Supreme Court of South Australia

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LEGAL PRACTITIONERS CONDUCT BOARD v ARDALICH [2005] SASC 478 (16 December 2005)

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SUPREME COURT OF SOUTH AUSTRALIA
(Full Court: Application)

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LEGAL PRACTITIONERS CONDUCT BOARD v ARDALICH

Judgment of The Full Court
(The Honourable Acting Chief Justice Perry, The Honourable Justice Duggan and The Honourable Justice Anderson)

16 December 2005

PROFESSIONS AND TRADES - LAWYERS - REMOVAL OF NAME FROM ROLL

Application by the Legal Practitioners Conduct Board to remove the name of a practitioner from the Roll of Practitioners - defendant had been found guilty by the Legal Practitioners Disciplinary Tribunal ("the Tribunal") of unprofessional conduct in his dealings with clients over a long period of time - conduct involved failing to deal properly with trust monies, including fraudulent conversion of trust monies, delay in complying with clients' instructions, knowingly creating a false document, failing to co-operate with the Board in its investigations and practising the profession of the law while suspended - observations as to appropriate approach to be adopted by the Tribunal where allegations of criminal conduct made against a practitioner - relevance of mental illness - order made striking practitioner from the Roll.
Legal Practitioners Act 1982 s 5(1), s 84(7) and s 89(2)(d); *Criminal Law Consolidation Act 1935* Part 8A, referred to.
Briginshaw v Briginshaw (1938) 60 CLR 336; *Legal Practitioners Conduct Board v Phillips* (2001) 83 SASR 467; *Legal Practitioners Conduct Board v Condon* (unreported) Full Court, 3 November 2004, judgment No [2004] SASC 346; *Jordan v Legal Practitioners Conduct Board* (1998) 198 LSJS 434; *Legal Practitioners Conduct Board v Fletcher* (unreported) Full Court, 30 September 2005, judgment No [2005] SASC 382; *A Solicitor v Council of the Law Society of New South Wales* (2003) 216 CLR 253; *NSW Bar Association v Cummins* (2001) 52 NSWLR 279; *In re Davis* (1947) 75 CLR 409; *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279, considered.

LEGAL PRACTITIONERS CONDUCT BOARD v ARDALICH [2005] SASC 478

Full Court: Perry ACJ, Duggan and Anderson JJ

1 **PERRY ACJ.** This is an application by the Legal Practitioners Conduct Board ("the Board") for an order pursuant to s 89(2)(d) of the *Legal Practitioners Act 1981* ("the Act") that the name of the respondent, Alexander Ardalich, a legal practitioner ("the practitioner") be struck off the Roll of Legal Practitioners.

2 The application is based upon reports made by the Legal Practitioners Disciplinary Tribunal ("the Tribunal") following an inquiry by the Tribunal, in which the Tribunal found the practitioner to have been guilty of unprofessional conduct.

3 The Tribunal had before it a charge laid by the Board relating to a number of transactions which, with one exception, occurred in the course of the conduct by the practitioner of his practice during the period between 4 January 1996 and 7 August 1998. The exception is that one of the counts included in the charge alleged unreasonable delay in carrying out instructions to obtain a grant of probate between March 1992 and August 1998.

4 The charge comprised in all some 29 counts, of which the Tribunal found the practitioner guilty of 27 counts.

5 The counts upon which he was convicted were wide-ranging. They may be summarised under the following headings:[1]

Delay in corresponding with the Board and failure to co-operate with the Board in its investigations – six counts.

Failure to deal properly with trust monies by failing promptly to deposit them in the practitioner's trust account or appropriating funds without first rendering a bill; or transferring trust monies to his own use and benefit, including fraudulent conversion of trust monies – twenty-two counts.

Delay without reasonable excuse in complying with instructions of a client – three counts.

Requesting a complainant to withdraw a complaint – one count.

Knowingly creating a false document – four counts.

Practising the profession of the law while suspended – one count.

6 The total amount of money involved in the counts as to which there was a misappropriation of trust monies was $43,223.

7 In all of those instances the money was applied for the personal benefit of the practitioner. In a few instances, which amount in all to a small proportion only of the monies, there was a premature transfer from the practitioner's trust account against costs which had not at that stage been earned but to which, according to the practitioner, he subsequently became entitled by reason of work done later for the client.

8 On 7 August 2000, on the application of the Law Society of South Australia, the practitioner's right to practise was suspended until further order. The suspension has remained in effect ever since.

