

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v WARBURTON

[2014] SASCFC 65

Judgment of The Full Court

(The Honourable Justice Gray, The Honourable Justice Peek and The Honourable Justice Nicholson)

20 June 2014

**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**

**PROFESSIONS AND TRADES - LAWYERS - TRUST ACCOUNTS -
MONEY HELD IN TRUST**

Application by the Legal Practitioners Conduct Board to have the name of a legal practitioner removed from the role of practitioners. The practitioner was found by the Legal Practitioners Disciplinary Tribunal to have engaged in conduct which involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute. The relevant conduct related to the practitioner's failure to comply with court orders requiring him to pay \$20,000.00, which he held on trust, to an unrepresented opponent. The Tribunal further found that the practitioner disposed of the trust monies held for the benefit of the unrepresented opponent to another person, knowingly made false and misleading statements to the unrepresented opponent, and attempted to mislead the Board.

Held per Gray J (Peek and Nicholson JJ agreeing):

1. The admitted conduct demonstrates that the practitioner is not fit to remain a member of the profession.
2. The name of the practitioner is to be removed from the role of legal practitioners.

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

**Defendant: GRAHAM JOHN WARBURTON Counsel: MS F NELSON QC - Solicitor: DAVID DE
SCISCIO & ASSOCIATES**

Hearing Date/s: 28/05/2014

File No/s: SCCIV-13-881

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Legal Practitioners Act 1981 (SA) s 31 and s 82(6)(v), referred to.
The Law Society of South Australia v Murphy (1999) 201 LSJS 456; *Legal Practitioners Conduct Board v Nicholson* (2006) 243 LSJS 293; *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371; *Re a Practitioner* (1982) 30 SASR 27, considered.

LEGAL PRACTITIONERS CONDUCT BOARD v WARBURTON
[2014] SASFC 65

Full Court: Gray, Peek and Nicholson JJ

GRAY J.

1 This is an application to strike the name of a legal practitioner from the role
of practitioners.

2 Graham John Warburton was found by the Legal Practitioners Disciplinary
Tribunal to have engaged in conduct which involved a substantial failure to meet
the standard of conduct observed by competent legal practitioners of good repute.
The Tribunal found the practitioner guilty of unprofessional conduct as charged.
The Tribunal recommended that disciplinary proceedings be commenced against
the practitioner pursuant to section 82(6)(v) of the *Legal Practitioners Act 1981*
(SA). The Legal Practitioners Conduct Board has, pursuant to that
recommendation, brought proceedings in this Court seeking a strike off order.

3 The practitioner acted for a wife in proceedings in the Federal Magistrates
Court concerning a property settlement. The husband was unrepresented. An
agreement was reached that the family home be sold and that from the proceeds,
the husband be paid \$20,000.00. It was further agreed that the proceeds of sale
would be paid into the trust account of the practitioner, and that he would then
disburse those monies in accordance with the order of the Court. An order made
in the Federal Magistrates Court pursuant to the agreement recorded the
husband's entitlement to receive \$20,000.00.

4 It transpired that some expenditure was required to prepare the family home
for sale. The orders made in the Federal Magistrates Court did not provide for
the husband to pay the costs of any such expenditure. The Tribunal summarised
the subsequent conduct of the practitioner as follows:

When the practitioner wrote to the husband on the 22 July 2008 stating "we also will seek
a variation of the existing orders so that any money which needs to be spent on
contracting a tradesperson or trades people to bring the house up to a marketable state is
deducted from your share of the proceeds of sale" the practitioner was well aware that the
husband had no obligation to pay such costs.

When the practitioner wrote in his letter of the 4 December 2008 to the husband "if you
do not agree (to a deduction of \$10,000) we are instructed to bring an application to the
Federal Magistrates Court for contravention orders on the basis of your failure to comply
with the existing orders. In that case there will be a full assessment of the costs of such
failure which is likely to far exceed \$10,000", the practitioner was aware that he had no
entitlement to simply deduct sums from the husband's share of the proceeds without order
of the Court or agreement by the husband.

