

# SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Application)

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## LEGAL PRACTITIONERS CONDUCT BOARD v KAYAL

[2011] SASCFC 25

**Judgment of The Full Court (*ex tempore*)**

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

6 April 2011

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT - TRUST MONEY**

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - SOUTH AUSTRALIA - ORDERS**

Application by Legal Practitioners Conduct Board to have the name of a legal practitioner struck off the Roll of Legal Practitioners – Legal Practitioners Disciplinary Tribunal considered three charges of unprofessional conduct based on allegations of a series of fraudulent misappropriations – recommendation made that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court.

Held: Application by Legal Practitioners Conduct Board granted – the circumstances demonstrate practitioner is not fit to remain a member of the legal profession – name of practitioner to be removed from Roll of Legal Practitioners.

*Legal Practitioners Act 1981 (SA) s 31, s 76(3)(a), s 89, referred to.*  
*The Law Society of South Australia v Murphy* (1999) 201 LSJS 456; *In re A Practitioner* [1941] SASR 48; *In re A Practitioner* (1982) 30 SASR 27; *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32, discussed.

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**Applicant: LEGAL PRACTITIONERS CONDUCT BOARD      Counsel: MR S COLE - Solicitor:**  
**LEGAL PRACTITIONERS CONDUCT BOARD**  
**Respondent: SULTAN KAYAL No Attendance**  
**Hearing Date/s: 06/04/2011**  
**File No/s: SCCIV-11-119**  
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**LEGAL PRACTITIONERS CONDUCT BOARD v KAYAL**  
**[2011] SASCF 25**

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

1 **DUGGAN J (*ex tempore*):** The Legal Practitioners Conduct Board (“the Board”) applies for an order that the name of Sultan Kayal (“the practitioner”) be struck off the Roll of Legal Practitioners on the ground of unprofessional conduct. The application is made pursuant to a recommendation by the Legal Practitioners Disciplinary Tribunal (“the Tribunal”).

2 The practitioner was admitted to practice on 7 September 1998. He was employed for a time by Hume Taylor & Co, solicitors, and became a partner in that firm in January 2006. He resigned as a partner and practised as a sole practitioner for the period 1 May 2007 to 14 November 2007 when he commenced employment with Georgiadis Lawyers. His employment with that firm terminated on 11 September 2008. It is alleged that the series of fraudulent misappropriations upon which the charges of unprofessional conduct are based commenced when the practitioner was practising as a sole practitioner and that it continued throughout the period of his employment at Georgiadis Lawyers.

3 The Board initiated proceedings against the practitioner by laying three charges of unprofessional conduct. The particulars of the charges are set out in the Report of the Tribunal dated 10 December 2010 as follows:

**Charge 1**

The conduct said to constitute the unprofessional conduct in Charge 1 is that between 11 August 2008 and 15 August 2008 the practitioner fraudulently misappropriated trust money in the sum of \$13,000.

**Charge 2**

The conduct said to constitute the unprofessional conduct in Charge 2 is that the practitioner failed to respond to a Notice issued by the Board on 11 September 2008 pursuant to s 76(3)(a) of the Act within the time allowed by the notice.

**Charge 3**

The conduct said to constitute the unprofessional conduct in Charge 3 is as follows:

- (a) On or about 17 August 2007 the practitioner fraudulently misappropriated trust money in the sum of \$2,400 in the matter of ML;
- (b) On 6 November 2007 the practitioner fraudulently misappropriated trust money in the sum of \$1,679 in the matter of ML;
- (c) On or about 2 November 2007 the practitioner fraudulently misappropriated trust money in the sum of \$1,500 in the matter of AT;

