

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment. The onus remains on any person using material in the judgment to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court in which it was generated.

LEGAL PRACTITIONERS CONDUCT BOARD v VISCARIELLO

[2013] SASCF 37

Judgment of The Full Court

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

21 May 2013

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

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

Order sought by the Legal Practitioners Conduct Board that the practitioner's name be removed from the roll of legal practitioners - where practitioner was charged with unprofessional conduct in engaging in conduct to defeat an adverse costs order, and falsely and dishonestly giving evidence in the Supreme Court - where the Legal Practitioners Disciplinary Tribunal found the practitioner guilty of unprofessional conduct in respect of both events - whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court upon whose roll the practitioner's name presently appears.

Held: Name of the practitioner, John Viscariello, to be removed from the roll of legal practitioners - the practitioner is not a fit and proper person to be entrusted with the important duties and responsibilities of a practitioner - a period of suspension would not afford adequate protection to the public.

Moyes & Anor v J & L Developments Pty Ltd & Anor (No 2) [2007] SASC 261; *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467; *Viscariello v Legal Practitioners Conduct Board (No 2)* [2013] SASCF 27; *The Minister for Justice and Attorney-General v A T Brown* (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies and Demack JJ, 11 June 1993); *Viscariello v Legal Practitioners Conduct Board* [2012] SASCF 147; *A Solicitor v Council of the Law*

**Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR RJ WHITINGTON QC WITH
MS G WALKER - Solicitor: LEGAL PRACTITIONERS CONDUCT BOARD**
**Defendant: JOHN VISCARIELLO Counsel: MR R KENDALL QC - Solicitor: COMMERCIAL
GENERAL LAW**

Hearing Date/s: 06/05/2013

File No/s: SCCIV-12-607

A

Society of New South Wales (2004) 216 CLR 253; *The Attorney-General and Minister for Justice v Gregory* [1998] QCA 409; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204; *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401; *Legal Practitioners Conduct Board v Lind* (2011) 110 SASR 531; *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655; *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279; *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145; *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371; *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454; *The Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72; *In Re A Practitioner* (1984) 36 SASR 590, considered.

LEGAL PRACTITIONERS CONDUCT BOARD v VISCARIELLO
[2013] SASCF 37

Full Court: Gray, Sulan and Blue JJ

THE COURT.

1 The Legal Practitioners Conduct Board seeks an order that the practitioner's name be removed from the roll of legal practitioners.

2 The practitioner, John Viscariello, was charged by the Legal Practitioners Conduct Board with unprofessional conduct. It was alleged that he engaged in conduct in an attempt to defeat an adverse costs order made against J & L Developments Pty Ltd, and falsely and dishonestly gave evidence in this Court on 1 December 2006 before Debelle J in the matter of *Moyes & Anor v J & L Developments Pty Ltd & Anor (No 2)*.¹ In the course of his reasons, Debelle J observed:²

Mr Viscariello was a most unsatisfactory witness. His answers were at times inconsistent with one another. His demeanour in the witness box was most unconvincing. More significantly, he did not produce any documentary evidence to support his assertions. He did not produce any minutes, financial returns or other records of either J & L Developments or of the Stirling Property Trust other than the trust deed, the deed amending it and the contract to purchase 33 Birch Road. There was no document to verify his assertion that J & L Developments was not acting as trustee of the Stirling Property Trust when it made the application for development consent or conducted the appeals thereafter. It was quite apparent that his evidence was of a self-serving kind designed to provide an *ex post facto* version of the facts for the purpose of defeating any liability for costs. Apart from these considerations, other evidence and the objective facts belie his assertions. When the facts are viewed as whole, it is quite apparent that his evidence was as contrived as it was dishonest.

3 The charges arose out of the purchase of land in Stirling by J & L Developments, a company of which the practitioner was, at various times, a director and shareholder, and the subsequent litigation arising from the proposed development of that land. It was not in dispute that the practitioner's conduct in relation to the underlying factual matters was in the course of, or in connection with, legal professional practice.

4 The Legal Practitioners Disciplinary Tribunal found the practitioner guilty of unprofessional conduct in respect of both events. The Tribunal was satisfied to the requisite degree that the practitioner lied to Debelle J in giving evidence in this Court and lied to the Tribunal in giving evidence in the course of the inquiry by, in effect, repeating his false evidence.

