

COPY

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v POTTER

[2012] SASFC 83

Judgment of The Full Court

(The Honourable Justice Vanstone, The Honourable Justice Anderson and The Honourable Justice Blue)

12 July 2012

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT - NEGLIGENCE AND DELAY

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

Application to strike practitioner's name from Roll of Legal Practitioners – practitioner does not oppose application – inordinate delay in the administration of one estate – practitioner failed to comply with Board's notice to produce file in relation to two estates – failure to co operate with Board's investigation – failure to lodge trust account audit report and to comply with Board's notice requiring a report concerning that failure.

Held: name of practitioner struck off the Roll of Legal Practitioners – practitioner guilty of substantial and recurrent failure to meet requisite professional standard over a prolonged period.

Legal Practitioners Act 1981 (SA) s 5, s 33, s 76, s 82, s 84, s 89, referred to.

Johns v Law Society of NSW [1982] 2 NSWLR 1; *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371; *Legal Practitioners Conduct Board v Nicholson* (2006) 243 LSJS 293; *Re Vernon*; *Ex parte Law Society of NSW* (1966) 84 WN (Pt 1) NW 136; *The Law Society of South Australia v Jordan* (1998) 198 LSJS 434; *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456; *The Law Society of South Australia v Rodda* (2002) 83 SASR 541, considered.

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR S COLE - Solicitor: LEGAL PRACTITIONERS CONDUCT BOARD

Defendant: ADRIAN JOHN POTTER In Person

Hearing Date/s: 03/04/2012, 13/06/2012

File No/s: SCCIV-11-1621

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LEGAL PRACTITIONERS CONDUCT BOARD v POTTER
[2012] SASFC 83

Full Court: Vanstone, Anderson & Blue JJ

1 **THE COURT:** In this matter, the Legal Practitioners Conduct Board seeks an order that the name of the defendant, Adrian John Potter, be struck off the Roll of Legal Practitioners pursuant to s 89(2)(d) of the *Legal Practitioners Act 1981* (SA) (“the Act”). This follows a recommendation by the Legal Practitioners Disciplinary Tribunal pursuant to s 82(6)(a)(v) and s 89(1) of the Act that disciplinary proceedings be commenced against the practitioner in this Court. The practitioner does not oppose the order sought by the Board.

2 At the conclusion of the hearing of the appeal on 13 June 2012, we made an order that the name of the practitioner be struck off the Roll of Legal Practitioners and indicated that we would subsequently provide reasons.

The charges

3 The relevant charges of unprofessional conduct laid by the Board against the practitioner can be summarised as follows:

1. Inordinate delay in the administration of the estate of Merna Merrick (of which the practitioner was the executor trustee and solicitor) and inadequate communication with the beneficiaries from June 1997 to August 2008 (when the charge was laid) and continuing.
2. Failure to comply with a notice given by the Board on 26 May 2006 pursuant to s 76 of the Act requiring production of his file in relation to his administration of the estate of Merna Merrick.
3. Failure to comply with notices given by the Board on 24 October 2008 pursuant to s 76 of the Act requiring a written report and production of his file concerning the administration of the estate of Reta Moriarty (for which he had been the solicitor) and failing to co-operate with the Board’s investigation concerning his conduct in relation thereto.
4. Failure to lodge a trust account audit report for the financial year 2005/06 and to comply with a notice given by the Board on 31 May 2007 pursuant to s 76 of the Act requiring a written report concerning that failure.

The Practitioner

4 The practitioner is 62 years of age. In December 1987 he was admitted as a practitioner of the Court. He was then 37 years old. He had previously worked as a land salesman and conveyancer. Following his admission, he worked as an employed solicitor at Knox and Hargrave.

5 In 1992, the practitioner commenced practice on his own account from an office in the city. In 1998 he moved his practice to his home in Woodside. It appears that he wound back his practice after commencing to practice from home. In late 1999, he informed the Court that he intended to cease practice and surrendered his practising certificate with effect from January 2000.

