

# SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

## LEGAL PRACTITIONERS CONDUCT BOARD v KERIN

[2006] SASC 393

### Judgment of The Full Court

(The Honourable Justice Duggan, The Honourable Justice Gray and The Honourable Justice White)

22 December 2006

### PROFESSIONS AND TRADES - LAWYERS - MISCONDUCT, UNFITNESS AND DISCIPLINE

Application by Legal Practitioners Conduct Board to have a legal practitioner removed from roll of practitioners - Legal Practitioners Disciplinary Tribunal considered three charges of unprofessional conduct and found the practitioner guilty in respect of each charge - the Tribunal recommended that disciplinary action be commenced against the practitioner in the Supreme Court - consideration of circumstances giving rise to unprofessional conduct - consideration of relevant legal principles - practitioner's conduct represented a gross departure from proper professional standards - Application by Board granted - practitioner to be removed from roll of practitioners.

*Legal Practitioners Act 1981* (SA) s 5, referred to.

*In the matter of Peter David Kerin* (1997) 195 LSJS 185; *Law Society (SA) v Murphy* (1999) 201 LSJS 456; *Bar Association (NSW) v Evatt* (1968) 117 CLR 177; *Wentworth v NSW Bar Association* (1992) 176 CLR 239; *Ziems v Prothonotary of Supreme Court (NSW)* (1957) 97 CLR 279; *Re B* [1986] VR 695; *Re R* [1927] SASR 58; *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467; *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454; *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197; *In re a Practitioner* (1984) 36 SASR 590; *The New South Wales Bar Association v Kalaf* unreported, NSWCA, no 588 of 1986; *Legal Practitioners' Conduct Board v Nicholson* (2006) 246 LSJS 293; *Law Society of South Australia v Jordan* (1998) 198 LSJS 434; *Kerin v Legal Practitioners' Complaints Committee* unreported, no S5650.2; *Ex parte Lenehan* (1948) 77 CLR 403, considered.

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Applicant: LEGAL PRACTITIONERS CONDUCT BOARD      Counsel: MR P MCNAMARA QC  
WITH MR M BARNETT - Solicitor: P KOLAROVICH  
Respondent: PETER DAVID KERIN      Counsel: MS E F NELSON QC - Solicitor: EDGLEY LAWYERS  
Hearing Date/s: 13/11/2006  
File No/s: SCCIV-05-1557



**LEGAL PRACTITIONERS CONDUCT BOARD v KERIN**  
**[2006] SASC 393**

**Full Court: Duggan, Gray and White JJ**

1     **DUGGAN J.**       I agree with the reasons prepared by Gray and White JJ.

2         In my view, the only appropriate order is that the name of the legal practitioner be struck off the roll of legal practitioners.

**GRAY J.**

3         The Legal Practitioners Conduct Board has applied for an order that a legal practitioner, Peter David Kerin, be removed from the roll of practitioners.

4         The primary issue to be decided is whether the material before this Court demonstrates that the practitioner is not a fit and proper person to remain a legal practitioner. As this application concerns the misconduct of a practitioner in the course of his practice of the law, it is important to assess that misconduct and its effect on the practitioner's competence, and his understanding of, and adherence to, professional standards.

5         The Board's application is based on findings by the Legal Practitioners Disciplinary Tribunal with respect to three charges. On 23 August 2005, the Tribunal concluded that the practitioner was guilty of unprofessional conduct in respect of each charge. The Tribunal recommended that disciplinary proceedings be commenced against the practitioner in the Supreme Court.

**Ms N**

6         The Tribunal, in its report, summarised the allegations in regard to a complaint by a client of the practitioner, Ms N:

- (a) The practitioner acted contrary to or without the instructions of [Ms N] and against her interest;
- (b) The practitioner misled the Board in relation to his assertion that he had decided to write off his claim for professional costs and disbursements in relation to the estate of which [Ms N] was an executor;
- (c) The practitioner on repeated occasions breached his client [Ms N's] confidence and privilege;
- (d) The practitioner improperly advised a beneficiary of the estate of alleged defaults by his client executor, [Ms N];
- (e) The practitioner wrote to [Ms N] in offensive and inappropriate terms in his letter dated 26 September 2000; and

- (f) The practitioner wrote to [Ms N] in offensive and inappropriate terms in his letter dated 26 October 2000.

With respect to these allegations the Tribunal noted:

The practitioner admitted the facts set out in paragraphs 4(a), (c), (d), (e) and (f) and conceded that each of them individually amounted to unsatisfactory conduct. He denied the facts set out in paragraph 4(b), and denied that the facts amounted to unprofessional conduct.