- (d) Between 22 November 2007 and 19 May 2008 the practitioner wrote five negotiable instruments when he knew or ought to have known that there were insufficient funds to ensure payment was made on all or any of the negotiable instruments;
- (e) On or about 11 January 2008 the practitioner fraudulently misappropriated trust money in the sum of \$500 in the matter of MC;
- (f) On or about 28 July 2008 the practitioner fraudulently misappropriated trust money in the sum of \$700 in the matter of MC;
- (g) On or about 30 January 2008 the practitioner fraudulently misappropriated trust money in the sum of \$2,000 in the matter of JK;
- (h) On or about 16 April 2008 the practitioner fraudulently misappropriated trust money in the sum of \$1,000 in the matter of JK;
- (i) On or about 7 February 2008 the practitioner aided Ms CA to obtain a financial benefit from a money lending company in circumstances where the practitioner knew or ought to have known that the documents relied upon by the company were forged or, in the alternative, the practitioner forged the documents relied upon by the company;
- (j) On 17 June 2008 the practitioner fraudulently misappropriated trust money in the sum of \$800 in the matter of JA;
- (k) On or about 1 August 2008 the practitioner fraudulently misappropriated trust money in the sum of \$1,000 in the matter of RK; and
- (l) On or about 19 August 2008 the practitioner fraudulently misappropriated trust money in the sum of \$880 in the matter of Mr CA.

4 The practitioner did not appear at the hearing before the Tribunal. He was represented at a directions hearing on 28 October 2008 by counsel who advised that the practitioner admitted the facts underlying the charges and that the charges would not be defended. The hearing of the allegations before the Tribunal took place on 17 September 2010.

5 In the case of each charge the Tribunal found that the allegations had been made out and that the circumstances in each case constituted unprofessional conduct. In my opinion, the evidence supported these findings.

6 The practitioner's fraudulent course of conduct began with the misappropriations set out in paras (a), (b) and (c) of Charge 3. The practitioner received monies from ML and AT, who consulted him for legal advice. The money was paid to the practitioner on account of costs and disbursements. At the time, he did not have a trust account and he used the monies given to him by these clients for his own purposes.

7 Mr AT complained about the practitioner's conduct to the Law Society of South Australia. On 25 June 2008 the Director (Professional Standards) wrote to the practitioner seeking a response to the allegations made by Mr AT. The

practitioner did not respond until 8 August 2008 when he wrote to the Law Society conceding that he did not operate a trust account during the period he practised as a sole practitioner and admitting that he had used the money paid to him by Mr AT for personal expenditure.

8 Despite the admissions in the practitioner's letter to the Law Society and an apology which accompanied them, the practitioner misappropriated a further amount of \$13,000 between 11 August 2008 and 15 August 2008. This amount had been entrusted to him by Mr C, a client who paid the money on account of anticipated fees. The cheque which was given to the practitioner by Mr C was banked in the practitioner's personal bank account. He made various withdrawals until the funds were exhausted. This is the misappropriation alleged in the first charge.

9 According to the Board, the practitioner continued this course of conduct with further fraudulent misappropriations of monies entrusted to him by Mr MC, Mr JK, Mr JA, Ms RK, and Mr CA, all clients of the practitioner. Two misappropriations are alleged in the case of each of Mr MC and Mr JK. The particulars of these misappropriations are set out in the third charge.

10 It is also alleged in the third charge that the practitioner wrote out cheques on five occasions between 22 November 2007 and 19 May 2008 when he knew, or ought to have known, that there were insufficient funds to meet them. The cheques were made out to Mr L, a barrister, Mr S, a client, and Mr AT. Two cheques were made out to Mr L and Mr S respectively.

11 Mr S is an Indian student who was persuaded by the practitioner to pursue a claim for a work related injury. The practitioner is alleged to have told him that he, the practitioner, needed money for surgery on a cancerous lesion. In fact, no such operation was required. According to Mr S, the practitioner persuaded him to take out a loan of \$5,000 in his own name and to then lend \$3,000 to the practitioner. At about this time, the practitioner billed Mr S \$2,250 for legal work. Mr S said the remaining \$2,000 from the loan was used to pay that bill. The practitioner did not repay the sum of \$3,000 and, at the time he reported this matter, Mr S remained liable to repay the loan and interest.

12 A further matter alleged against the practitioner in the third charge relates to a transaction with Mr F, a money lender, for whom the practitioner had acted previously. According to Mr F, the practitioner told him that he acted for a woman who needed a loan. The practitioner said that the woman had a WorkCover claim which was about to be settled. He said that the payment would ensure that the loan would be repaid. Subsequently the practitioner took his wife to meet Mr F in order to finalise the loan. It is alleged that, in effect, the practitioner's wife posed as a client. A forged letter was produced to Mr F to support the ruse. A letter written by WorkCover to a client of the practitioner referring to the settlement of a claim was amended with the name of the practitioner's wife being substituted for the name of the client.