6 In July 2001, the practitioner applied for and was granted a new practising certificate, and held a practising certificate until November 2006, when it was suspended due to his failure to lodge a trust account audit report for the 2005/2006 financial year. He has not held a practising certificate since that time. He informed the Tribunal that he does not intend to return to the practice of law.

Merrick Estate

7 Merna Merrick died in November 1995. Under her will, the practitioner was appointed her executor and trustee. Her will provided that he was entitled to charge for both professional and other services in the administration of the estate.

8 Under her will, Merna left her house in Port Augusta (valued at \$27,500) to her three youngest children and the residue of her estate (valued at about \$65,000) to all seven of her nine children living at the time she made her will. One of those seven named children died before Merna and that daughter's four children in turn became entitled to her share *per stirpes*.

9 The administration of the estate ought to have been relatively straightforward and completed within a relatively short time.

10 In relation to the house property, the only steps that the practitioner was required to take were to apply to the Registrar-General for a replacement duplicate certificate of title (because the original could not be located) and lodge for registration a transmission of the property and a transfer to the three specified beneficiaries. This ought to have been done at the very latest by June 1997 as the Board contends. However, the practitioner did not lodge the transfer to the three specified beneficiaries until 2004, being over eight years after Merna's death. The practitioner has not provided an accounting to the beneficiaries in respect of the expenses incurred in connection with the house property (which he was required to account for separately from those to be borne by the residual estate).

11 The beneficiaries requested that the estate arrange and pay for a headstone to be erected at Merna's grave. While this involved consultation with the ten residual beneficiaries, it ought to have been achieved at the very latest by June 1997 as the Board contends. The practitioner did not effect the engraving and erection of a headstone until 2005, being almost ten years after Merna's death.

12 The assets in the residuary estate comprised approximately \$58,000 which was already held by the practitioner in trust for Merna at the date of her death, together with miscellaneous assets totalling in value about \$9,000. The practitioner has not provided an accounting to the beneficiaries in respect of the

collection of the miscellaneous assets (or the incurring and payment of expenses out of the residuary estate). In May 1996, the practitioner made an interim distribution of \$42,000 to the residuary beneficiaries. It appears that later in 1996 he made selective additional distributions of \$1,000 each to only two of the ten residual beneficiaries. At the time of the last hearing before the Tribunal in July 2011, the practitioner retained in his trust account approximately \$6,000 on behalf of the estate. However, he has not provided an accounting to demonstrate that this is the true balance of the funds of the estate or the receipts and payments which have given rise to it. Assuming that the house property and the headstone had been addressed, the residuary estate ought to have been distributed to the beneficiaries at the very least by June 1997 as the Board contends.

13 The estate as a whole ought to have been finalised by June 1997 as the Board contends.

14 In December 1998 and March 1999, Merna's youngest and eldest daughters, Lorraine and Marjory respectively, wrote to the practitioner expressing concern that the estate had not been finalised. In August 1999, solicitors for Marjory wrote to the practitioner to the same effect. The practitioner responded by making a selective distribution to Marjory of approximately \$1,000 and saying he would finalise the estate.

15 In February 2005, Marjory wrote to the Conduct Board complaining that the practitioner still had not finalised the estate. In March 2005, the Board wrote to the practitioner requiring his written response. Despite several reminders between April 2005 and March 2006, the practitioner did not provide a written response to the complaint.

16 In May 2006, the Board issued formal notices pursuant to s 76 of the Act requiring a written response to the complaint and production of his file by 16 June 2006. The practitioner provided his written response to the complaint on 29 June 2006 but did not produce his file to the Board. He thereby committed an offence contrary to s 76 of the Act.

17 In May 2007, the Board laid a charge before the Tribunal alleging unprofessional conduct by reason of the practitioner's failure to comply with the May 2006 notices. In July 2007, the Tribunal issued a summons pursuant to s 84(1)(b) of the Act requiring production of the file. It was produced by the practitioner in August 2007.