- 7 The Tribunal reviewed the evidence and concluded that the complaints had been proved. The Tribunal decided that there was a substantial departure from the required standard of professional conduct and that the practitioner was guilty of unprofessional conduct.

### **Ms B**

- 8 In respect of Ms B, the Tribunal summarised the complaint and the practitioner's response in the following terms:

The Board alleged that the practitioner abused the process of the Court in relation to his representation of [Ms B].

- 1.1 On or about 30 September 1999 [Ms B] instructed the practitioner in relation to an action initiated against her in the Adelaide Magistrates' Court by [Mr C] being action number 22134 of 1999 ("the claim").
- 1.2 [Ms B] instructed the practitioner to defend the claim against her and to lodge a counterclaim.
- 1.3 On or about 24 November 1999 the practitioner filed on behalf of [Ms B] a defence to the claim, a counterclaim and a third party notice.
- 1.4 The counterclaim was so deficient as to amount to an abuse of process.
- 1.5 The practitioner knew at the time of filing the counterclaim that the pleading:
  - 1.5.1 Did not comply with Rule 24 of the Magistrates Court Rules or Rule 46.04 of the Supreme Court Rules in that it:
    - 1.5.1.1 contained evidence and irrelevant and inappropriate facts;
    - 1.5.1.2 failed to plead a cause of action
  - 1.5.2 Had no reasonable prospect of success.
  - 1.5.3 Was not intended to be relied upon at any hearing before the Magistrates' Court.
- 1.6 The practitioner commenced and continued proceedings by way of counterclaim and third party claim on behalf of [Ms B] not for the purpose of litigating the claims between the parties but for the collateral purpose of

putting the plaintiff, [Mr C] under personal and professional pressure to compromise his claim.

The practitioner admitted that the pleading was poorly drafted and should not have been filed in the form. However he denied he was guilty of unprofessional conduct, but admitted it was open to us to find unsatisfactory conduct.

9 The Tribunal concluded that the practitioner had conducted himself in such a way as to involve a substantial failure to meet the required standard of professional conduct. The Tribunal found the complaints proved and that the practitioner was guilty of unprofessional conduct.

10 To understand the reasons for these conclusions it is convenient to have recourse to the following extracts from the Tribunal's report:

The practitioner told us that one of the purposes in filing the counterclaim in that form was to scare off the plaintiff. He said he knew at the time it was not right to file the document. He knew he should not file the document, he told [Ms B] he should not file the document, but [Ms B] said she wanted him to and he did. He knew when he filed the document that he was overstepping the line.

It is obvious to us that the practitioner's client was very emotional about the claim. Her use of the term "*ferret face*" when referring to the plaintiff is indicative of how she felt. The material she put in the written instructions, and left in by the practitioner in the pleading as filed, indicate there were a number of issues that had annoyed her over the years, but they were irrelevant to the claim. The practitioner's client needed, and was entitled to, professional objectivity and sound legal advice. She did not get that from him.

He told us:

He knew at the time he was compromising his own professional standards.

He was prepared to compromise his own professional standards to advance the cause of his client.

He saw the end as justifying the means.

Not only does the counterclaim not reveal a cause of action, it included irrelevant and inflammatory materials including allegations of heavy consumption of alcohol, being inebriated, vague and non-coherent upon arrival at work in the mornings, leaving the office for long periods to consume alcohol, conversations between [Ms B] and [Mr C's] wife "*in the most intimate terms about the alcohol abuse and behaviour ...*".

...

## Ms T

11 The complaint relating to the affairs of Ms T were in the following terms:

1 In the course of, or in connection with his practice in relation to the estate of the late [Ms T]:

- 1.1 The practitioner paid a commission to [Mr F] without the authority of the Supreme Court pursuant to section 70 of the Administration and Probate Act, 1919.
- 1.2 The practitioner paid a commission amounting to the full allowance under the Barr Smith Scale to [Mr F] notwithstanding:
  - 1.2.1 Paid agents were employed to perform the executor's duties;  
and/or
  - 1.2.2 It was neither just nor reasonable to allow [Mr F] a commission in that amount for the work actually performed by [Mr F] as an executor when such work was minimal.
- 1.3 The practitioner in his capacity as a solicitor entered into an agreement between his own practice, Millennium Law, and himself in his capacity as an executor to charge fees in excess of the Supreme Court Scale, absent a charging clause in the will of the said testatrix, permitting him to do so.