13 When the Board embarked on its investigation into the practitioner's conduct it issued a notice to him pursuant to s 76(3)(a) of the *Legal Practitioners Act 1981* (SA) ("the Act") requiring him to deliver up relevant documents. The notice is dated 11 September 2008. The documents were to be delivered by 19 September 2008. The practitioner did not comply with the notice. His failure to do so is the subject of the second charge.

14 Section 89 of the Act provides for disciplinary proceedings before the Supreme Court. Insofar as is relevant, the section provides as follows:

**89—Proceedings before Supreme Court**

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

15 The nature and purpose of disciplinary proceedings under the Act was referred to by Doyle CJ in *The Law Society of South Australia v Murphy*:<sup>1</sup>

In dealing with a charge of unprofessional conduct, the Court acts in the public interest, and not with a view to punishment: *New South Wales Bar Association v Evatt* (1968) 117

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<sup>1</sup> (1999) 201 LSJS 456 at 460; [1999] SASC 83 at [30].

CLR 177 at 183-184; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 250-251. 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.

- 16 The requirement to protect the public in relation to the property of clients held on trust is self evident. Section 31 of the Act provides that, subject to any direction by the person entitled to the contrary:

... a legal practitioner must, as soon as practicable after receipt of any trust money in the course of practice, deposit the money in a trust account and must not withdraw or permit it to be withdrawn except as authorised by this Part.

- 17 In *In re A Practitioner*,<sup>2</sup> the Full Court stated that such a provision recognises "... that a practitioner's trust account should be sacred". King CJ emphasised this consideration when referring to the conduct of the practitioner in *In re A Practitioner*:<sup>3</sup>

His conduct nevertheless was an affront to the sanctity of a practitioner's Trust Account and this Court has a duty to vindicate the inviolability of the trust imposed upon a practitioner to treat his clients' money in all respects as their money and to use their money for their purposes and no other. The public can feel confidence in legal practitioners and their handling of their money only if they know that there is involved no element of judgment on the part of the practitioner, and that their money must remain in his Trust Account until it is disbursed in accordance with their direction; because no matter how good the intentions of a practitioner might be, no matter how confident he might be that the money can be made good, whenever a client's money is deliberately used for a purpose other than the purpose for which the client entrusts it to the practitioner, there is an act of dishonesty on the part of the practitioner and one which exposes the client to some element of risk as to his money. There are two aspects of such misuse of trust moneys held for clients: (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.

- 18 Conduct of this nature goes beyond mere dishonesty. As Ipp J said in *Barwick v Council of the Law Society of New South Wales*:<sup>4</sup>

The trust and confidence which clients place in their solicitors are a basic element of the administration of justice in this country. Violations by legal practitioners of trust accounts betray that trust and harm public confidence in the legal system. This explains the sacrosanct nature of trust accounts and the acute concern that courts have when practitioners, in breach of their fiduciary obligations, misuse trust moneys for their own benefit.

<sup>2</sup> [1941] SASR 48 at 51.

<sup>3</sup> (1982) 30 SASR 27 at 31.

<sup>4</sup> [2004] NSWCA 32 at [118].

19       The total amount misappropriated was \$25,459. All except \$4,000 was  
reimbursed to the victims, but not by the practitioner.

20       According to the findings made by the Tribunal, the practitioner embarked  
upon a course of fraudulent conduct over an extended period of time. The  
conduct was directly related to his practice as a solicitor in that it involved a  
complete disregard of his duties in relation to monies entrusted to him by his  
clients. The misappropriations by the practitioner continued after he had been  
confronted by the Board with earlier similar conduct. He refused to cooperate  
with the Board's enquiries concerning the later conduct.

21       The circumstances clearly demonstrate that the practitioner is not fit to  
remain a member of the legal profession.

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

23       **GRAY J:** I would order that the name of the practitioner be struck off the  
Roll of Legal Practitioners. I agree with the reasons of the presiding Judge.

24       **SULAN J:** I agree with the reasons of Duggan J and I would make the order,  
namely, that the practitioner be struck off the Roll of Legal Practitioners.