18 In May 2008, Lorraine made a complaint to the Board concerning *inter alia* the delay in finalising the Merrick estate. In June 2008, the Board wrote to the practitioner requiring his written response as to the current status of the administration of the estate. The practitioner did not respond despite several reminders. In October 2008, the Board issued a notice pursuant to s 76 of the Act requiring a written response. The practitioner did not comply. He thereby committed a further offence contrary to s 76 of the Act.

19 In August 2008, the Board laid a further charge before the Tribunal alleging unprofessional conduct by reason of the practitioner's failure to progress the administration of the estate with reasonable diligence and failure to provide an accounting to or maintain adequate communication with the beneficiaries. In December 2008, the Board laid a further charge before the Tribunal alleging unprofessional conduct by reason of the practitioner's failure to comply with the October 2008 notices.

20 In March 2009, the Tribunal commenced hearing the three charges. There were a series of 21 hearings before the Tribunal, the last of which was in July 2011. Over that period, under the close supervision of the Tribunal and the Board, the practitioner made some progress in locating missing documents and information relating to the estate, but still did not provide an accounting to the beneficiaries or finalise the estate.

21 Over the 16 year period of his administration, the practitioner engaged in only limited communication with the beneficiaries, failed to respond to a number of communications from the beneficiaries and failed to report progress or provide an accounting to them over most of the period.

Moriarty Estate

22 Reta Moriarty was one of Merna Merrick's daughters who predeceased her in December 1994. Under her will made in 1989, Reta appointed her youngest sister Lorraine and her then de facto husband (from whom she had separated by the time of her death) as executors and trustees. Reta left 75% of her estate to her former de facto husband and 25% to her nephew Elijah (Lorraine's son).

23 Reta's former de facto husband was not apparently located. Lorraine acted as executor and trustee. She retained the practitioner as solicitor for the estate.

24 The only significant asset of the estate was a townhouse, which was sold in June 1998 for approximately \$70,000. In September 1998, a distribution of \$10,000 was made to Reta's nephew Elijah. No distribution was made to Reta's former de facto husband (apparently because he had not been located).

25 As at July 2003, the estate comprised approximately \$53,000 which was held by the practitioner in a bank investment account. The practitioner purchased a bank cheque for that amount made payable to the executor Lorraine. He intended to give the bank cheque to her and leave her to finalise the estate herself. However, she did not receive the bank cheque and it is not clear that he sent it to her. In November 2004, the bank transferred the amount of the bank cheque into an unclaimed monies account.

26 At some point prior to May 2008, it became apparent to the practitioner that Lorraine had not received the bank cheque. The practitioner informed her that he had written a cheque but was unable to locate it.

27 In May 2008, Lorraine made a formal complaint to the Board about the delay in the finalisation of the Moriarty estate (as well as the Merrick estate). In June 2008, the Board wrote to the practitioner requiring his written response. Despite several reminders, the practitioner did not respond.

28 In October 2008, the Board issued formal notices pursuant to s 76 of the Act requiring his written response to the complaint and production of his file. He did not comply. He thereby committed an offence contrary to s 76 of the Act.

29 In December 2008, the Board laid a charge before the Tribunal of unprofessional conduct by reason of failing to respond to the notices and failing to co-operate in the Board's investigation.

30 The Tribunal commenced hearing of the charges in May 2009 (in conjunction with the other charges which had by then been laid). Over the course of several hearings, the practitioner was cross-examined by counsel for the Board. As a result of that cross-examination and subsequent enquiries, in about March 2011 it was ascertained that the bank cheque had been drawn in 2003 and gone into the bank's unclaimed funds account in 2004. Ultimately, the funds were paid by the bank to Lorraine as executor of the estate.

31 In the meantime, the estate had earned no interest on the funds of approximately \$53,000 for approximately eight years. In addition, the finalisation of the Estate was delayed over that period of eight years.

32 The practitioner has not been charged in respect of the delay in the administration and finalisation of the estate over the period 1995 to 2003, nor in respect of the delay from 2003 onwards in relation to the bank cheque. In the circumstances, we proceed on the basis that the practitioner was not guilty of unprofessional conduct in relation to the period between 1995 and 2008.