12 The Tribunal summarised the practitioner's response as follows:

The practitioner did not admit that the facts constituting this charge amounted to unprofessional conduct but conceded that it was open to the Tribunal to find that the conduct was unsatisfactory.

13 The Tribunal reached the conclusion that the practitioner's conduct amounted to unprofessional conduct. In particular it reported:

We can accept that from time to time a practitioner will make a mistake because of ignorance of the law. Ideally it does not happen, but sometimes it does. That does not necessarily mean that the practitioner has failed to meet the standard of conduct observed by a competent legal practitioner of good repute, irrespective of whether the failure was substantial or recurrent. However the significant problem for the practitioner in this charge is that he thought it appropriate, in his capacity as a solicitor, to enter into an agreement with himself, in his capacity as an executor, to charge fees in excess of the Supreme Court Scale, absent a charging clause in the will, and absent the consent of the beneficiary. In fact the beneficiary by her letter of 14 December 2000 indicated in very clear terms that she strongly objected to the payment of any further monies from his Trust Account. Nevertheless, he still proceeded to appropriate the money, not only without the beneficiary's consent, but knowing that she objected.

The parties have agreed that the total sum of approximately \$18,000.00 was paid to [Mr F] and the practitioner, whereas the correct sum should have been a total of approximately \$6,000.00 i.e. there has been an overcharging of approximately \$12,000.00.

### **An Earlier Suspension**

14 The practitioner's conduct outlined above followed findings of unprofessional conduct and suspension from practice as a result of orders of an

earlier Full Court in November 1997.<sup>1</sup> The unprofessional conduct leading to the suspension order included the deliberate misleading of the Legal Practitioners Complaints Committee and the breach of duty as a fiduciary in a number of respects. The practitioner's unprofessional conduct the subject of the present application can be seen to have some similarity to aspects of the conduct that led to his earlier suspension.

- 15 The unprofessional conduct on the earlier occasion led to findings that were summarised by the Tribunal as follows:<sup>2</sup>

In respect of one complaint, he was found guilty on five counts which can be summarised as follows:

- (1) The practitioner sought to arrange for the importation into Australia of firearms or parts of firearms which he believed were prohibited imports;
- (2) The practitioner proposed dishonestly to avoid duty payable on imported goods;
- (3) The practitioner knowingly made a statement to a Customs Officer that was false in a material particular, namely that that practitioner was not bringing into Australia firearms or weapons;
- (4) The practitioner brought into Australia prohibited firearms or parts thereof;
- (5) The practitioner misled or attempted to mislead the Legal Practitioners Complaints Committee in a letter he forwarded to it.

The second series of complaints forming the basis of unprofessional conduct can be summarised as follows:

- (1) The failure to deposit investment moneys in a trust account as required by s 31 of the Act;
- (2) The failure to disclose to clients the full extent of the profit made by (the practitioner's mortgage company) and failure to advise them to obtain independent advice;
- (3) The making of unsecured advances of the clients' moneys to companies in which the practitioner had an interest and when that interest was not disclosed;
- (4) He deposited moneys received from clients in the course of the practitioner's legal practice into the account of (the practitioner's mortgage company) and not, as was required, into his trust account;
- (5) The appropriation of \$20,000.00 standing to the credit of a client's account with (the practitioner's mortgage company) and the transfer of the amount into the practitioner's firm account as payment for professional fees without the rendering of an account;

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<sup>1</sup> *In the matter of Peter David Kerin* (1997) 195 LSJS 185.

<sup>2</sup> 127-128

- (6) The failure to advise of a conflict of interest which the practitioner had between his financial interest in (the practitioner's mortgage company) and his duty towards his clients and failure to advise his clients that they should seek independent advice.

16 In respect of these matters, Duggan J speaking for the Court concluded:<sup>3</sup>

The firearms importation matters had no connection with the practitioner's legal practice, although he did write letters on his firm's notepaper. Of course this does not mean that the correspondence and the importation cannot be taken into account when assessing the practitioner's fitness to practise. I also agree with the tribunal's assessment of the practitioner as having acted in an immature fashion. The deliberate misleading of the complaints committee is a more serious consideration, although there is force in Mr Hayes' argument that this one incident should not be taken as an indication that the practitioner could never be accepted as truthful.

In the case of the mortgage practice it is relevant to have regard to the tribunal's findings that the practitioner, albeit erroneously, regarded the mortgage practice as separate and apart from his legal practice; that he had inherited it from his father and did not appear to have turned his mind to the legal issues affecting the business; that there was no evidence of conscious deception; and that there was no failure to account to his client. Nevertheless it should have been apparent to the practitioner that he breached his duties as a fiduciary in a number of respects.

