

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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LEGAL PRACTITIONERS CONDUCT BOARD v PERTL

[2014] SASCFC 88

Judgment of The Full Court

(The Honourable Chief Justice Kourakis, The Honourable Justice Gray and The Honourable Justice Vanstone)

5 August 2014

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

Application by the Legal Practitioners Conduct Board (the Conduct Board) to have the name of the legal practitioner struck off, pursuant to s 89(1) of the Legal Practitioners Act 1981 (SA), following a finding that the defendant was guilty of unprofessional conduct. During the course of the hearing, the defendant made an oral application that his name be removed from the Roll of Legal Practitioners and Roll of Public Notaries, on the ground that he wished to retire from practice. This application was allowed which removed the need for the Court to determine the Conduct Board's application.

Legal Practitioners Act 1981 (SA) ss 16, 21, 82, 89 and 89A; Solicitors Act 1976 (UK) ss 8, 87; Solicitors Keeping of the Roll Regulations 2011 (UK) regs 7.1, 10.1, 11; Legal Practitioners (Miscellaneous) Amendment Act 2013 (SA) s 52, referred to.

WORDS AND PHRASES CONSIDERED/DEFINED

"unprofessional conduct"

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MISS E NELSON QC WITH MR M BARNETT - Solicitor: LEGAL PRACTITIONERS CONDUCT BOARD

Defendant: JOSEPH PERTL Counsel: MR P SCRAGG - Solicitor: PETER SCRAGG & ASSOCIATES

Hearing Date/s: 04/06/2014

File No/s: SCCIV-14-388

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LEGAL PRACTITIONERS CONDUCT BOARD v PERTL
[2014] SASCFC 88

Full Court: Kourakis CJ, Gray and Vanstone JJ

1 **KOURAKIS CJ:** The Legal Practitioners Conduct Board (the Conduct Board) brought these proceedings pursuant to s 89(1) of the *Legal Practitioners Act 1981* (SA) (the Act) thereby invoking both the statutory and inherent jurisdiction of this Court to supervise and discipline legal practitioners.¹ The proceedings were brought by the Conduct Board on the recommendation made by the Legal Practitioners Disciplinary Tribunal (the Tribunal),² pursuant to s 82(6)(v) of the Act, after it had found that Mr Pertl was guilty of unprofessional conduct.

2 It is unnecessary to detail that conduct. It suffices to say that the conduct arose out of Mr Pertl's decision to continue to practise for several years after his advanced age and deteriorating health had compromised his capacity to meet the standards expected of legal practitioners. On 14 February 2014, an interim order suspending Mr Pertl's practising certificate was made pursuant to s 89A of the Act.

3 Mr Pertl is 76 years of age and was admitted to practice on 6 March 1962. He has practised law for some 50 years. But for the recent events, he has an unblemished record.

4 Mr Pertl was admitted as a legal practitioner not long after he had arrived in Australia as a displaced person following World War II. He overcame significant language and social obstacles to become a solicitor and established a substantial practice.

5 Mr Pertl is multilingual. Through his practice he assisted many immigrants from the former Eastern-Block countries. They were thankful to have a practitioner with whom they could communicate in their own language, or another language which they could understand. Mr Pertl provided a valuable service to those individuals and thereby to the wider South Australian community.

6 In the course of the hearing of the Conduct Board's application, Mr Pertl made an oral application that his name be removed from the Roll of Legal Practitioners and the Roll of Public Notaries, on the ground that he wished to retire from practice because of his advanced age and deteriorating health. Such an application by a legal practitioner does not involve the disciplinary

¹ This Court's disciplinary powers include the ultimate statutory and inherent power to strike a legal practitioner's name from the Roll of Legal Practitioners maintained by the Court on the application of the Attorney-General, the Law Society or the Conduct Board or on its own motion.

² Legal Practitioners Disciplinary Tribunal, *Reasons for Decision*, delivered 28 February 2014.

jurisdiction of the Court but arises out of the voluntary nature of membership of the profession.

7 According to Cordery,³ a solicitor in England could request that his or her name be struck off the Roll. To support that request, it was necessary to file an affidavit stating that there was no pending complaint of unprofessional conduct against the solicitor and that he or she did not anticipate any such complaint.

