

Case No. 11-962

**SUPREME COURT OF SOUTH AUSTRALIA**  
(Full Court)

**LEGAL PRACTITIONERS CONDUCT BOARD v FARDONE**

[2011] SASFC 138

**Reasons for the Order of The Full Court**

(The Honourable Justice Anderson, The Honourable Justice Kelly and The Honourable Justice Stanley)

18 November 2011

**PROFESSIONS AND TRADES - LAWYERS - MISCONDUCT,  
UNFITNESS AND DISCIPLINE - DISCIPLINARY ORDERS - STRIKING  
OFF AND ANCILLARY ORDERS**

Application by the Legal Practitioners Conduct Board for an order striking off the defendant from the roll of legal practitioners - application not opposed - where the defendant had been found by the Legal Practitioners Disciplinary Tribunal to be guilty of unprofessional conduct - the findings of unprofessional conduct related to the defendant's conduct in an estate matter and to earlier findings of unprofessional conduct.

Held: The practitioner's name be struck off the Roll of Legal Practitioners pursuant to s 89(2)(d) Legal Practitioners Act 1981 (SA).

*Legal Practitioners Act 1981 (SA) s 89(2)(d); Trustee Act 1936 (SA) s 7, referred to.  
Legal Practitioners Conduct Board v Fardone [2009] SASC 15, considered.*

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**Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR M BARNETT - Solicitor:  
LEGAL PRACTITIONERS CONDUCT BOARD**

**Defendant: ENZO ANTHONY FARDONE Counsel: MR N ROCHOW SC WITH HIM MR I  
COLGRAVE - Solicitor: JOHNSTON WITHERS**

**Hearing Date/s: 07/11/2011**

**File No/s: SCCIV-11-962**

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**LEGAL PRACTITIONERS CONDUCT BOARD v FARDONE**  
**[2011] SASCFC 138**

**Full Court: Anderson, Kelly and Stanley JJ**

1 ANDERSON J.

**Introduction**

2 The Legal Practitioners Conduct Board (“the Board”) seeks an order from the Court pursuant to s 89(2)(d) of the *Legal Practitioners Act 1981* (SA) that the name of the defendant (“the practitioner”) be struck off the roll of legal practitioners. The Board also seeks an order for the costs of the application. The practitioner does not oppose the order.

3 On 7 November 2011 the Court ordered that the name of the practitioner be struck off the roll of legal practitioners and that he pay the costs of the Board. These are my reasons explaining why the practitioner was struck off the roll.

4 On 23 January 2009 Gray J made an order and published reasons relating to the legal practitioner’s right to continue practice. His Honour ordered that the practising certificate of the practitioner be suspended until further order: see *Legal Practitioners Conduct Board v Fardone* [2009] SASC 15. The Legal Practitioners Disciplinary Tribunal (“the Tribunal”) made a report and published its findings on 25 February 2011. The unprofessional conduct alleged against the practitioner involved a course of conduct over a number of years.

**Background**

5 The alleged conduct was as follows:

1. Between about April 2000 and about February 2001 the practitioner breached his fiduciary duties as executor and solicitor in that he appropriated or applied Trust money in the amount of \$50,000 for the benefit of Empros Pty Ltd (“Empros”), of which he was a director and a substantial shareholder.
2. Between about April 2000 and about February 2001 the practitioner acted in breach of his fiduciary duties as executor and solicitor in that he failed to disclose his interest in Empros to Ms James, a joint executor and trustee of the estate of Margherita Di Salvo (“the estate”).
3. Between about April 2000 and about February 2001 the practitioner acted in breach of his fiduciary duties as executor and solicitor in that he failed to advise Ms James to obtain independent advice about his proposal to make the Empros payments.