9 The practitioner was involved in earlier disciplinary proceedings.

10 In 1985, he was reprimanded by the Tribunal, following a hearing of a charge laid by the Legal Practitioners Complaints Committee, that he had unreasonably delayed in prosecuting Supreme Court proceedings.

11 In 1989, he was fined $1,000 after a finding by the Tribunal of unprofessional conduct relating to the withdrawal on two separate occasions of sums of money from his trust account in circumstances in which the withdrawals operated as a breach of an undertaking not to do so without the consent of another firm of solicitors or their client.

District Court Criminal Proceedings

12 On 27 August 2002, the practitioner was dealt with by a judge in the District Court on an information alleging 14 counts, 7 for offences of forgery and 7 for offences of uttering.

13 The counts related to seven individual transactions which occurred in March and April 1999. In each case the practitioner used his home computer to create false Commonwealth Bank cheques, which he directly or indirectly uttered to several businesses. By that means he obtained various items of computer or computer-related equipment.

14 The offending was soon discovered, and within a month or so police recovered the items.

15 The cheques which were uttered were of the value of $77,000. The goods obtained were valued at about $20,000.

16 On 27 August 2002, a District Court judge recorded findings that the practitioner was mentally incompetent to commit the offences, but he otherwise found that the objective elements of each offence were established. Accordingly, he found that the practitioner was not guilty on each count, but held that he was liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935* ("the CLCA").

17 In his remarks made at the time when he fixed a limiting term under s 269O of the CLCA, the judge commented that the offending was "... frequent, carefully planned and involved a substantial sum of money".

18 After fixing the limiting term, he ordered the release of the practitioner on licence. The order for release on licence was subject to a number of conditions which included a direction that the practitioner be under the care of the Director of Forensic Mental Health Services or a consultant psychiatrist nominated by him, and obey that person's directions with regard to medical and psychiatric treatment and the taking of prescribed medication.

19 None of the criminal charges dealt with in the District Court relate to any of the transactions the subject of the charge before the Tribunal.

The Tribunal's reports

20 The Tribunal delivered three reports dated respectively 23 April 2004, 19 August 2004 (described as an "Addendum to Report with Findings") and 17 December 2004 (described as "Report in relation to Final Orders").

21 In the first report the Tribunal canvassed the evidence at length in the context of each of the charges. Much of the first report deals with the issue of the mental competence of the practitioner to commit certain of the counts which had been framed in terms of an allegation of the commission of a criminal offence.

22 For reasons which I will come to, I am of the view that the proceedings before the Tribunal miscarried as to that aspect of the matter.

23 There was no serious dispute as to the facts constituting the allegations the subject of each of the counts. Appended to the first report is a copy of the charges, with a note against the factual particulars alleged with respect to each count, indicating whether or not the particulars were admitted. With minor exceptions, all of the particulars were admitted.

24 There was, therefore, no dispute that the practitioner had committed the acts said to constitute unprofessional conduct.

25 However, the Tribunal received written reports and heard much oral evidence from six expert psychiatrists, as to the mental condition of the practitioner. This was regarded by the Tribunal of particular relevance to those counts which had been pleaded in terms of the commission of criminal offences.

26 It was apparently common ground between all six psychiatrists that over a period commencing before and which extended throughout the time when the alleged offences were committed, the practitioner was suffering from a mental condition known as bi-polar affective disorder. However, the psychiatrists disagreed on the issue as to whether or not the mental condition of the practitioner was so serious that he was unable to control his conduct.

27 In the first report, the Tribunal set out their findings with respect to each of the psychiatrists. They then proceeded to set out their conclusions as to the issue of mental incompetence. They did so in the following terms:

114 There can be no doubt that the practitioner was and is suffering from a mental illness and at the relevant time his mental illness was a significant factor in his overall behaviour. As Dr Raeside said, his condition is complex and it deteriorated over time to the extent that in 1999 the majority of the medical evidence was sufficient to enable the District Court to make the findings that it did in relation to the forging and uttering charges.

115 We find that the practitioner's practice declined significantly because of his mental illness and he was undoubtedly at the relevant times in circumstances when he needed access to funds in order to meet commitments. He virtually acknowledged this in his evidence before the Tribunal and admitted that he worked on the "*squeaky door principle*" in relation to the payment of bills and very often his wife would alert him to the need to pay accounts which he would not otherwise be bothered about paying.

...

118 ... It was put to us that notwithstanding his recognition of financial need, with a mixed affective bipolar disorder which might be also a rapid cycling one, his subsequent actions are explained by his impaired ability to reason about the inhibitors to that action.