I have reached the conclusion that this is not a case which calls for the removal of the practitioner's name from the roll of practitioners. In my opinion the fact that the practitioner was brought before the tribunal and this court with the attendant publicity and legal costs, coupled with a period of suspension, should bring home to other members of the profession and the public the court's insistence on practitioners observing high standards. I think the case comes within the category of cases referred to by King CJ in *In re a Practitioner* 36 SASR 590 when he said:<sup>4</sup>

The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.

(See also the decision of Matheson J in *In the Matter of Mahony*<sup>5</sup>.)

After balancing the matters to which I have referred I have reached the conclusion that it would be appropriate to suspend the practitioner from practice for a period of 18 months.

### Matters Personal to the Practitioner

17 The practitioner was born on 12 June 1961. He was admitted and enrolled as a barrister and solicitor of the Supreme Court of South Australia in February 1984. The practitioner began his practice in a firm in which his father was a

<sup>3</sup> *In the Matter of Peter David Kerin* (1977) 195 LSJS 185 at 197-198.

<sup>4</sup> *In re a Practitioner* (1984) 36 SASR 590 at 593.

<sup>5</sup> *In the Matter of Mahony* (1996) 189 LSJS 205.



partner and in 1987, he commenced his own firm. He predominately practised in the areas of conveyancing, probate and limited commercial litigation.

- 18 As earlier observed, the Full Court suspended the practitioner's practising certificate for the period 1 January 1998 to 30 June 1999. The Tribunal summarised the practitioner's personal circumstances after this period of suspension as follows:

After his suspension had ceased he commenced "*Millennium Law*" on 1 July 1999. He does not consider he has ever practised law full time. From 1995 to the present time the practitioner has been involved in the business that develops and manages vineyards, and that has taken two days per week of his time.

He currently spends 5% - 10% of his time practising law. He presently practises in the areas of conveyancing, business related agreements, drawing occasional wills, and occasional probate work as a solicitor for executors.

The practitioner was married on 30 June 1990, has two children aged 13 and 11, and separated in October 2003.

- 19 The practitioner placed before the Court a number of affidavits from fellow practitioners and clients that depose that the practitioner is of good character, and that in their dealings with him in a legal capacity, he has been courteous, ethical and professional. A number of the affidavits made reference to the negative impact of the practitioner's marriage difficulties at the time of the three charges. However, while one may have sympathy for the practitioner's personal circumstances they do not provide a satisfactory explanation for his unprofessional conduct nor his unwillingness to learn from his earlier suspension.

### Relevant Principles

- 20 The general approach to be taken in matters of professional misconduct were summarised by Doyle CJ in *Law Society (SA) v Murphy*:<sup>6</sup>

In dealing with a charge of unprofessional conduct, the court acts in the public interest, and not with a view to punishment.<sup>7</sup> The court is concerned to protect the public, not to punish a practitioner who has done wrong, although of course the removal of the practitioner's name from the roll will operate as a punishment. The Court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner, and by demonstrating that the person is, by reason of his or her conduct, not fit to remain a member of a profession that plays an important part in the administration of justice and in which the public is entitled to place great trust.

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By allowing a practitioner to remain on the Roll of Practitioners, the Court holds the practitioner out as a fit and proper person to practise. There is a certain incongruity in

<sup>6</sup> *Law Society (SA) v Murphy* (1999) 201 LSJS 456 at 460-461.

<sup>7</sup> *Bar Association (NSW) v Evatt* (1968) 117 CLR 177 at 183-184; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 250-251.

allowing a practitioner to remain on the roll even though it has been demonstrated that the practitioner is not a fit and proper person to remain a practitioner. However, there are decisions indicating that in some circumstances an order suspending a practitioner's right to practise will be adequate, even though for the time being the practitioner cannot be held out as a fit and proper person to remain a practitioner.<sup>8</sup>

21 It is appropriate for this Court to accept and act on the findings of the Tribunal. They were not challenged on the hearing of this application. I agree with the Tribunal's observations and findings. The conduct was not isolated. The practitioner was unable to satisfactorily explain much of his conduct. His conduct may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct expected or approved of by members of the profession of good repute and competence.<sup>9</sup>

22 Evidence before the Tribunal suggests that the practitioner was apparently competent in the areas of law in which he practised. The practitioner may be technically competent, however this evidence did not address the departures from professional standards that have occurred.<sup>10</sup>

23 While the Court acts in the public interest and not with a view to punish a practitioner, the practitioner's personal circumstances are not to be ignored. Even making full allowance for those circumstances, this is a clear case for the making of the order sought. The practitioner engaged in a course of unprofessional conduct over a period of more than three years. No sufficient explanation for that conduct has been proffered.