4. Between about April 2000 and about February 2001 the practitioner was grossly negligent and failed to comply with his obligations under s 7 of the *Trustee Act 1936* (SA) ("the Act") in proposing and making the Empros payments.
  5. Between about April 2002 and about April 2005 the practitioner renewed the investment in Empros annually and on each occasion applied Trust moneys to his own benefit and breached the duties referred to in paragraphs 1 to 4.
  6. Between about April 2002 and about April 2005 the practitioner renewed the investment on an annual basis contrary to the terms of a written authorisation for the disposition of the trust moneys signed by the practitioner and Ms James, and the practitioner failed to obtain written authorisation for his conduct contrary to s 31 of the Act.
  7. In or about December 2005 and thereafter the practitioner breached his fiduciary duties and was grossly negligent in failing to advise Ms James that Empros was de-registered on 18 December 2005 at a time when Empros had not repaid all of the principal to the estate and continuing to purport to renew the loan.
  8. In or about December 2005 the practitioner acted in breach of his duty to the estate by allowing Empros to be de-registered for failing to pay an annual registration fee, and did not seek to have Empros re-instated in circumstances where it had not repaid its debt to the estate.
  9. On an occasion or occasions that the Board is currently unable to particularise other than to say they occurred after April 2000, and that one fee of \$1,000 was deducted between April 2004 and June 2006, the practitioner breached his fiduciary duties as solicitor and executor by purporting on behalf of Empros to reduce the amount of principal owing to the estate by applying a \$2,000 "administration fee" as compensation for his time in dealing with matters relating to the investment.
  10. From about April 2001 until 2 March 2009 the practitioner has failed to maintain adequate records of payments of principal and interest to the estate by or on behalf of Empros or by the practitioner.
- 6 The unprofessional conduct alleged against the defendant arises from his administration of an estate in the matter of Di Salvo. When Mrs Di Salvo died on 9 June 1999 the practitioner obtained a grant of probate. The practitioner and Mrs Di Salvo's daughter, Mrs James, were the joint executors and trustees of Mrs Di Salvo's will. Mrs James and her children were also the beneficiaries of the estate. The practitioner suggested to Mrs James that they should invest \$50,000 from the estate in a company called Empros. The practitioner was a director and shareholder of that company but he did not inform Ms James of that fact.

7 The details of the alleged investment were not properly documented but in essence the amount of \$50,000 was invested by Ms James for a term of 12 months at a rate of 10% interest. Ms James later complained to the Board alleging that moneys were outstanding and that the practitioner had defaulted and was delaying her when she asked for repayment.

8 When the matter was dealt with by the Tribunal there was a dispute as to how much remained unpaid. Whilst the Board alleged that the amount unpaid was some \$25,884.87 the practitioner maintained through his counsel that the amount unpaid was closer to \$4,000. However, the practitioner had not kept sufficient records to establish that the amount outstanding was only \$4,000. The best the practitioner could do was to establish that he was potentially liable for \$16,999.48.

9 The practitioner maintained that he did not deliberately act in contravention of his professional and fiduciary duties and ultimately the Tribunal was unable to conclude that the allegation of deliberate breach was made out. The Tribunal believed that the practitioner may well have been ignorant of his obligations.

10 Given the insufficient recording of repayments made by the practitioner, the Tribunal was unable to calculate how much was outstanding. The Board's position at that time was summarised in the Tribunal's finding as follows:

(a) the amount outstanding as at April 2010, taking into account interest at the rate of 10% with annual rests, and not taking into account the additional cash payments made by the practitioner as referred to in his affidavit sworn 21 January 2001 was \$25,884.87; and

(b) making the same assumptions but taking into account the additional cash payments referred to in the practitioner's affidavit sworn 21 January 2011, the sum outstanding is \$16,999.48.

11 The Tribunal found that the true indebtedness was likely to be somewhere between those two amounts. The practitioner was found guilty of unprofessional conduct and the Tribunal recommended that disciplinary proceedings be commenced in the Supreme Court.

12 Gray J in his reasons summarised the seriousness of the practitioner's conduct in paragraph [16] as follows:

[16] The gravamen of the practitioner's conduct in respect of the estate of Di Salvo may be summarised as follows:

- The practitioner applied trust monies for his own personal benefit in his business activities in the operating of a nightclub.
- The practitioner, in so doing, acted in gross breach of duty as a trustee.

