

SUPREME COURT OF SOUTH AUSTRALIA

(Civil: Application)

LEGAL PROFESSION CONDUCT COMMISSIONER v A PRACTITIONER

[2019] SASC 24

Reasons for Decision of The Honourable Justice Nicholson

1 March 2019

PROFESSIONS AND TRADES - LAWYERS - PRACTISING CERTIFICATES - CANCELLATION AND SUSPENSION

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

The Legal Profession Conduct Commissioner has commenced investigations into various complaints lodged with him concerning the practitioner. The Commissioner applied to this Court for an order suspending the practitioner's practising certificate on an interim basis, consequent on the failure by the practitioner to cooperate with the investigations. The application was brought pursuant to subclause 5(7) of Schedule 4 to the Legal Practitioners Act 1981 (SA). The application was heard ex parte and the orders set out in paragraph [2] were made immediately on the hearing of the application.

Held: application for interim suspension allowed; orders made as set out herein.

Legal Practitioners Act 1981 (SA) Sch 4, referred to.

Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER
LEGAL PROFESSION CONDUCT COMMISSIONER
Respondent: A PRACTITIONER No Attendance

Counsel: MR J KEEN - Solicitor:

Hearing Date/s: 15/02/2019, 21/02/2019

File No/s: SCCIV-19-113

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**LEGAL PROFESSION CONDUCT COMMISSIONER v A
PRACTITIONER
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Civil: Application

NICHOLSON J.

Introduction

1 The respondent to the plaintiff's application is a legal practitioner admitted to practice in this Court of some 29 years standing.

2 On Friday 15 February 2019 and on the application of the Legal Profession Conduct Commissioner (the Commissioner) I made a conditional order suspending the practitioner's practising certificate and right to practice on an interim basis as at 9.30am on Thursday 21 February 2019. The order was "self-executing" in the event that certain matters were not complied with by the practitioner by 5.00pm on Wednesday 20 February 2019. The orders made on 15 February 2019 are as follows.

1. The defendant, [the practitioner], is by 5.00pm on Wednesday 20 February 2019 to answer properly the following statutory notices under subsection 4(1) of Schedule 4 of the Legal Practitioners Act 1981 (SA):

1.1 The notice issued in respect of the "S" complaint, dated 26 November 2018, and personally served on the defendant on 26 November 2018; and

1.2 The notice issued in respect of the "B" complaint, dated 14 January 2019, and personally served on the defendant on 16 January 2019.

2. If such an answer to either notice is not provided by 5.00pm on Wednesday 20 February 2019, then pursuant to clause 5(7) of Schedule 4 of the Legal Practitioners Act 1981 (SA), the practising certificate of [the practitioner], and his right to practise under the law, is suspended from 9.30am on Thursday 21 February 2019 until further order.

3. The matter is to be adjourned to Thursday 21 February 2019 at 9.30am.

3 When the matter was next before me on Thursday 21 February 2019 at 9.30am, there was no appearance by the practitioner and notwithstanding that the matter was called on outside of and in the precincts of the courtroom. I also had before me affidavit evidence affirmed that morning by the solicitor having care and conduct of the matter on behalf of the Commissioner. I was satisfied that there had been no communication by the practitioner with the Commissioner or his office and, in particular, that there had been no compliance with order 1 above. As a consequence, I directed at the hearing on 21 February 2019 that order 2, above, was to take effect according to its terms. I also reserved the question of costs and gave both parties liberty to apply.

4 Also present at the hearing was Ms Rosalind Burke, the Director Ethics and Practice for the Law Society of South Australia. She advised that the Society would take immediate steps to install a practice manager for the practitioner's practice in accordance with the powers available to it under the *Legal Practitioners Act 1981* (SA) (the Act).

5 These are my reasons for making the orders on 15 February 2019 and for allowing order 2 to take effect according to its terms.