24 The earlier unprofessional conduct involved deception of the Legal Practitioners Complaints Committee. The practitioner's deception of the Board is a serious matter. Public confidence in the legal profession necessarily involves confidence in the disciplinary process. The need for integrity in the disciplinary process underscores the importance of the professional obligations of candour and frankness owed by practitioners to the Board and Tribunal. The attempt for whatever reason to conceal relevant information from the Board indicates a weakness of character of a disqualifying nature. If the practitioner is to be allowed to practise in the future, the Court must be satisfied that he is of good character.

25 The circumstances disclosed before this Court reveal a failure by the practitioner to understand public professional standards. In particular the position is that, despite the earlier suspension from practice, on his return 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 those obligations.

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<sup>8</sup> *Ziems v Prothonotary of Supreme Court (NSW)* (1957) 97 CLR 279 and *Re B* [1986] VR 695 at 705.

<sup>9</sup> *Re R* [1927] SASR 58 at 60.

<sup>10</sup> *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467.

The material before this Court suggests that the practitioner's behaviour cannot be said to be behind him, isolated, and unlikely to recur.

26 The practitioner claimed not to have read the earlier Full Court decision and the reasons for judgment. That would indicate, first, an almost reckless lack of concern for the disciplinary process of the legal profession of which he seeks to remain part. Secondly, it would indicate a failure or an inability or an unwillingness to take proper or any steps to reform his ways despite the earlier reprimand, thereby demonstrating his unfitness to continue to be entrusted with the conduct of the affairs of his clients.

27 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 admitted conduct demonstrates that the practitioner is not fit to remain a member of the profession. Only those who observe the standards expected of the profession should be permitted to remain members of it.

### Conclusion

28 In regard to Ms N, the practitioner's conduct included breaching client confidence, acting against the interests of his client, acting against instructions and the sending of threatening and abusive letters to his client. In respect of Ms B, the practitioner filed a pleading containing defamatory and embarrassing material and thereby abused his absolute privilege. In relation to Ms T, the practitioner appropriated trust monies for fees in excess of an entitlement notwithstanding the client's complaint and, in so doing, acted in breach of his fiduciary duty and then failed to immediately remedy that breach. The conduct in respect of the three charges occurred between 1999 and 2002.

29 The totality of the circumstances before the Court indicates that the practitioner lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.<sup>11</sup> Neither suspension nor supervision are appropriate orders.

30 The practitioner's conduct represented a gross departure from proper professional standards. The conduct amounted to an abuse of the privileges that accompany a practitioner's admission to this Court. His treatment of and his conduct towards clients and others were disgraceful and dishonourable.

31 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 the public's confidence in the legal profession. The public must be protected from legal

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<sup>11</sup> *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454 at 465.

practitioners who are ignorant of the basic rules of proper professional practice and who are indifferent to rudimentary professional requirements.<sup>12</sup>

32 The gravity of the practitioner's conduct, particularly having regard to his earlier suspension from practice, necessitates his removal from the roll of practitioners.

33 **WHITE J:** The circumstances of this application for removal of the name of the practitioner from the Roll of Practitioners are set out in the reasons of Gray J.

34 At the hearing before this Court, the practitioner accepted the factual findings of the Legal Practitioners' Disciplinary Tribunal ("the Tribunal"). Before the Tribunal, the practitioner had maintained that his conduct amounted to no more than unsatisfactory conduct as that expression is defined in s 5 of the *Legal Practitioners Act 1981* (SA) ("LPA"), ie:

conduct in the course of, or in connection with, practice by the legal practitioner that is less serious than unprofessional conduct but involves a failure to meet the standard of conduct observed by competent legal practitioners of good repute.

However, before this Court, the practitioner accepted that the Tribunal's characterisation of his conduct as unprofessional, rather than simply unsatisfactory, was appropriate. The expression "unprofessional conduct" is defined in s 5 of the LPA to mean:

- (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.

It is the second limb of that definition which is relevant presently.

35 The practitioner's acceptance that his conduct was unprofessional involved an acknowledgment on his part of a substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

36 The principal features of the practitioner's conduct are:

1. Acting not only without instructions from his client Ms N but in a way which was contrary to her interests, including by breaching her confidences and her privilege.