¹ *Moyes & Anor v J & L Developments Pty Ltd & Anor (No 2)* [2007] SASC 261.

² *Moyes & Anor v J & L Developments Pty Ltd & Anor (No 2)* [2007] SASC 261, [16].

- 5 In reaching its conclusions, the Tribunal held that it was satisfied that the practitioner did not:

...tell [the Tribunal] the truth in giving sworn evidence before [the Tribunal] on the topic of whether or not J & L Developments was acting in its own right or as trustee of the trust for the purpose of the development at Birch Road, Stirling, and in particular for the purpose of lodging a development applications [sic] with Council and pursuing a subsequent appeal.

The Tribunal further held that the practitioner had not acted honestly, as he took certain steps in relation to the Stirling Property Trust:

...as an intended and deliberate course of conduct with the objective of defeating any adverse costs orders against J & L Developments. Those actions were done in the course of, and in connection with, practice by the practitioner. Those actions amount to unprofessional conduct.

The Tribunal concluded that the practitioner's evidence in this Court on 1 December 2006 was given falsely and dishonestly and that:

...the practitioner lied to Debelle J, and he lied to [the Tribunal]. ... In [the Tribunal's] opinion, there was nothing inadvertent about the wrongful statements made to Debelle J, or to [the Tribunal]. The practitioner knew that they were not true at the time of making the statements.

- 6 The practitioner appealed against the findings of the Tribunal in separate proceedings. On 21 December 2012, this Court dismissed the practitioner's appeal, concluding that no error had been made by the Tribunal in reaching its earlier referred to conclusions.³ The practitioner applied to reopen the appeal. On 12 April 2013, this Court dismissed the application.⁴

- 7 Counsel for the practitioner advised the Court that the practitioner proposed to seek special leave to appeal to the High Court with respect to this Court's dismissal of the application to reopen the practitioner's appeal. The Court was provided with a draft of the proposed application for special leave. The practitioner applied to adjourn the hearing of the Board's application for an order striking the name of the practitioner from the roll of legal practitioners.

- 8 During the hearing of the application, the Court suggested that the application for a stay could be viewed as premature. The Court suggested that an appropriate procedure that could be followed was to hear the parties' submissions with regard to the strike off application and that, at the time of judgment, the application for a stay could be pursued. The Court could then determine whether to grant a stay with respect to the orders to be made. In the event that the Court was not prepared to grant a stay, a short stay could be granted to enable the practitioner to apply to the High Court for a stay. It was intimated that the Court would make available to the parties its reasons and proposed orders on the

³ *Viscariello v Legal Practitioners Conduct Board* [2012] SASCF 147.

⁴ *Viscariello v Legal Practitioners Conduct Board (No 2)* [2013] SASCF 27.

Board's application and would hear any further submissions on consequential matters before publishing its reasons and making formal orders.

9 Counsel for both parties agreed that the proposed procedure was appropriate in the circumstances. The application for a stay at this time was not pressed.

10 The conduct as found by the Tribunal of unprofessional conduct is most serious. The giving of false evidence is at the heart of the relationship between the practitioner and the Court.

11 The ultimate issue for the Court where an order for striking off is sought is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court.⁵

12 The Court's primary concern is the public interest; not the punishment of the practitioner. The public interest includes the maintenance of public confidence in the legal profession and the protection of the public from unprofessional and dishonest practitioners.⁶ Honesty and candour with the courts, clients and fellow practitioners are fundamental elements of a practitioner's entitlement to practice.⁷ The following observations were made in *Legal Practitioners Conduct Board v Phillips* when addressing a case of dishonest conduct by a practitioner:⁸

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 public confidence in the legal profession. There is a need to protect the public from unprofessional and dishonest practitioners. The public must be protected from legal practitioners who are ignorant of the basic rules of proper professional practice or indifferent to rudimentary professional requirements.⁹

13 The practitioner's unprofessional conduct has been addressed in the Tribunal's findings and in our dismissal of the practitioner's appeal. It is convenient to repeat our summary of the practitioner's unprofessional conduct from our decision in *Viscariello v Legal Practitioner's Conduct Board (No 2)*:¹⁰

⁵ *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, [15]; *The Attorney-General and Minister for Justice v Gregory* [1998] QCA 409, [2].