On the 20 December 2008 the practitioner recorded a conversation with the wife "Michael complained re money", the practitioner was aware that the husband was complaining about the money.

On the 12 March 2009, when the practitioner wrote to the husband enclosing a cheque for \$9,291.05, the practitioner failed to adopt the process he had advised in his previous correspondence that he would undertake namely a contravention application.

The practitioner was fully aware that the husband's entitlements pursuant to the order were to receive the sum of \$20,000. The practitioner knew that he had strict obligations pursuant to the order of the Court to pay the sum of \$20,000 to the husband.

The Tribunal's Findings

5 On the first count, the Tribunal found that the practitioner knowingly breached the order of the Federal Magistrates Court in making deductions from the sum due and owing to the husband pursuant to that order, being deductions that the husband had not agreed to and were not the subject of a court order. The Tribunal considered that the conduct of the practitioner was cavalier and disdainful towards the rights and entitlements of the husband and to the practitioner's obligations as an officer of the Court. The Tribunal then concluded that the practitioner engaged in conduct which involved a substantial failure by the practitioner to meet the standard of conduct observed by competent legal practitioners of good repute.

6 On the second count, the Tribunal found that the practitioner disposed of trust money held for the benefit of the husband to another person without the authority or direction of the husband. The Tribunal emphasised that the *Legal Practitioners Act* imposed strict obligations on practitioners in dealing with trust monies, and that the practitioners conduct involved a breach of section 31(1) of the *Legal Practitioners Act*. The Tribunal further found that the practitioner knew that the husband was the person entitled to receive the sum of \$20,000.00 from his trust account, both pursuant to the orders of the Court and in performance of his obligation as the conveyancer acting on behalf of the husband and the wife. The Tribunal concluded this count with the finding that the practitioner engaged in conduct that involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute.

7 On the third count, the Tribunal found that, in December 2008, the practitioner, in his earlier referred to letter to the husband, knowingly made false and misleading statements to an unrepresented party in litigation. In particular, the Tribunal concluded that there was no basis for an assertion made by the practitioner in the letter that an agent had provided an opinion that the defects in the house detracted from the appeal of the home, lowering the market price by at least \$20,000.00. Further, the Tribunal concluded that it was misleading for the practitioner to assert that the Federal Magistrates Court orders required the husband to carry out repairs on the house and prepare it for sale. The Tribunal also concluded that it was misleading for the practitioner to assert that the

husband had failed to comply with the orders of the Court and that the wife could bring an application to the Court asserting that the husband had failed to comply with the terms of the order. The Tribunal was satisfied that the evidence established that the practitioner had persisted over many months to pursue the husband for monies allegedly owing for the works allegedly to be done pursuant to the order of the Court in circumstances where he well knew that the orders created no such obligation on the husband. As a consequence of the foregoing, the Tribunal concluded that the practitioner, in communicating with the husband in the terms that he did, engaged in conduct involving a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute.

- 8 On the fourth count, the Tribunal concluded that the practitioner attempted to mislead the Board. This finding related to a letter written by the practitioner to the Board in anticipation of a complaint being made by the husband. It was found that, in sending this letter, the practitioner had attempted to mislead the Board as to the terms of the Court orders and as to the validity of the concerns raised by the husband. As a consequence, the Board found that the practitioner did not meet his obligations to provide all relevant information to the Board in the course of its investigations and that, as a consequence, the practitioner engaged in conduct that involved a substantial failure by the practitioner to meet the standard observed by competent legal practitioners of good repute.

The Board's Application

- 9 On the hearing of the Board's application, the practitioner, subject to one matter addressed below, accepted that he was guilty of unprofessional conduct and accepted the Tribunal's findings in respect of each count.
- 10 The Board, as mentioned above, sought an order striking the name of the practitioner from the role of practitioners. Attention was drawn to authorities of this Court that have emphasised that the Court's power to discipline practitioners is not punitive, but rather is to be exercised for the paramount purpose of the protection of the public. Attention was drawn in particular to the decision of this Court in *Law Society of South Australia v Murphy*, where the general approach to be taken in matters of professional misconduct was summarised by Doyle CJ as follows:¹

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 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

¹ *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456, [30]; see also *Legal Practitioners Conduct Board v Nicholson* (2006) 243 LSJS 293; *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371.

