conduct in that he failed to pay fees due to medical and para-medical practitioners as well as to counsel when provided with the funds to do so.

26 The practitioner's failure properly to manage his practice and the affairs of his clients has been prolonged. It has occurred with a disturbing frequency. It constitutes a gross departure from his professional obligations. He has displayed an inability, if not an unwillingness, to observe accepted professional standards and a failure to comply with fundamental obligations in relation to the proper management of a legal practice and, in particular, the obligations relating to trust moneys. These all demonstrate an unfitness to practise. His failure to comply with reasonable requests for information by the Board and his

failure to honour an undertaking to the Tribunal serves to emphasise his unfitness to practise.

27 It is apparent that the practitioner learned nothing from his appearance before the Tribunal in 2000. Neither the management of his practice nor his knowledge or understanding of his obligations in respect of trust moneys improved. When the findings in the report the subject of his second appearance before the Tribunal are considered with those made after his first appearance before the Tribunal, it is manifest that the practitioner is quite unfit to practise. The circumstances compel this Court to order that the practitioner's name be removed from the roll of legal practitioners.

28 On 7 September the Court made the following orders:

1. That the name of Neil Jeffrey Fletcher ("the practitioner") be struck from the Roll of Practitioners.

2. That the practitioner pay the costs of the Legal Practitioners Conduct Board both in the Tribunal and in this Court.

3. That no process issue to enforce the order as to costs until 1 September 2006.

On further consideration and before the order made on 7 September had been sealed, the Court considered it appropriate also to order the practitioner to pay the sums outstanding to Mrs Laskarin and to Dr Lukacs. Both the Board and the practitioner were informed that the Court believed it appropriate to make orders to that effect. Each was asked if they consented. Both the Board and the practitioner have informed the Court that they consent. The order made on 7 September will be amended to add the following paragraph as paragraph 4 of the order:

4. That within 90 days the practitioner pay the sum of $500 to his former client, Glenys Laskarin and the sum of $180 fees due and payable to Dr Zsolt Lukacs.

29 **BESANKO J:** I agree with the reasons for judgment of Debelle J and with the orders set out in those reasons.

30 **VANSTONE J:** I agree.