⁶ *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467, [43].

⁷ *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204, 230; *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401, [66]; *Legal Practitioners Conduct Board v Lind* (2011) 110 SASR 531, [14]-[15]; *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 682; *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 284; *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145, [59].

⁸ *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467, [43].

⁹ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 at 201.

¹⁰ *Viscariello v Legal Practitioners Conduct Board (No 2)* [2013] SASFC 27, [8]-[9].

In our decision on the appeal published on 21 December 2012, we sustained the Tribunal's conclusion that Mr Viscariello was guilty of unprofessional conduct. On the first count we concluded:¹¹

Conclusion – 2004 events

No error has been demonstrated in the Tribunal's finding that Mr Viscariello made the June 2004 amendment to clause 20(b) of the Stirling trust deed for the purpose of attempting to defeat adverse costs orders against J & L Developments in the development approval litigation. No material error has been demonstrated in the reasoning of the Tribunal. The findings made by the Tribunal were open to it.

We would go further. On the evidence before the Tribunal, the conclusion was overwhelming that this was Mr Viscariello's purpose. Mr Viscariello unequivocally admitted in his evidence before Debelle J on 1 December 2006 and his letter to the Board dated 23 November 2007 that the change to clause 20(b) of the trust deed was motivated by the forthcoming hearing of the appeal before Debelle J. His evidence in this respect before the Tribunal was both internally inconsistent and contrary to those earlier accounts in December 2006 and November 2007.

It was not in issue that the above conduct occurred whilst Mr Viscariello was acting as solicitor for J & L Developments and that if the allegations were established the conduct amounted to unprofessional conduct.

In regard to the second count of unprofessional conduct, we concluded:¹²

Mr Viscariello complained that the Tribunal erred in concluding that the evidence given by Mr Viscariello on 1 December 2006 was given falsely and dishonestly. This complaint has been addressed above. We repeat our rejection above.

It follows that, if the Tribunal did not err in reaching its conclusion that J & L Developments under the control of Mr Viscariello had not been acting in its own right in lodging the development application and in the subsequent appeals, the evidence which he gave to that effect on 1 December 2006 was knowingly false. As his evidence concerned his own state of mind as controller of J & L Developments, there is no room for any contention that his evidence was honest but mistaken.

The fundamental premise of Mr Viscariello's evidence was that, in or before March 2003, he was concerned to ensure that the Stirling property be insulated from any claims if liabilities incurred by J & L Developments in the development of the house on the Stirling property, including any liabilities incurred by reason of the application for development approval and any subsequent litigation. His evidence was that he decided that J & L Developments would undertake the entirety of the development in its own right to insulate the Stirling property from any such liabilities. He decided that it would be agreed between J & L Developments in its own right and J & L Developments as trustee of the Stirling Trust that J & L Developments would develop the property on the basis that it would earn a profit margin in so doing. If Mr Viscariello had so decided, it would have been vital for him to document the decision and arrangements so that, in any

¹¹ *Viscariello v Legal Practitioners Conduct Board* [2012] SASCFC 147, [122]-[123].

¹² *Viscariello v Legal Practitioners Conduct Board* [2012] SASCFC 147, [172]-[178].

future dispute, the position would not depend upon his mere assertion as to his intentions. To achieve the very purpose which he said he had, he would have prepared a document or documents and executed them on behalf of J & L Developments in its own right and J & L Developments as trustee of the Stirling Trust. He would have ensured that the existence and execution of the documents was verified by a third party such as submitting the documents to the Stamp Duties Office for stamping. He would also have decided what consideration was payable by the Stirling Trust to J & L Developments for undertaking the development and on what terms.

Mr Viscariello took none of these steps. His evidence was that he never determined the consideration that Stirling Trust would pay to J & L Developments. There never was any agreement between J & L Developments and the Stirling Trust for the payment of such consideration. It did not convene a meeting of directors of J & L Developments or prepare minutes of a meeting recording the decision or any agreement. His own conduct belies the evidence which he gave before DeBelle J and the Tribunal.

