

SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

LEGAL PRACTITIONERS CONDUCT BOARD v FIGWER

[2013] SASC 135

Judgment of The Full Court

(The Honourable Chief Justice Kourakis, The Honourable Justice Peek and The Honourable Justice Stanley)

23 August 2013

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT - GENERALLY

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

PROFESSIONS AND TRADES - LAWYERS - QUALIFICATIONS AND ADMISSION - FIT AND PROPER PERSONS

PROFESSIONS AND TRADES - LAWYERS - DUTIES AND LIABILITIES - GENERALLY

The Legal Practitioners Conduct Board applied to the Supreme Court for an order removing the practitioner from the Roll of Legal Practitioners. The practitioner did not oppose the application.

In support of its application, the Board invited the Court to adopt the findings of unprofessional conduct made by the Legal Practitioners Disciplinary Tribunal. The practitioner did not oppose this course.

The Legal Practitioners Disciplinary Tribunal concluded that a practitioner was guilty of unprofessional conduct and unsatisfactory conduct after hearing a number of complaints against him. The Tribunal's findings of unprofessional conduct related to numerous instances of dishonest conduct of the practitioner, along with the practitioner's failure to comply with regulatory requirements.

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MS F NELSON QC - Solicitor: LEGAL PRACTITIONERS CONDUCT BOARD

Defendant: MICHAEL ALEXANDER JOHN FIGWER Counsel: MR B J TREMAINE - Solicitor: B J TREMAINE, BARRISTER AND SOLICITOR

Hearing Date/s: 15/08/2013

File No/s: SCCIV-13-13

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Held (by the Court): The unprofessional conduct of the practitioner is serious. To protect the public, and to maintain the public's confidence in the proper regulation of the legal profession and the administration of justice, nothing less than striking off the practitioner's name from the Roll sufficed. [15].

Legal Practitioners Act 1981 (SA) s 89, referred to.

Legal Practitioners Conduct Board v Rowe [2012] SASCFC 144; *A Solicitor v Law Society (NSW)* 216 CLR 253; *In Re A Practitioner* (1982) 30 SASR 27; *Law Society of South Australia v Murphy* (1999) 201 LSJS 456; *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43; *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, considered.

LEGAL PRACTITIONERS CONDUCT BOARD v FIGWER
[2013] SASC 135

Full Court: Kourakis CJ, Peek and Stanley JJ

THE COURT:

Introduction

1 The Legal Practitioners Conduct Board (the Board) sought an order from the Court pursuant to s 89(2) of the *Legal Practitioners Act 1981* (SA) (the Act) striking the name of Michael Alexander John Figwer from the Roll of Legal Practitioners. That order was not opposed by the practitioner. Nonetheless, the Court was still obliged to determine whether the practitioner was a fit and proper person to remain on the Roll.¹ That question fell to be decided on the basis of the facts and circumstances as they existed at the time of the hearing, not at the time of the misconduct.²

2 In support of its application, the Board invited the Court to adopt the findings of unprofessional conduct and unsatisfactory conduct made by the Legal Practitioners Disciplinary Tribunal (the Tribunal) contained in two decisions of the Tribunal delivered on 28 October 2010 and 4 October 2012.³ The practitioner did not oppose this course.

3 At the conclusion of the hearing of the Board's application, the Court made the following orders:

1. That the practitioner's name be removed from the Roll; and
2. That the practitioner pay the Board's costs of and incidental to the application to the Court.

4 These are our reasons for making those orders.

Background

5 The Board brought three charges against the practitioner. The charges related to conduct by the practitioner over a lengthy period between September 2007 and October 2011. The Tribunal found the practitioner guilty of 12 counts of unprofessional conduct and one count of unsatisfactory conduct.

6 The practitioner's conduct which resulted in the Tribunal's findings included:

¹ *Legal Practitioners Conduct Board v Rowe* [2012] SASCFC 144 at [77] – [78].

² *A Solicitor v Law Society (NSW)* [2004] HCA 1 at [21], (2004) 216 CLR 253 at 268.

³ Section 89(5) of the Act.

- Failing to comply with regulatory requirements under the Act, namely, a failure to file an audit report, failure to keep an accurate and detailed account of trust monies, and misappropriation of trust monies;
- Engaging in conduct amounting to offences under the Act, namely, practising when suspended, failing to comply with a s 76(4a) notice, and misappropriation of trust monies;
- Failing to cooperate with the Law Society Professional Standards Department and the Board;
- Failing to progress a client matter in a competent and timely manner;
- Delay in payment of counsel's fees; and
- Acts of dishonesty including the dishonest retention of trust money, misleading counsel as to the reason for non-payment of counsel fees, making a misleading statement to a Federal Magistrate in the course of a hearing, and attempts to mislead the Board during the course of the Board's investigation.

Consideration

7 The Tribunal's findings in relation to the dishonest conduct of the practitioner is particularly concerning. The Tribunal found the practitioner acted dishonestly in dealing with counsel he had retained in relation to the payment of counsel's fees, in representations he made to the Board and the Tribunal in relation to this matter, and in submissions he made to the Federal Magistrates Court in relation to the availability of counsel. In addition, he acted dishonestly in misappropriating trust monies contrary to s 31(3) of the Act.