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<sup>12</sup> *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 at 210.

2. Writing offensive and inappropriate letters to Ms N. The letters were inappropriate for a number of reasons but in particular because of their threatening and intimidatory nature and their offensive tenor.
3. An intentional misleading of the Legal Practitioners' Conduct Board in relation to his conduct of Ms N's matter.
4. In the case of Ms B, engaging in conduct amounting to an abuse of the process of the Magistrates Court including by filing a pleading which was grossly deficient and which was not, in any event, intended to be relied upon at any hearing.
5. In the case of Ms T, entering into an agreement with himself permitting his practice to charge fees in excess of the Supreme Court scale without any reference to the client, and paying monies to another without any authority to do so.

37 For the reasons given by Gray J, this conduct plainly amounted to a substantial failure by the practitioner to meet the standards of conduct observed by legal practitioners of good repute. It is also conduct which occurred over a considerable period of time. In the case of the client Ms N, the conduct comprising the unprofessional conduct commenced on 1 September 2000 and concluded in November 2002. In the case of the client Ms T, the conduct occurred in December 2000. In the case of the client Ms B, the conduct occurred in November 1999 when the practitioner filed the counter-claim in the Magistrates Court which the Tribunal regarded as amounting to an abuse of process. In these circumstances, it cannot be said that the practitioner's conduct was attributable to a short lived lack of judgment, or was otherwise a temporary aberration.

38 Ms Nelson QC, who appeared for the practitioner, submitted that the protection of the public and the maintenance of proper professional standards which should guide this Court on applications of this kind could be addressed appropriately in this case by permitting the practitioner to practice on a restricted basis only and subject to supervision.

39 The suspension of a practitioner from practice, or the imposition of a requirement that a practitioner practice only under supervision, may be appropriate in cases in which the practitioner has fallen below the high standards to be expected of practitioners but not in such a way as to indicate that he or she lacks the qualities of character and trustworthiness which are necessary attributes of legal practitioners.<sup>13</sup> In these circumstances, the question for this Court is whether "the practitioner is permanently or indefinitely unfitted to be a member

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<sup>13</sup> *In re a Practitioner* (1984) 36 SASR 590 at 593 per King CJ; *Legal Practitioners Conduct Board v Hay* [2001] SASC 322 at [62]; (2001) 83 SASR 454 at 466.

of the legal profession, with the great privileges and responsibilities that go with that membership".<sup>14</sup>

40 Ms Nelson QC emphasised a number of matters. First, it was submitted that the supervisory jurisdiction of the court with respect to legal practitioners is exercised for the purpose of protection of the public interest and not for the purposes of punishment of the individual practitioner. I accept that that is so. This Court exercises its supervisory jurisdiction so as to ensure the maintenance of proper professional standards and for the purposes of protection of the public.<sup>15</sup>

41 Secondly, Ms Nelson emphasised the practitioner's willingness to take advice about ethical and professional issues which arose. This willingness had been evidenced, it was said, ever since the practitioner's resumption of practice in July 1999. It indicated a consciousness by the practitioner of the need to act with appropriate professional propriety. Ms Nelson referred to evidence that the practitioner had, from time to time, sought advice from a senior member of the profession who worked in an office adjoining his own.

42 The Tribunal accepted that the practitioner had sought such advice in relation to the letter written to his client Ms N, dated 26 September 2000, to which reference is made in the reasons of Gray J. It is not now necessary to recount the content of that letter. It was plainly offensive and inappropriate. The plaintiff now accepts that characterisation of the letter. He said that the letter had been written to "shock" his client but he accepted that at the time he wrote the letter he was aware that his client suffered from a mental disturbance for which she had received psychiatric treatment. That serves to underline the inappropriateness of the letter. However, it was submitted that the fact that the letter had been sent only after reference to a senior practitioner militated to some extent against the seriousness of the practitioner's conduct in sending it.

43 Although in a general way, the practitioner's willingness to seek out and take advice is relevant, I do not attach much significance to this factor. The circumstances in which the letter of 26 September 2000 was sent indicate why that is so. At the time the letter was sent, the practitioner had been admitted as a practitioner for over 16 years. It is reasonable to suppose that a practitioner with that amount of experience would recognise immediately, and without the need for advice from anyone, the plain inappropriateness of the letter in question. Further, the evidence to the effect that the letter had in fact been read and approved by the senior practitioner before being sent was somewhat equivocal. It seems that the senior practitioner's advice had been sought in relation to conflict of interest issues which the practitioner saw arising in relation to his client Ms N, rather than with respect to the specific content of the letter. The senior practitioner gave evidence to the Tribunal. He could not recall being

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<sup>14</sup> *The New South Wales Bar Association v Kalaf*, unreported, NSWCA, no 588 of 1986, per Kirby P.