Mr Viscariello's subsequent conduct in mid-2004 in changing clause 20(b) of the Stirling trust deed, in mid-2006 in changing the trustee of the Stirling Trust and in September 2006 in deposing to the grounds of opposition to the charging order without mentioning J & L Developments having acted in its own right also belies his evidence.

No error has been demonstrated in the Tribunal's finding that J & L Developments acted in its capacity as trustee of the Stirling Trust and not in its own right in lodging the application for development approval and in relation to the subsequent appeals. No material error has been demonstrated in the reasoning of the Tribunal. The findings made by the Tribunal were open to it.

We would go further. The evidence before the Tribunal was overwhelming. The conclusion that J & L Developments had not been acting in its own right, that Mr Viscariello belatedly advanced this contention in an attempt to defeat the charging orders being sought and that he gave false evidence before DeBelle J when he said that J & L Developments had been acting in its own right was open and should in our view be confirmed.

14 The practitioner's dishonesty before the Tribunal 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 the Tribunal.¹³

15 The conduct demonstrates that the practitioner lacks the qualities of good character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner. If the practitioner is to

¹³ *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371, [24]; *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454, [44], [63]; *The Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72, 78, 80; *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467, [34], [43].

be allowed to practise in the future, the Court must be satisfied that he is of good character.¹⁴ As this Court observed in *Re a Practitioner*:¹⁵

... A practitioner who thus betrays the trust and confidence reposed in him by his clients and his partners, and whose integrity is thus diminished, forfeits the right to practice for a substantial period of time; and the Court does not readily offer him a *locus poenitentiae*. It will need very cogent and convincing evidence to persuade the Court again to hold him out to the public as a practitioner worthy of implicit trust—not merely as one who is no longer subject to temptation, or as one who has suffered the penalty of his present lapse, but as one who demonstrably merits the confidence of the Court as a person once again able to bear the responsibilities of practice. That is a heavy onus to discharge, and its discharge ought not to be lightly undertaken. I am not to be understood as saying that the practitioner could never discharge that onus, but the penalty of suspension would assume for the future something which clearly ought to be proved.

- ¹⁶ Counsel for the Board drew the Court's attention to observations of the Queensland Full Court made in disciplinary proceedings in *The Minister for Justice and Attorney-General v A T Brown*.¹⁶ The Court was there concerned with the conduct of a legal practitioner who knowingly participated in a scheme to remove the business and assets of an incorporated body so as to avoid an adverse costs order. The scheme, to the knowledge of the practitioner, involved the backdating of agreements. The practitioner permitted deponents to swear affidavits containing false information and caused those affidavits to be filed in the Supreme Court and served on other interested parties. The Court concluded its reasons for ordering that the practitioner be struck off the roll of solicitors with the following observations:¹⁷

The matters proved against the respondent involved a deliberate and sustained course of grave misconduct which, partially at least, was directly aimed at misleading the Court.

Further, the respondent displayed absolutely no remorse. On the contrary, he gave evidence before the Statutory Committee which it did not accept, which attempted an elaborate explanation of what had occurred in an effort to diminish his culpability.

The inescapable conclusion is that the respondent is not "a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor". In *Re Weare*; In *Re The Solicitors Act 1888* (1893) 2 Q.B. 439, 448; *Southern Law Society v. Westbrook* (1910) 10 CLR 609, 612, 619. It is, in our opinion, impossible to conclude that a period of suspension affords adequate protection to the public from such serious dereliction of duty as is evident in the respondent's behaviour.

- ¹⁷ The Board submitted that, in the face of the deliberate and sustained course of professional misconduct found by the Tribunal, and the giving of false evidence as recently as December 2011, the only order that would afford

¹⁴ *In Re A Practitioner* (1984) 36 SASR 590, 593.

¹⁵ *In Re A Practitioner* (1984) 36 SASR 590, 593-4.

¹⁶ *The Minister for Justice and Attorney-General v A T Brown* (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies and Demack JJ, 11 June 1993).

¹⁷ *The Minister for Justice and Attorney-General v A T Brown* (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies and Demack JJ, 11 June 1993).

adequate protection to the public would be the striking off of the name of the practitioner from the roll of legal practitioners.