33 However, the practitioner was charged with failing to comply with the s 76 notices issued in October 2008 and with failing to co-operate in the Board's investigation. Co-operation by the practitioner and a prompt and satisfactory response would have resulted in the discovery that the bank cheque had not been presented and the saving of the further delay and apparent loss to the estate from 2008 to 2011.

Failure to lodge trust account audit report

34 The practitioner was required by s 33 of the Act to have his trust account audited by an approved auditor and submit it to the Court by 31 October in respect of each financial year.

35 The practitioner did not have his trust account audited in respect of the financial year ending 30 June 2006 and still has not done so. He thereby committed an offence contrary to s 33(1)(b) of the Act.

36 In February 2007, the Board wrote to the practitioner requiring an explanation for his failure to comply with s 33 of the Act. Despite reminders, he failed to respond. In May 2007, the Board served on him a formal notice pursuant to s 76 of the Act requiring a detailed report. The practitioner failed to comply. He thereby committed an offence contrary to s 76 of the Act.

37 In October 2007, the Board laid a charge before the Tribunal alleging unprofessional conduct by reason of his failure to cooperate with the Board's investigation and failure to comply with the s 76 notice.

Unprofessional conduct

38 "Unprofessional conduct" is defined by s 5 of the Act to mean, relevantly:

[A]ny 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.

39 In relation to the Merrick estate, the practitioner acted as executor and trustee of the estate in the course of, and in any event in connection with, his practice as a legal practitioner. Under the will which he drew, he was entitled to charge professional fees for his work in his capacity as executor and trustee as well as for his work in his capacity as solicitor for the executor and trustee. In October 1998, he rendered an account for his work to date as executor and trustee and solicitor and was paid out of estate funds.

40 The delay by the practitioner in the administration of the Merrick estate between 1997 and 2012 involves a gross failure to meet the standard of conduct observed by competent legal practitioners. It comprises both a substantial and recurrent failure to meet the requisite standard over an extremely prolonged period. Likewise, the failure to account to and communicate adequately with the beneficiaries involves substantial and recurrent failures to meet the requisite standard of conduct.

41 A psychiatric report obtained by the Board in April 2009 from Dr Tiller was tendered in evidence before the Tribunal. Dr Tiller diagnosed the practitioner as suffering from depression between November 1999 and February 2000 and from dysthymia in February 2001 and again between September and November 2006. The fact that a legal practitioner is suffering from depression is a factor which may be taken into account in making a determination whether the practitioner's conduct involves a substantial or recurrent failure to meet the requisite standard of conduct but, where the depression extends over a substantial period, the steps taken or not taken by the practitioner to seek assistance in the conduct of his or her practice over that period will be taken into account in making that assessment.¹ In the present case, the practitioner took no steps at all to seek

¹ *Legal Practitioners Conduct Board v Kerin* [2006] SASFC 393; (2006) 246 LSJS 371 at [19] and [23] per Gray J, [44] per White J (Duggan J agreeing).

professional assistance either by way of instructing another solicitor to act for him in his capacity as executor and trustee of the Merrick estate or by way of seeking assistance from the Law Society or others. Even if the periods during which the practitioner was suffering from depression or dysthymia were to be disregarded, the fact remains that the practitioner's failure to complete the administration of the estate extended for well over a decade and, on any view, involved a substantial and recurrent failure to meet the requisite standard of conduct.

42 The fact that the practitioner's failure to finalise the Merrick estate continued over the period from February 2005 to June 2006 while the Board was investigating his conduct exacerbates that conduct. The same applies to the period from May 2007 to July 2011 during which the Board was prosecuting charges against the practitioner in relation to the estate before the Tribunal and the Board, and the Tribunal were attempting to induce him to complete the administration and accounting in respect of the estate.

43 The failure of the practitioner, in contravention of s 76 of the Act, to produce to the Board his file relating to the Merrick estate in compliance with the Board's notice issued in May 2007 in itself comprises conduct involving a substantial and recurrent failure to meet the requisite standard of conduct. A legal practitioner commits a serious offence in contravention of s 76 if he or she fails to comply with a formal notice issued by the Board. In this case, the practitioner's failure to comply with the notice extended over a period of 16 months from June 2007 to October 2008, and the practitioner only ultimately produced his file in response to a subpoena issued by the Tribunal.