8 In South Australia the first instance of a practitioner having his name '*struck off at his own request*' was in 1890.⁴ William Isbister was the first of the four practitioners who have had their names removed from the Roll following such a request. Isbister was admitted in 1888 and requested that his name be removed from the Roll because he could not be admitted as a student at an Inn of Court if his name was already on a superior court Roll. The three other practitioners had experienced considerable difficulties in private life and professional practice and used their removal applications as formal acts of retirement from the profession.⁵

9 A solicitor in the United Kingdom may now apply to have his or her name removed from the Roll of Practitioners pursuant to s 8(1) of the Solicitors Act 1974 (UK). That legislation distinguishes between a "removal" and a "strike off".⁶ An application to have a name removed is made to the Solicitors Regulation Authority (SRA) pursuant to reg 7.1 of the Solicitors Keeping of the Roll Regulations 2011 (UK). A solicitor in England facing a complaint or disciplinary proceedings, who does not wish to continue to practice law, can now remove their name from the Roll in hope that it will bring the complaint or proceedings to an end.⁷ However, the SRA has a discretion to refuse to remove the name of the solicitor from the Roll against whom there is an outstanding complaint.⁸ The SRA may also resolve serious complaints which have not yet reached the Tribunal stage through entry into a Regulatory Settlement Agreement; however, entry into such an agreement takes account of the public interest. The ordinary practice which is to prosecute a complaint when it is in the public interest to do so may be varied if a solicitor is, for example, suffering ill health.⁹

³ A Cordery, *The Law relating to Solicitors* (Stevens and Sons, 1878), 236.

⁴ Peter Moore (ed), *The Roll of Practitioners admitted in the Supreme Court of South Australia 1837 to 1945* (Australian Legal Heritage, 2013), 19.

⁵ These removals occurred between 1909 and 1971.

⁶ Solicitors Act 1976 (UK), s 87(2)(a) and s 87(2)(b).

⁷ LexisNexis, *Cordery on Legal Services*, Vol 1 (at December 2013), [750.16].

⁸ Solicitors Keeping of the Roll Regulations 2011 (UK), reg 10.1

⁹ Whilst reg 11 provides that the SRA shall not remove the name of a solicitor from the Roll against whom disciplinary proceedings are pending before the Solicitors Disciplinary Tribunal or senior courts, it is possible for a solicitor, after Tribunal proceedings have commenced, to enter into a Regulatory Settlement Agreement which contains undertakings to apply for removal from the Roll and to not subsequently seek restoration. This is conditional on the consent of the Tribunal.

10 In Australia the terms “removal” and “strike off” are often used interchangeably in applications that a practitioner’s name be struck from the Roll of Practitioners. In my view, there is no difference in substance, at common law or under the Act, between those terms. The term “strike off” simply refers to the writing on the Roll and there is nothing more emphatic or denunciatory in that term than there is in the word “removal”. The important distinction is between a solicitor’s own request to be struck off in order to retire from the profession and an application that he or she be struck off for disciplinary reasons.

11 Section 89(1b) of the Act, which was recently enacted by s 52 of the *Legal Practitioners (Miscellaneous) Amendment Act 2013 (SA)*, allows a legal practitioner to bring an application in anticipation of disciplinary proceedings which have not yet been instituted and empowers this Court to strike the practitioners name from the Roll before the proceedings are instituted. In addition this Court retains its inherent jurisdiction to entertain a practitioner’s request to have his or her name struck from the Roll of Practitioners and, subsequently, the Roll of Public Notaries, on the ground that the practitioner wishes to retire from practice. Nonetheless, this Court may decline to make the order on the practitioner’s application if the public interest demands that it exercise its disciplinary jurisdiction, which may result in the making of additional, or other, orders.

12 The Conduct Board did not oppose Mr Pertl’s request. The orders he sought were made on his request because the Court was of the opinion, that in the circumstances of his case, nothing further would be achieved by exercising the Court’s disciplinary jurisdiction.

13 By reason of the strike off order made on Mr Pertl’s request, he is not entitled to a practising certificate pursuant to s 16 of the Act and is, therefore, prohibited from practising the law by s 21 of the Act. The public interest is thereby protected.

14 Mr Pertl’s request obviates the need for this Court to determine the Conduct Board’s application other than to order, with the consent of Mr Pertl, that he pay the Conduct Board its costs of the application fixed at \$3,000.00.

15 **GRAY J:** On 4 June 2014, I joined in an order of the Court that the practitioner be permitted to apply to have his name removed from the Roll of Practitioners.

16 I agree with the reasons of the Chief Justice for the making of this order.

17 **VANSTONE J:** I, too, agree.