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. ...

11 The Board submitted that the circumstances of the first count, in substance, amounted to a contempt of Court; that the circumstances of the second count involved the deliberate misapplication of trust monies to the disadvantage of an unrepresented party; that the circumstances of the third count involved a breach of the duties owed to opponents and included the attempt to take advantage of an unrepresented opponent; and finally, that the circumstances of the fourth count involved a dishonest attempt to deflect the Board from investigating the matter. It was further submitted that this conduct was serious unprofessional conduct, that it was dishonest and deliberate and that it was committed by a mature practitioner. It was emphasised that the conduct amounted to a serious breach of the practitioner's fiduciary duties. It was then submitted that, individually and cumulatively, the conduct of the practitioner amounted to a substantial failure to meet the standards of honesty, integrity and propriety in the practitioner's dealings with court, his opponent, his client and the Board.

12 Earlier in these reasons, reference has been made to the practitioner's conduct in misleading the Board. There is an important history on that topic to be noted. The husband complained to the practitioner about the proffered payment of \$9,291.05. The husband returned the cheque and demanded the payment of the ordered sum of \$20,000.00. The husband commenced proceedings in the Federal Magistrates Court to have the order for the payment of the \$20,000.00 enforced. The practitioner responded by filing a cross-application by the wife, seeking an order that the husband be paid only the sum of \$9,291.05. Counsel appearing on the application before this Court acknowledged that this was a proceeding brought to benefit the practitioner and that the wife was not exposed to costs on the application. Following the issue of these proceedings, the practitioner entered into negotiations with the husband, who by this time was represented by the Northern Community Legal Service. The practitioner offered to pay the husband an extra \$5,000.00 and then increased that offer to an extra \$6,000.00, both amounts in addition to the sum of \$9,291.05. The husband responded by offering to take an extra \$10,000.00. The practitioner rejected this offer and eventually offered \$7,000.00, which the husband accepted. According to the husband's statement, the practitioner made it clear at all times that there would be no settlement unless he agreed to withdraw his complaint to the Board.

13 The practitioner prepared a formal deed of settlement, which was executed on 28 May 2010. One recital recorded that the husband had filed a complaint against the practitioner to the Board, and another recital recorded that the parties had reached an agreement, *inter alia*, to resolve the complaint. The husband agreed to give notice in writing to the Board that he withdrew "wholly and in perpetuity his complaint against [the practitioner]". A further term of the deed was that both the very existence of the deed and its terms would remain strictly

confidential. At the time of these negotiations and the entry into the deed, the practitioner was denying any wrongdoing, either as a breach of trust or by way of unprofessional conduct.

14 Counsel appearing for the practitioner submitted that the practitioner's conduct had been influenced by misstatements that the husband had made during negotiations about his keeping up to date with mortgage payments on the house. It was suggested to this Court that the husband was substantially in default of those payments and that this had not been disclosed during the initial settlement negotiations. The husband was not represented before this Court, and it is to be noted that he denied this allegation in a statement made to the Board in August 2011.

15 The practitioner, as noted above, accepted that each of the counts of unprofessional conduct had been made out. Earlier in the proceedings, the practitioner had disputed many of the findings of the Tribunal. However, these contentions were abandoned and only one matter remained in dispute at the time of the hearing of the appeal. The practitioner, in an affidavit filed shortly before the hearing, deposed:

I accept the findings of the Tribunal except the finding that there was no conversation between me and the real estate agent regarding the state of the home. I accept that I have not appealed that finding but nonetheless ask this Honourable Court to accept that I am contrite and accept my wrongdoing.

The finding of the Tribunal to which the practitioner referred was as follows:

We find that there was no basis at all and the practitioner was unable to substantiate any basis for the allegation that an agent had provided an opinion that the defects in the house for example, damage to the ceilings detracted from the appeal of the home and lowered the market price by at least \$20,000.