The Commissioner's concerns in general and the Commissioner's application

6 The Commissioner has commenced investigations into six written complaints brought against the practitioner as required of the Commissioner by subsection 77B(2) of the Act. Each complaint is and, in combination, are of a potentially serious nature. The allegations include: forgery of a deed of settlement; delay, lack of communication with and overcharging of a client over a period of 18 months; failures to meet counsel fees; and a failure to adequately communicate with a client and of handling that client's matter poorly. Each of the six investigations is in a nascent stage and unable to be satisfactorily progressed by the Commissioner in a timely way. I am satisfied that this is essentially because of a complete failure on the part of the practitioner to communicate with and cooperate with the Commissioner with respect to each investigation.

7 Once a decision is made by the Commissioner to commence an investigation into a complaint about a legal practitioner, the Commissioner must provide to the practitioner a summary or details of the complaint and a notice informing the practitioner of the right to make submissions.¹ The conduct of any ensuing investigation and the rights of a practitioner throughout the conduct of the investigation are regulated by the Act, including in particular sections 77B to 77F which come within Part 6 of the Act dealing with investigations, enquiries and disciplinary proceedings with respect to legal practitioners.

8 Schedule 4 to the Act provides for investigatory powers available to the Commissioner with respect to any investigation undertaken under Part 6 of the Act. Clause 4 of Schedule 4 to the Act is in these terms.

4—Requirements that may be imposed for investigations under Part 6

(1) For the purpose of carrying out a complaint investigation in relation to a legal practitioner or former legal practitioner, an investigator may, by notice served on the practitioner or former practitioner, require the practitioner or former practitioner to do any 1 or more of the following:

(a) to produce, at or before a specified time and at a specified place, any specified document (or a copy of the document);

¹ Subsection 77D(1)(b) and (c) of the Act.

- (b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states);
 - (c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.
- (2) ...
- (3) A person who is subject to a requirement under subclause (1) or (2) must comply with the requirement.

Maximum penalty: \$50 000 or imprisonment for 1 year.

- (4) A requirement imposed on a person under this clause is to be notified in writing to the person and is to specify a reasonable time for compliance.

Clause 5 of Schedule 4 to the Act is in these terms.

5—Provisions relating to requirements under this Part

- (1) This clause applies to a requirement imposed on a person under this Part.
- (2) The validity of the requirement is not affected, and the person is not excused from compliance with the requirement, on—
- (a) the ground that the giving of the information or access to information may tend to incriminate the person; or
 - (b) the ground that a law practice or legal practitioner has a lien over a particular document or class of documents.
- (3) If compliance by a person with a requirement to answer a question or to produce, or provide a copy of, a document or information might tend to incriminate the person or make the person liable to a penalty, then—
- (a) in the case of a person who is required to produce, or provide a copy of, a document or information—the fact of production, or provision of a copy of, the document or the information (as distinct from the contents of the document or the information); or
 - (b) in any other case—the answer given in compliance with the requirement, is not admissible in evidence against the person in proceedings other than disciplinary proceedings under this Act or proceedings—
 - (c) for an offence—
 - (i) against this Act; or
 - (ii) relating to the keeping of trust accounts or the receipt of trust money; or
 - (d) in respect of the making of a false or misleading statement.
- (4) The investigator imposing the requirement may—

- (a) inspect any document provided pursuant to the requirement; and
 - (b) make copies of the document or any part of the document; and
 - (c) retain the document for a period the investigator thinks necessary for the purposes of the investigation in relation to which it was produced.
- (5) The person is not subject to any liability, claim or demand merely because of compliance with the requirement.
- (6) A failure by a legal practitioner to comply with the requirement is capable of constituting unsatisfactory professional conduct or professional misconduct.
- (7) The Supreme Court may, on application by the Commissioner or the Society, or on its own initiative, suspend a legal practitioner's practising certificate while a failure by the practitioner to comply with the requirement continues.

9 The Commissioner's application for an interim suspension of the practitioner's practising certificate was based on the asserted non-compliance with two notices served on the practitioner pursuant to subclause 4(1) and in reliance on the power conferred by subclause 5(7) of Schedule 4.

10 As earlier indicated, there has been a complete failure on the practitioner's part to communicate with the Commissioner and to cooperate with his investigations. In particular, the practitioner has failed to comply with a requirement under subclause 4(1) of Schedule 4 in that he has failed to answer properly two statutory notices issued pursuant to subclause 4(1) having been given a reasonable time for compliance, being:

- (i) a notice issued in respect of the "S" complaint, dated 26 November 2018 and personally served on the practitioner on 26 November 2018; and
- (ii) a notice issued in respect of the "B" complaint, dated 14 January 2019 and personally served on the practitioner on 16 January 2019.