- Apparently the practitioner obtained his co-trustee's agreement to the transaction without explaining to her that the transaction involved a breach of trust and without advising her to take independent legal advice.
- The monies applied by the practitioner in breach of trust were monies held in trust for an infant beneficiary of the estate.
- Totally inadequate records were kept with respect to the transaction.
- The advance was made without any form of security and without any independent appraisal of an appropriate interest return in such circumstances.
- The practitioner's breach of trust has continued to the present time, a period of almost nine years. This is notwithstanding the practitioner being on notice of the allegations for some years.
- In 2005, Empros Pty Ltd, the company to whom the practitioner had made the advance and in which, as earlier observed, he was the sole director and company secretary and held a third interest, was deregistered through non-payment of fees. Apparently, prior to deregistration its assets were liquidated producing, it is said, \$35,000. Instead of repaying immediately the balance of the loan into an appropriate trust investment, the practitioner elected to have the monies from the proceeds of the sale paid to another entity, Quick Fix Loans Pty Ltd. Apparently, the controller of that entity is the owner of the premises from which the practitioner conducts his legal practice.
- There was no appropriate loan documentation with respect to the advance of \$35,000 to Quick Fix Loans. The loan was expressed to be repayable from a deposit to be returned on a real property transaction. That did not occur. The loan has remained outstanding for almost four years. There has been no repayment of interest or principal. There is no documentation as to the terms of the loan.
- Apparently, it is said, the practitioner in about 2007 made enquiries of his landlord, the controller of Quick Fix Loans Pty Ltd, as to whether Quick Fix Loans could repay the debt. Repayment did not eventuate but instead the practitioner was relieved from paying rent in respect of his office premises for a substantial period.

13 I adopt this summary as an accurate record of the practitioner's unprofessional conduct.

#### **The practitioner's details**

14 When the matter came before the court the practitioner was 60 years of age having been admitted as a practitioner in April 1975. In 1979 he operated his own firm of solicitors and that continued until the suspension imposed by Gray J. He has had a chequered history in that there are eight previous instances where he has been dealt with by the authorities for various matters. These include a criminal conviction involving unprofessional conduct. The practitioner admitted a sexual offence with a female work experience student in his office. She was a

minor when subjected to the practitioner committing an act of gross indecency. In addition there were a number of instances of unprofessional conduct where the practitioner exhibited an ignorance or disregard of the obligations of a practitioner, including negligence and dishonesty. He was dealt with by the Tribunal in 1993 for offences of dishonesty which included occasions where the practitioner had misled the court.

15 There is no need to say that this latest matter involving his misuse of funds in the estate of Di Salvo amounts to a case of gross unprofessional conduct. It is a very serious matter.

16 Mr Rochow SC, who appeared for the practitioner, made submissions to highlight the positive steps the practitioner has taken. He submitted that he should be given credit for his co-operative attitude towards the authorities. The reason for such submissions was to potentially leave open the question of his possible future readmission of the practitioner as a practitioner of the Court.

17 Mr Rochow asked the Court to take into account the admissions made by the practitioner before the Tribunal regarding each of the particulars laid by the Board and his further admission that he agreed that he had engaged in unprofessional conduct. Whilst it is true that he has co-operated with the authorities, the fact is that the evidence against him was compelling.

18 Mr Rochow pointed out that the practitioner did not oppose the recommendation from the Tribunal that disciplinary proceedings be commenced against him in this Court and finally he has not opposed the order to have his name removed from the roll of practitioners.

19 In addition the practitioner has been able to make restitution in part. However, it is clear from the information before the Court that he is unable to make further contributions due to his impecunious situation at the present time. The fact is that there is still a substantial amount outstanding and there is little hope of that being recouped.

20 Bearing in mind that this Court cannot bind any future courts in relation to any application by the practitioner for re-admission, it is my view that the combination of the serious offending in this matter, together with the unfortunate previous history of unprofessional conduct and the fact of a lack of full restitution, would make such an application a difficult one. Mr Rochow acknowledged that it could not even be considered until complete restitution was made.

21 The order for striking off was made on 7 November 2011. I now publish my reasons.

22 **KELLY J:** I agree with the reasons of Anderson J.

- 23 **STANLEY J:** I have read the reasons of Anderson J. I have nothing further to add to those reasons.