18 The Board further submitted that it was relevant for the purposes of these proceedings that Debelle J considered that the practitioner's evidence in this Court was of a "self-serving kind designed to provide an *ex post facto* version of the facts for the purpose of defeating any liability for costs. ... When the facts are viewed as [sic] whole, it is quite apparent that his evidence was as contrived as it was dishonest."¹⁸

19 Counsel for the practitioner emphasised that for the purposes of the submissions, there was an acceptance of the findings of unprofessional conduct without prejudice to the practitioner's earlier referred to application for special leave.

20 It was submitted that prior to the events giving rise to the findings of unprofessional conduct, the practitioner had enjoyed an unblemished reputation. Attention was drawn to three affidavits filed as to his otherwise good character. Two deponents were clients of the practitioner who spoke of their dealings with the practitioner and of finding him to be both competent and trustworthy. The other deponent was an experienced legal practitioner who attested to the practitioner's good character primarily as a client of the deponent, but also as to his good character as a member of the profession, albeit in circumstances of limited contact.

21 It was further submitted that the practitioner's unprofessional conduct arose out of acting in his own interests and those of his then domestic partner. The planning development application that gave rise to the adverse costs orders related to their home property, held in trust with the corporate entity J & L Developments as trustee. It was pointed out that this was not a case of the solicitor committing a fraud on an arms-length client or involving an arms-length client in any act of dishonesty.

22 The Court's attention was drawn to personal difficulties that the practitioner faced at the time of the hearing before Debelle J. The Court had been informed that the practitioner had, at that time, been under some personal pressure due to the death of a close family member. Further, on the day of giving evidence before Debelle J, the practitioner was called to attend as a matter of urgency from another court.

23 Counsel submitted that, following the Board's application that his name be struck off, the practitioner had been subject to restrictions on his ability to practice. An order had been made in that respect by a Judge of this Court. The Court was advised that there had been no suggestion of any misconduct by the practitioner since that time. Counsel submitted that this Court, in all the

¹⁸ *Moyes & Anor v J & L Developments Pty Ltd & Anor (No 2)* [2007] SASC 261, [16].

circumstances, should not order the removal of the practitioner's name from the roll of legal practitioners. It was said that an order restricting the practitioner's right to practice should be made.

24 The practitioner's misconduct was serious. Earlier in these reasons, we have referred to relevant authorities that address discreditable conduct. The need to maintain high professional standards has been emphasised. Ultimately, the protection of the public is the primary consideration.

25 For the Court to function effectively, practitioners must, at all times, be honest in their dealings with the Court. The Court relies on the honesty of its practitioners. Honesty and reliability allow the Court to proceed with confidence in its dealings with practitioners. Any erosion in that confidence undermines the system of justice. For these reasons, courts, both in this State and elsewhere, have treated dishonest conduct in dealings with the court as a very serious matter.

26 The practitioner engaged in a deliberate and sustained course of serious misconduct which, in part, involved misleading a Judge of this Court. He gave evidence before the statutory tribunal that was evasive and dishonest in an attempt to explain his conduct and to diminish his culpability. The practitioner has displayed no insight into his misconduct. These matters lead to the conclusion that the practitioner is not a fit and proper person to be entrusted with the important duties and responsibilities of a legal practitioner of this Court. A period of suspension would not afford an adequate protection to the public. Accordingly, the name of the practitioner is to be removed from the roll of legal practitioners.

27 In many ways, this is a sad case. The practitioner studied law at a mature age. He completed his law degree in 2001 and was admitted as a practitioner the following year. Prior to studying law, he had received a bachelor degree of applied science in building technology, a master degree of applied science in project management and a master degree of applied science in business administration. From 1978 to 1993, he worked in the building, construction and property development industry. From 1993 to 2001, he worked in the retail industry as a director and part-owner of numerous retail outlets. Following his admission to legal practice, he obtained a diploma from the Company Directors Course, conducted by the Australian Institute of Company Directors. The unprofessional conduct of the practitioner has tarnished his prior good record. We would not rule out the possibility of a successful application by the practitioner for re-admission at some time in the future.

28 The Court orders that the name of the practitioner, John Viscariello, be removed from the roll of legal practitioners.