<sup>15</sup> *Legal Practitioners' Conduct Board v Nicholson* [2006] SASC 21 at [27]; (2006) 246 LSJS 293 at 296 per Doyle CJ.

shown the letter of 26 September 2000 but did recall discussing the conflict of interest issues which the practitioner's continued acting for Ms N involved. The senior practitioner said, however, that had he read the letter closely he would not have approved it. The plaintiff's own evidence referred to a practice of discussing ethical and professional issues with the senior practitioner in the course of which he may well have shown the senior practitioner his draft of the letter. His evidence fell short, however, of a positive assertion that the letter of 26 September 2000 had been read and approved by the senior practitioner. In these circumstances I would attach little, if any, weight to the suggestion that the letter of 26 September 2000 had been read and approved by the senior practitioner.

44 Thirdly, Ms Nelson QC referred to marital difficulties which the practitioner had experienced in 1999, 2000 and 2001 when the unprofessional conduct occurred. The practitioner had separated from his wife in October 2003. The evidence of some of his friends and colleagues suggested an improvement in the practitioner's mental wellbeing since the separation. It was submitted that the stress of his matrimonial situation had contributed to the practitioner's poor judgment, and that the removal of that stress should give this Court confidence that there would not be a repetition. Although the practitioner gave evidence about the mental situation and breakdown, it was not in terms attributing his conduct to the stresses which it had produced. The Tribunal did not make any finding on this topic. One can accept, however, that the practitioner's matrimonial situation may have affected his judgment. I agree that this circumstance does extenuate the practitioner's conduct to some extent.<sup>16</sup> However, I do not regard it as being appropriate to attach much weight to this factor in this case. Practitioners are expected to maintain high standards of conduct even in times of personal stress. Again the fact that the conduct occurred over such a long period is relevant. It is not a case in which a single error of judgment can be attributed to a moment of stress.

45 The Tribunal found that the practitioner had deliberately withheld additional relevant material from the Legal Practitioners' Conduct Board ("the Board") in relation to its investigation of the complaint of Ms N. The Tribunal's finding was that the practitioner had, in effect, intentionally misled the Board by making statements which were literally true, but at the same time, withholding additional relevant information. It is not necessary to recite the detail of the matters withheld. Conduct which involves the misleading of the Board is unprofessional conduct of a serious kind. This Court has emphasised on many occasions the obligation of practitioners to be cooperative with the Board and to answer its questions properly and honestly.<sup>17</sup>

<sup>16</sup> Cf *In re a Practitioner* (1984) 36 SASR 590 at 592 per King CJ.

<sup>17</sup> For example, see *Law Society of South Australia v Jordan* [1998] SASC 6809, (1998) 198 LSJS 434 at 476.

46 Ms Nelson QC submitted that although there had been a finding in the previous matters which resulted in the practitioner's suspension from practice for a period of 18 months that the practitioner had misled the Board, that conduct had not involved an *intentional or deliberate* misleading of the Board. Thus Ms Nelson submitted that whilst the conduct involved in the intentional misleading of the Board in the case of Ms N was serious, it was not aggravated by the circumstances of having been a repetition of the previous conduct which had brought the practitioner before this Court. I am unable to accept this submission. In April 1995, the Tribunal found the practitioner guilty of unprofessional conduct in that, amongst other things, he had

misled or attempted to mislead the [Legal Practitioners' Complaints] Committee in as much as he had implied or stated:

1. That the Australian Customs Service had no interest in the contents of the correspondence the practitioner had been having with [an officer of the Australian Federal Police], then knowing that the practitioner had been prosecuted under the Customs Act;
2. That he had not been knowingly involved in any relevant improper activities.

On appeal from that finding of the Tribunal, it was accepted that proof of an intention to mislead was an essential element of proof of the unprofessional conduct alleged.<sup>18</sup> Millhouse and Debelles JJ accepted that there was no proof of such an intention in relation to the conduct alleged in [2], but all members of the Court found the existence of such an intention proved in relation to the conduct alleged in [1].