44 The practitioner's failure to comply with the Board's notices issued in October 2008 in relation to the Moriarty estate involved the commission of further offences in contravention of s 76 of the Act. The practitioner failed to provide a written response to Lorraine's complaint and failed to produce his file in relation to the Moriarty estate. He has never remedied that breach. This constitutes another clear case of unprofessional conduct committed by the practitioner.

45 In *The Law Society of South Australia v Jordan*,² this Court made the following remarks which are equally apposite in the present case:

A practitioner whose conduct is the subject of an inquiry by the Board has a duty to assist the Board in its enquiries.³ That does not mean that the solicitor must disregard his own interests. But it does mean that there is an obligation upon the solicitor to respond to reasonable requests for information, particularly when one takes into account the fact that often the solicitor will have a better knowledge and understanding of the matter, the subject of the complaint, than will the client who complains. In the present case,

² [1998] SASC 6809; (1998) 198 LSJS 434 at 476 per Doyle CJ (Millhouse and Nyland JJ agreeing).

³ *Johns v Law Society of NSW* [1982] 2 NSWLR 1 at 6; *Re Veron; Ex parte Law Society of NSW* (1966) 84 WN (Pt 1) (NSW) 136 at 141-142.

Mr Jordan fell a long way short of meeting his obligation. By his conduct Mr Jordan has delayed, and to some extent frustrated the Board in its attempts to deal satisfactorily with the complaints made to it. I consider that his conduct manifests a plain disregard, over a sustained period, of his professional obligations when dealing with the Board ...

46 Before the Tribunal, it was agreed that the practitioner failed to submit an audit report to the Court in respect of the 2005/2006 financial year and thereby contravened s 33(1)(b) of the Act. It was agreed that this conduct would be taken into account notwithstanding that it was not the subject of a charge by the Board.

47 The practitioner contravened s 76 of the Act by failing to provide a written report in relation to his failure to submit an audit report in response to the Board's formal notice issued in May 2007. The practitioner has not rectified that contravention. This conduct in itself constitutes unprofessional conduct, as does the continuing failure to lodge the audit report itself.⁴

Other charges

48 In addition to the charges addressed above, the charge by the Board in May 2007 alleging unprofessional conduct relied in part upon the practitioner's failure to comply with the notice requiring a written response to Marjory's complaint by 16 June 2006. The practitioner provided that response on 29 June 2006. The delay of 13 days does not constitute unprofessional conduct, and we disregard it for the purposes of determining the Board's application.

49 The Board's August 2008 charge alleging unprofessional conduct relied in part upon an allegation that the practitioner practised the profession of the law between January and July 2000 when he did not hold a practising certificate. The practitioner contested this charge before the Tribunal and the Tribunal did not make a finding whether his conduct over that period comprised unprofessional conduct. In light of the other charges in respect of which we have concluded that the practitioner is guilty of unprofessional conduct and that in all of the circumstances his name ought to be removed from the Roll of Practitioners, it is unnecessary to make a determination whether or not he practised without a practising certificate in 2000 and thereby engaged in unprofessional conduct.

Some additional observations

50 The practitioner was not charged in respect of the delay in the administration and finalisation of the Moriarty estate over the period 1995 to 2003, nor in respect of the delay from 2003 onwards in relation to the bank cheque. While the Attorney-General's consent was required before the Board could lay a charge involving conduct occurring more than 5 years previously, it is not clear why the Board did not seek the Attorney-General's consent in respect of the practitioner's conduct prior to 2003. It is also not clear why the Board did not lay a charge in respect of the practitioner's conduct between 2003 and 2008,

⁴ *The Law Society of South Australia v Jordan* (1998) 198 LSJS 434 at 477 per Doyle CJ (Millhouse J and Nyland J agreeing).

nor why the Board did not seek to subpoena the practitioner's file. In general, if the Board forms a view that a practitioner has engaged in unprofessional conduct, it is preferable that the Board lays charges in respect of the substantive conduct and not just the practitioner's failure to comply with the Board's investigatory notice issued pursuant to s 76 of the Act.