119 However, it is in our view necessary to show more than that he was suffering from an inhibited or impaired reasoning power, but rather that he was unable to control the conduct alleged against him. In other words, that he was suffering from a total incapacity to restrain himself from committing the acts alleged. On all of the evidence we are not able to conclude that he was so suffering.

...

122 We are of the view that the evidence as a whole is sufficient on the balance of probabilities to satisfy us that the practitioner was not mentally incompetent at the time of the alleged offences. We are unable to find that the condition from which the practitioner undoubtedly suffers was of the nature and severity at the time of each of the appropriations to render him unable to control his conduct which is the basis of the charges against him.

123 In all the circumstances therefore, we find that the practitioner was mentally competent at the time each of the offences alleging a breach of the CLCA charged against him took place, ...

28 They proceeded to find that the practitioner was guilty of unprofessional conduct with respect to each of the offences alleged as breaches of the CLCA, and as well with respect to the other counts before the Tribunal, with the exception of the two counts upon which he was acquitted.

The approach by the Tribunal to the counts alleging a breach of the *Criminal Law Consolidation Act* 1935

29 An example of a count alleging such a breach is count 13, which is in the following terms (I have included the notation on the copy of the charge attached to the report, which records the position of the practitioner):

13. On 23 January 1998 the practitioner misappropriated or failed to deal properly with trust monies, the property of Bakar (the first instance).
Particulars of misconduct
13.1 On 23 January 1998 the practitioner fraudulently converted to his own use and benefit, or the use or benefit of another, the sum of $1000.00 by transfer from the money standing to the credit of Bakar in his trust account at the Commonwealth Bank to Michael Evans by cheque number 7879 in breach of section 184 of the Criminal Law Consolidation Act 1935. **Denied – the practitioner asserts that he was mentally incompetent to commit the offence of fraudulent conversion, being unable, through mental impairment, to control his conduct.**
13.2 By the same conduct referred to in paragraph 13.1 above, the practitioner, in breach of section 31(1) of the Act, withdrew trust money without the authorisation of Bakar, being the person entitled to the money. **Admit breach of s 31(1) objective elements.**

30 In my view, formulation of the charge in those terms, which is representative of the manner in which a number of other counts were pleaded, led the Tribunal into error.

31 It is likely that the formulation of the charge in those terms was thought to be appropriate having regard to the first part of the definition of unprofessional conduct in the Act. In s 5(1) of the Act, unprofessional conduct is defined as follows:

"Unprofessional conduct" in relation to a legal practitioner, means-

(a) an offence of a dishonest or infamous nature committed by the legal practitioner in respect of which punishment by imprisonment is prescribed or authorised by law; or
(b) any conduct in the course of, or in connection with, practice by the legal practitioner that involves substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute;

32 As for part (a) of that definition, the fact that it refers to a criminal offence, does not mean that it is appropriate for the Tribunal to embark upon an inquiry directed towards determination of the question whether a criminal offence has been committed.

33 As was acknowledged by the Tribunal in the course of its first report, the Tribunal is not a court and does not conduct a criminal trial.[2] However, after making that observation they state:

It seems to us that the standard of proof remains proof on the balance of probabilities but the strength and quality of the evidence required to discharge this standard or proof having regard to the seriousness of the charges and the presumption of innocence, will be much greater.[3]

34 They then referred to a submission by the Board in the following terms:

[27] The Board accepted that it is required to prove on the balance of probabilities that the alleged offences of fraudulent conversion contrary to s 184 of the CLCA would include that the particular conversion was accompanied by criminal mens rea. That is to say that it occurred fraudulently and that it is for the Tribunal as the trier of fact to decide whether the practitioner had the knowledge, belief or intent, sufficient to render the act dishonest by the standards of ordinary decent people.
[28] The Board accepted that necessarily implicit in such a state of mind is that the practitioner was acting voluntarily, consciously and intentionally. A mental illness may preclude one or more of those states of mind from existing in certain circumstances referred to in Part 8A of the CLCA.

35 They go on to note that the Board submitted that, having regard to s 269FA(5) of the CLCA, the onus is on the practitioner to displace the presumption expressed in s 269B that a person was mentally competent to commit the offence.

36 They then observed:

[32] The Tribunal is not conducting a trial; it is conducting an inquiry into whether or not the practitioner, by virtue of what is alleged against him is guilty of unprofessional conduct as that term is defined in the Act. If the unprofessional conduct alleged involves facts and circumstances which are a breach of the criminal law, the task of the Tribunal is to inquire into those facts and circumstances and to be satisfied on the balance of probabilities that the practitioner did or was capable of committing what is alleged against him.