8 While the findings of dishonesty are very serious matters, there were additional concerns raised by the practitioner's conduct. The practitioner's failure to comply with regulatory requirements was found by the Tribunal to be deliberate rather than inadvertent. He provided no satisfactory explanation as to why he engaged in legal practice when his practising certificate was suspended. The Tribunal found that he did so in deliberate disregard of his knowledge that he was not entitled to do so as a matter of law. His failure to keep accurate and detailed accounts of trust monies also is extremely serious, having regard to the strict view the Court takes in relation to such breaches.⁴ The practitioner's conduct in failing to carry out his duties in a competent and timely manner, and his unreasonable delay in the payment of counsel's fees, constituted deliberate and serious breaches of his professional obligations.

9 We are satisfied that the conduct demonstrated in the 12 counts of unprofessional conduct, for which the practitioner was found guilty by the

⁴ *In Re A Practitioner* (1982) 30 SASR 27 per King CJ at 31.

Tribunal, constitutes serious professional misconduct. The issue before the Court was whether that unprofessional conduct was of such a character as to require the practitioner's name to be struck from the Roll. When exercising disciplinary powers, either pursuant to the Act or pursuant to the Court's inherent jurisdiction to discipline legal practitioners, the Court acts in the public interest to protect the public and the administration of justice. It is primarily concerned with protecting the public, not punishing the practitioner.

10 Section 89(2) of the Act confers a range of powers on the Court, from reprimand to striking off. The Court will prevent a person from acting as a legal practitioner by striking him or her off the Roll to protect the public, and in doing so, demonstrating that the person is, by reason of his or her conduct, not fit to remain a member of the profession that plays an important part in the administration of justice, and in which the public is entitled to place great trust.⁵

11 It is of the utmost importance that public confidence in the legal profession be maintained. Legal practitioners play an integral part in the administration of justice. The obligations which accompany a practitioner's position are commensurate with the responsibility involved. The duties of a legal practitioner include a duty to uphold the law, a duty to the Court, a duty to clients and a more general duty to members of the public. The Court and the public demand high standards from practitioners. This is reflected in the legislative processes that regulate the admission of practitioners and govern their conduct.⁶

12 It is important to recognise that, in exercising the powers conferred on the Court in disciplinary proceedings, the issue for the Court is whether the practitioner's unprofessional conduct demonstrates that he or she is not fit to remain a member of the legal profession. This requires consideration of what the High Court describes as "the whole position".⁷ Nevertheless, the primary focus must be on the unprofessional conduct. After all, the very reason the practitioner was subject to disciplinary action is because of his or her unprofessional conduct. As Fullagar J said in *Ziems v The Prothonotary of the Supreme Court of New South Wales*,⁸ in a different context, in considering whether a practitioner should be disbarred, the ultimate question is to be answered by establishing what the practitioner did and then characterising the conduct in order to determine whether he or she is disqualified from the practice of the profession. The practitioner's professional conduct, whether it preceded or succeeded the unprofessional conduct, while not an irrelevant consideration, is very much a secondary

⁵ *Law Society of South Australia v Murphy* [1999] SASC 83, (1999) 201 LSJS 456 at 460 – 461; *Legal Practitioners Conduct Board v Clisby* [2012] SASCF 43 at [5].

⁶ *Legal Practitioners Conduct Board v Lind* [2011] SASCF 104 at [14], (2011) 110 SASR 531 at 534.

⁷ *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1 at [18], (2004) 216 CLR 253 at 266.

⁸ [1957] HCA 46, (1957) 97 CLR 279 at 288.

consideration. The same point can be made in relation to the practitioner's personal circumstances and any other extenuating circumstances.⁹

13 In our view, the practitioner's misconduct represents a very significant departure from proper professional standards. The misconduct was not an isolated case. It occurred over a four-year period. The practitioner's conduct is such that, if tolerated, it would bring the legal profession into disrepute. The conduct amounted to an abuse of the privileges which accompany a practitioner's admission to this Court. There is a need to protect the public from unprofessional practitioners. The public must be protected from legal practitioners who are ignorant of the basic rules of proper professional practice, indifferent to rudimentary professional requirements, and unable to uphold the highest standards of honest conduct in dealing with fellow practitioners, professional regulatory bodies, the public and the courts. The proper administration of justice depends upon this basic requirement.

14 There are different but related public interests involved in the Court's exercise of its supervisory function. First, there is the protection of the public from practitioners whose past conduct demonstrates that they lack the qualities of character and competence essential to the practice of the profession of the law. Secondly, there is the obligation to maintain public confidence that professional standards are being upheld, and with that, the maintenance of the public's confidence in the mechanisms for supervising professional conduct. This Court sits at the apex of the structure established by the Parliament for that purpose. Ultimately, this Court must be satisfied that to permit the practitioner to remain in practice in the light of his proven and admitted professional misconduct, would not erode the public's confidence in those matters to which we have referred.

15 In this case, the practitioner no longer holds a practising certificate. Further, he indicated he no longer intends to practice the profession of the law. Nonetheless, we do not consider that is sufficient either to protect the public nor to maintain the public's confidence in the proper regulation of the legal profession and the administration of justice. Nothing less than striking off the practitioner's name from the Roll sufficed.

⁹ *Law Society of South Australia v Murphy* [1999] SASC 83, (1999) 201 LSJS 456 per Doyle CJ at 461.