51 Before the Tribunal, it was agreed that the practitioner's failure to submit an audit report to the Court in respect of the 2005/2006 financial year would be taken into account notwithstanding that it was not the subject of a charge by the Board. We observe that, if the Board forms a view that a practitioner is guilty of unprofessional conduct, it is generally preferable that charges be laid before the Tribunal as opposed to requesting that that conduct be taken into account.

52 In its report, the Tribunal recommended that disciplinary proceedings be commenced against the practitioner in this Court and thereby implicitly found that the practitioner was guilty of unprofessional conduct. However, the Tribunal did not expressly state that it made such a finding and did not explicitly identify which of the charges alleging unprofessional conduct it upheld. In cases in which the Tribunal recommends that disciplinary proceedings be commenced in this Court, the Tribunal ought to set out its relevant findings of fact, identify by reference to those findings the conduct which it upholds as constituting unprofessional conduct and provide reasons for that conclusion. The Court often relies to a greater or lesser extent on the analysis by the Tribunal of the facts which are alleged to constitute unprofessional conduct and its reasons for its findings. Section 89(5)(a) of the Act expressly provides that the Court may, without further inquiry, accept and act on any findings of the Tribunal. In *The Law Society of South Australia v Rodda*,⁵ Doyle CJ said that the enquiry by the Tribunal under s 82 of the Act should ensure that the issues are properly investigated and that all relevant facts are fully investigated. In the present case, while the Tribunal did not make explicit findings, it is clear on the evidence before the Court that the conduct of the practitioner comprised unprofessional conduct.

53 Since the institution of the disciplinary proceedings in this Court, the practitioner has co-operated in the assumption of jurisdiction by the Court over the Merrick and Moriarty estates with a view to giving directions for the finalisation of those estates. It is expected that those estates will be finalised in the next three months. We have noted the practitioner's co-operation in this respect.

Appropriate orders

54 The Board contends that, in all of the circumstances, the only appropriate order which ought to be made by this Court is an order that the name of the practitioner be struck off the Roll of Legal Practitioners.

⁵ [2002] SASC 274; (2002) 83 SASR 541.

55 In *The Law Society of South Australia v Murphy*,⁶ this Court said:

In dealing with a charge of unprofessional conduct, the Court acts in the public interest, and not with a view to 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 ...

By allowing a practitioner to remain on the role of practitioners, the Court holds the practitioner out as a fit and proper person to practise.

56 In the present case, there is no suggestion by the Board that the practitioner's conduct involved any personal gain or bad faith. However, the fact remains that he persistently engaged in conduct involving substantial and recurrent failures to meet the requisite standard of conduct over a period well in excess of a decade. That conduct was engaged in notwithstanding encouragement by both the Board and the Tribunal over a number of years to complete the administration of Merrick estate and facilitate the completion of the administration of the Moriarty estate. That conduct encompassed the commission of an offence in contravention of s 33(2) of the Act and three offences in contravention of s 76 of the Act. That conduct included failures by the practitioner to respond to formal notices issued by the Board pursuant to s 76 over periods ranging from one to four years.

57 The practitioner has not held a practising certificate for over four years, is now 62 years of age and does not intend to return to the practice of the law. In these circumstances, alternative orders such as suspension from practice or practising under supervision are inapplicable. Taking this into account in conjunction with the nature and extent of the unprofessional conduct and the fact that the practitioner does not oppose an order striking his name from the Roll of Practitioners, the only appropriate order is that the name of the practitioner be struck off the Roll of Practitioners. We so order.

⁶ [1999] SASC 83; (1999) 201 LSJS 456 at 460-461 per Doyle CJ (Millhouse J and Prior J agreeing); see also *Legal Practitioners Conduct Board v Nicholson* [2006] SASC 21; (2006) 243 LSJS 293 at [27] per Doyle CJ (Perry J and White J agreeing) and *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371 at [20] per Gray J.