37 In my view, it was not appropriate for the Tribunal to embark upon some sort of quasi criminal trial, but adopting a lower standard of proof, and then to express conclusions as to mental competence which would be appropriate when, in the course of a trial being dealt with in a criminal court, a question of mental impairment falls to be dealt with under Part 8A of the CLCA.

38 If the Board charges the practitioner with unprofessional conduct constituted by the commission of a criminal offence, short of an admission by the practitioner, it is incumbent upon the Board to produce evidence of the conviction of the practitioner of the offence recorded in a court exercising criminal jurisdiction. In this context, I note that the powers of the Tribunal under the Act include the following:

84 (1) .....
(7) In the course of an inquiry, the Tribunal may-
(a) ...
(b) adopt, as in its discretion it considers proper, any findings, decision, judgment, or reasons for judgment, of any such court that may be relevant to the proceedings.

39 That section would, for example, have enabled the Board to have tendered before the Tribunal a record of the findings made in the District Court in the course of the criminal charges dealt with in that court, including the order for release on licence.

40 Even though that course was not followed before the Tribunal, this Court may, having regard to s 89(5)(b)(ii), which is in similar terms to s 84(7)(b) of the Act, adopt a similar procedure.

41 Notwithstanding the irregularities attendant upon the approach of the Tribunal to this aspect of the matter, the fact remains that they heard the evidence adduced both by the Board and by the practitioner, and came to a clear finding of unprofessional

conduct with respect to all but two of the counts. But in doing so, with great respect to the Board, they traversed a lengthier route than was necessary, and adopted a wrong approach to their role with respect to the counts which alleged a breach of the criminal law.

42 The admissions made by the practitioner as to his commission of the objective facts associated with each of the counts was sufficient to justify the finding of unprofessional conduct with respect to each count.

43 The practitioner's mental state, serious though it was, could not deflect the Tribunal from a finding that the charges of unprofessional conduct were made out once the objective facts were proved or admitted. What would otherwise amount to unprofessional conduct does not cease to be such, by reason of the existence of a mental illness on the part of the practitioner, which had the potential to establish a mental impairment defence under Part 8A of the CLCA.

44 The disciplinary provisions of the Act which come into play upon a finding of unprofessional conduct reflect the interests of the public in ensuring that legal practitioners answer to the high standards of probity and competence which must be observed if the integrity of the administration of justice is to be preserved.

45 Mental illness of a practitioner which may cause or contribute towards his commission of acts constituting unprofessional conduct cannot excuse the conduct, but may be a mitigating circumstance in considering what disciplinary orders should be made.[4]

46 I do not use the words "mitigating circumstance" in the sense in which they may be used in the context of the criminal sentencing process.

47 The primary function of disciplinary proceedings is not to punish the practitioner, but to protect the public and the administration of justice by ensuring that that practitioners live up to the high standards expected of them.[5]

48 In determining the approach to be adopted in a particular case, it may be relevant to take into account the fact that the mental illness of the practitioner is of temporary duration and unlikely to recur, or may be successfully treated. Consideration could then be given to the question whether or not the practitioner should be permitted to resume practice, perhaps after a period of suspension, or subject to conditions.

49 There will be cases, however, where the offending conduct was so serious and particularly where it has persisted over a period of time, that evidence of a mental state or illness which explains the conduct cannot be permitted to deflect the court, acting in the public interest, from striking off the practitioner.

The proceedings in this Court

50 Before the matter came on for hearing in this Court, the practitioner filed an affidavit sworn on 18 August 2005 in which he said that he did not oppose the order sought by the Board in the proceedings, namely, an order that he be struck off.

51 However, at the commencement of the hearing on 7 October 2005, the practitioner intimated that while not advancing an argument in opposition to the order sought, he wanted to give his account of the circumstances surrounding his offending conduct, and would then leave it to the Court to make such order as it saw fit.

52 The Court permitted Mr Ardalich to give from the bar table his explanation of the matter.

53 He said that he had been suffering from manic depression for very many years, but first learned about it only in 1998-1999.

54 He said that while he was labouring under this condition, "I had this curious sensation where I knew what I was doing and yet I had absolutely no control over

my actions".

55 He said that the condition was subject to rapid oscillations, sometimes occurring within one day.

56 One of the symptoms of his depression was an obsession to procure possessions, even when he could not afford to pay for them.

57 He explained that he had been a sole practitioner for almost his entire legal career, and felt isolated, with nobody offering any feedback as to his behaviour.

58 He has not practised during the period of this suspension, that is, for some seven years.

59 He said that he had not worked "at all in any real sense" for six of those seven years, but during the last twelve months he had done a variety of work, some charity work and work as a storeman, a clerk and office manager.