This finding was based on the evidence available to the Tribunal and this Court has been given no evidentiary or other basis to doubt the accuracy of this finding. As there is no appeal against this finding, the Court should proceed on the basis of the factual findings made by the Tribunal.

16 Counsel for the practitioner, in the course of submissions, acknowledged that the practitioner had behaved very poorly. However, it was said that his judgment had been influenced by his sympathy for the wife's position and that this sympathy influenced the way that he conducted himself. Counsel acknowledged that there was a breach of trust and that the party who had suffered as a consequence had not been fully reimbursed by the practitioner. Notwithstanding the practitioner's acknowledgment that he had failed to comply with the Court order and acted in breach of trust, he has made no further offer to the husband to effect full reparation.

- 17 In my view, the practitioner's conduct demonstrates that he lacks the qualities of character and trustworthiness which are necessary attributes of a person entrusted with the responsibilities of a legal practitioner. His breach of trust is particularly serious. As King CJ observed in *Re a practitioner*:²

But it is important to bear in mind the truth which is expressed in the passage from the judgment of the Full Court in *In re a Practitioner* that the "trust account should be sacred, so that moneys paid into the account should only be paid out to the persons to whom the money belonged, or as they directed". In this case there was clearly an intentional misuse of trust moneys. The practitioner made use of moneys entrusted to him for his clients' purposes for the purposes of the companies in which he had an interest. It is true that he intended to pay the money back and, in fact, did pay the money back in the sense of banking the cheques from the hospitals in due course and rectifying the irregularity in the Trust Account. 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.

[Footnote omitted.]

- 18 In the present case, \$20,000.00 of the money in the practitioner's trust account was impressed with a trust in favour of the unrepresented husband. Further, the practitioner was obliged by a Court order to pay those monies to the husband. The husband had agreed to the proceeds of the sale of the house being paid into the solicitor's trust account on the basis that he would be paid the \$20,000.00. In my view, the practitioner's conduct was a serious breach of trust, aggravated by the circumstance that the conduct was in direct non-compliance with a court order. The public are to be protected from such conduct. It is important that the profession be reminded in the clearest of terms of their responsibilities in regard to trust monies. As a consequence, the profession can be expected to comply with their obligations as trustees. In this way, public confidence can be maintained.

- 19 Counsel suggested, as discussed above, that the practitioner was influenced inappropriately by his sympathies for his client. I do not consider this to be a relevant matter. It may explain the practitioner's conduct, but it in no way justifies his conduct or addresses the gravity of that conduct. The public expect practitioners not to be inappropriately influenced. This is particularly so in a case such as the present where the opposing unrepresented litigant, the husband,

² *Re a Practitioner* (1982) 30 SASR 27, 30-1.

places his trust in his wife's solicitor to act in accordance with the order of the Court and the terms of the trust.

20 I consider that the attempts by the practitioner to deflect attention from his wrongdoing and to seek to bring the complaint to an end do him no credit and, as with his misleading of the Board, indicate a fundamental misunderstanding of his role as a practitioner. The practitioner should have faced up to the consequences of his conduct and made immediate reparation to the husband. As noted above, he now acknowledges the breach of trust but suggests that the Court proceed on the basis that he is truly contrite. This submission is substantially weakened when it is recognised that he has taken no further step to fully repair the consequences of his breach of trust.

21 The other findings of unprofessional conduct are serious and all findings, taken together, call for an order striking the name of the practitioner from the role of practitioners. Counsel for the practitioner submitted that the Court should impose an order for supervision. In my view, the practitioner's unprofessional conduct is far too serious to allow the Court to adopt such an approach. The protection of the public calls for a strike off order.

Conclusion

22 As earlier noted, this Court acts in the public interest and not to punish the practitioner. The public interest is understandably demanding of proper behaviour and accountability from members of the profession. The admitted conduct demonstrates that the practitioner is not fit to remain a member of the profession.

23 I would order that the name of the practitioner be removed from the role of legal practitioners.

24 **PEEK J.** I agree with the order proposed by Gray J and with his reasons.

25 **NICHOLSON J.** I agree with the order proposed by Gray J for the reasons his Honour has given.