47 In my opinion, the conduct of the practitioner in deliberately misleading the Board so soon after he had resumed practice in mid 1999 is particularly significant. It demonstrates either a continued failure by the practitioner to appreciate the standards of conduct required by practitioners or a continuing unwillingness or inability to meet those standards.

48 Next, Ms Nelson QC drew attention to the fact that much of the conduct of the practitioner which led to his previous suspension was of a substantially different character from his present conduct. I accept that that is so. Prior to 1999, the practitioner had conducted a mortgage investment business. He had taken over the conduct of that business from his father. The conduct of the business involved the practitioner receiving a procuration fee or commission from the borrowers of his clients' funds. His receipt of the procuration fee or commission was not disclosed to his clients. In addition, despite the potential for a conflict between his interests and those of his clients, the practitioner had not advised his mortgage investment clients to seek independent legal advice. The

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<sup>18</sup> *Kerin v Legal Practitioners' Complaints Committee*, unreported, no S5650.2 at 11 per Duggan J; S5650.3 at 2 per Debelles J.



conduct of the practitioner which has brought him before the Court on this occasion has not involved conduct of that kind.

49 However, as already noted, the practitioner's conduct which led to his previous suspension did include, as did his present conduct, the intentional misleading of the Legal Practitioners' Conduct Board. In the circumstances of this case, I regard this conduct as particularly serious. The practitioner should, at the very least, have been aware from the judgments of this Court involving himself that candour and honesty in his dealings with the Board was required. In this respect, the practitioner's admission that he had not even read, until shortly before the hearing before the Tribunal, the reasons of the Full Court for suspending him is startling. Although the fact of his suspension, and the processes which led to it, may not have been palatable for the practitioner, it is remarkable that he had not even read the assessment by members of this Court of his conduct. It indicates, in my opinion, "an almost reckless lack of concern for the disciplinary processes of the legal profession of which he seeks to remain part",<sup>19</sup> an indifference to the supervisory authority of this Court, and an indifference to developing an understanding of the standards of conduct which the Court and the community expect of legal practitioners. It militates very much against this Court now having any confidence that the practitioner will modify his behaviour in the future.

50 Ms Nelson QC submitted that the practitioner ought to be able to continue practice in only a limited field of practice and under supervision. I do not regard a limitation of the fields of practice in which the practitioner might engage as being appropriate. It is not the practitioner's competence or lack of competence which has led to the application for the removal of his name from the Roll of Practitioners. A lack of competence in a particular area of practice may be a reason to restrain a practitioner from participation in that area. However, in this case, it is the failure of the practitioner to meet the standards of conduct required of all practitioners, in whatever field of practice they engage, which is significant.

51 Finally, Ms Nelson referred to the decision of the Court of Appeal in New South Wales in *The New South Wales Bar Association v Kalaf*.<sup>20</sup> In that case, a barrister who had previously been subject to disciplinary action was suspended from practice for a period of one year and not removed from the Roll. As I understood the submission, *Kalaf* was relied upon as indicating that the fact that a practitioner had been subject to previous disciplinary action should not result inflexibly in an order for his removal from the Roll. I accept that submission but in my opinion it does not take the matter very much further. Obviously each case turns on its own facts. There is little point in engaging in a case by case factual

<sup>19</sup> *Legal Practitioners' Conduct Board v Hay* [2001] SASC 322 at [62] per the Court.

<sup>20</sup> Unreported, NSWCA no 588 of 1986.

comparison. I refer to what was said by Latham CJ, Dixon and Williams JJ in *Ex parte Lenehan*.<sup>21</sup>

The question to be decided is not one of law to be determined by reference to previous decisions. The duty of the court is to determine in what manner the court should exercise its discretion in the particular circumstances of each case. Generalisations relating to questions of character and moral fitness, such as the statement quoted from *Ex parte Macaulay* should not be treated as if they were propositions of law.<sup>22</sup> [Citations omitted]

The conduct alleged in this case against the practitioner was conduct which was more persistent and more serious than that alleged in *Kalaf*.

52 In my opinion, the persistence of the practitioner's conduct and its seriousness, coming so soon after his resumption of practice following his suspension for his previous unprofessional conduct indicates that the practitioner does lack the qualities of character and trustworthiness required of practitioners. I do not consider that the conduct can reasonably be attributed to a temporary aberration on his part. Despite the submissions of Ms Nelson QC to which I have referred above, I am satisfied that removal of the name of the practitioner from the Roll of Practitioners is appropriate in this case.

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<sup>21</sup> (1948) 77 CLR 403.

<sup>22</sup> Ibid at 422.