60 At the time of the hearing he was unemployed.

61 He said that he had recently completed the three year term under licence ordered by the District Court, and that the period had expired without incident. He had tried very hard to avoid problems, and had taken his medication regularly. He said his illness was "very much under control" at the moment.

62 However, he qualified this by saying that he had to be careful not to be placed under unnecessary stress.

63 He admitted in as many words that he did not think he was "strong enough" to practise on his own, but would like to practise under supervision.

64 His wife, who has stood by him, was obliged to go back to work, but her ability to continue with employment has been placed under a cloud in that she has developed a fairly serious condition of rheumatoid arthritis.

65 He urged the Court to make every allowance for the mental condition under which he had been labouring at the time of the offending conduct.

66 Mr Harris QC, counsel for the Board, drew the Court's attention to the Tribunal's findings as to what it described as the mental competence of the practitioner. He submitted that the Court should, pursuant to s 89(5), accept and act on the findings of the Tribunal, without further inquiry.[6]

67 While the practitioner's mental illness was a mitigating factor, he submitted, in effect, that the offending conduct was too serious to be met with by anything short of an order striking the practitioner off the Roll.

Conclusion

68 There can be no doubt, having regard to the terms of the reports furnished by the Tribunal, that the practitioner was guilty of professional misconduct in the course of his practice between 1996 and 1998. The misconduct took a variety of forms, and included a number of separate acts of fraudulent conversion of monies held in his trust account; inordinate delay in attending to his clients' affairs; and creating false documents designed to conceal his conduct.

69 Although he was acquitted of the criminal charges by reason of mental incompetence, for the reasons which I have given, the practitioner's conduct in connection with those alleged offences was nonetheless capable of amounting to unprofessional conduct:

... even though conduct was not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct a

person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise.[7]

70 If it was necessary to do so, I would also have regard to the practitioner's misconduct involved in the offences of forgery and uttering which occurred in March and April 1999 and which were dealt with in the District Court.

71 This Court is not bound to have regard only to the report of the Tribunal. Disciplinary proceedings are proceedings sui generis. They are not adversarial in nature.[8] The Court is not limited to any issue struck between the parties and is not bound to consider the case simply on the basis on which it may have been presented.

72 Of course, that is subject to the requirements of natural justice which oblige the Court to afford a proper opportunity to the parties to be heard as to any matter arising in the proceedings which could affect the outcome of them.

73 That we might take that course was not a matter which was argued on the hearing of the application. Given that the matters which were relied on by the Board in pursuing the application are of sufficient gravity to warrant striking off, I do not think it necessary to have regard further to the matters dealt with in the District Court.

74 Given the seriousness of the practitioner's conduct and the fact that it extended over a not inconsiderable period of time, and allowing also for the fact that substantial sums of money were involved in many of the transactions, I am of the view that the only proper course for this Court to take is to make the order sought.

75 I would order that the name of the practitioner be struck off the Roll of Practitioners.

76 **DUGGAN J.** In my view the name of the practitioner should be struck off the Roll of Practitioners. I agree with the reasons prepared by Perry ACJ.

77 **ANDERSON J.** I have read the draft reasons of Perry ACJ and I agree with those reasons. I agree that the only proper course for this Court is to make an order that the name of the practitioner be struck off the Roll of Practitioners.

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[1] The number of counts referred to in this summary exceeds 27, as some counts included conduct answering to more than one description.

[2] See par [25] of the first report.

[3] Citing *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[4] See *Legal Practitioners Conduct Board v Phillips* (2001) 83 SASR 467 per Gray J at 476 [39] and *Legal Practitioners Conduct Board v Condon* (unreported) Full Court, 3 November 2004, judgment No [2004] SASC 346 at [23].

[5] See the discussion of general principle in *Jordan v Legal Practitioners Conduct Board* (1998) 198 LSJS 434, *Legal Practitioners Conduct Board v Fletcher* (unreported) Full Court, 30 September 2005, judgment No [2005] SASC 382 and the cases there cited.

[6] See *The Law Society of South Australia v Jordan* (1988) 198 LSJS 434 per Doyle CJ at 474.

[7] *A Solicitor v Council of the Law Society of New South Wales* (2003) 216 CLR 253 per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ at 267 citing *NSW Bar Association v Cummins* (2001) 52 NSWLR 279 at 291 [66], *In re Davis* (1947) 75 CLR 409 and *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279 at 298.

[8] *Jordan* (supra) per Doyle CJ at [32].