11 The Commissioner read the following affidavits in support of his application:

- (i) affidavit of Gregory Mornington May (the Commissioner) sworn 25 January 2019;
- (ii) second affidavit of Gregory Mornington May sworn 14 February 2019;
- (iii) affidavit of Philippa Joan Branson (the solicitor with the care and conduct of the matter on behalf of the Commissioner) affirmed 21 February 2019.

12 The following chronology of the dealings between the Commissioner and the practitioner and between the practitioner and the Court can be gleaned from the affidavit evidence provided by the Commissioner in support of his

application and from the Court record together with documents handed up during the hearing or read on to the transcript during the hearing.

Item	Date	Communication
1.	8 September 2016	Complaint against the practitioner received by the Commissioner in relation to the “W” matter. The practitioner’s response was requested by 6 October 2016. An issue was successfully conciliated with the practitioner’s lawyers. The practitioner was then required to respond to other aspects of the complaint by 31 January 2017.
2.	8 August 2017	The Commissioner ² sent a letter to the practitioner requiring a response to outstanding aspects of the “W” complaint by 22 August 2017. A further letter in relation to the “W” complaint was sent by the Commissioner to the practitioner following his undertaking to respond to all matters by 20 December 2018 (See Item 21). No response was received.
3.	20 June 2018	Complaint against the practitioner received by the Commissioner in relation to the “B” matter. The practitioner’s response was requested by 20 July 2018. At the practitioner’s request an extension of time to 3 August 2018 was given.
4.	9 August 2018	Further letter sent by the Commissioner to the practitioner requiring production of the signed copies of the Deed in relation to the “B” matter.
5.	21 August 2018	Further follow-up letter sent by the Commissioner to the practitioner in relation to the “B” matter.
6.	30 August 2018	Complaint against the practitioner received by the Commissioner in relation to the “S” matter.
7.	5 September 2018	Another follow-up letter sent by the Commissioner to the practitioner in relation to the “B” matter. (Telephone calls also made to the practitioner, but were not returned).
8.	12 September 2018	Initial letter to the practitioner seeking response by 2 October 2018 in relation to the “S” matter.
9.	2 October 2018	Complaint against the practitioner received by the Commissioner in relation to the “P” matter. The practitioner’s response was requested by 16 November 2018. The Commissioner later wrote to the practitioner requiring his reply by 25 January 2019.
10.	9 October 2018	No response from the practitioner in relation to the “S” matter, and a further letter sent requiring a reply within 14 days.

² References in the chronology to correspondence from the Commissioner include correspondence from the Commissioner and from solicitors in his office and sent on his behalf.

Item	Date	Communication
11.	12 October 2018	A member of the Commissioner's office spoke to the practitioner in relation to the "S" matter.
12.	1 November 2018	A member of the Commissioner's office spoke to the practitioner who apologised and asked for an extension of time to respond in relation to the "S" matter.
13.	9 November 2018	The Commissioner emailed the practitioner, requiring a reply by return, and warning that a Schedule 4 notice was imminent, in relation to the "S" matter.
14.	16 November 2018	The Commissioner made a determination to issue a Schedule 4 notice in relation to the "S" matter.
15.	19 November 2018	A complaint against the practitioner received by the Commissioner in relation to the "M" matter. The practitioner's response was requested by 21 December 2018.
16.	20 November 2018	Telephone message left for the practitioner asking when he intended to respond in relation to the "S" matter.
17.	21 November 2018	Email from the practitioner apologising "sincerely" for "tardiness" and stating an intention to respond by 5.00pm on 22 November 2018 in relation to the "S" matter.
18.	26 November 2018	A notice to the practitioner pursuant to subclause 4(1) of Schedule 4 to the <i>Legal Practitioners Act 1981</i> (SA) in relation to the "S" matter issued and personally served. The notice required the practitioner to reply by 4.00pm 10 December 2018.
19.	6 December 2018	A member of the Commissioner's office rang and left a message for the practitioner to return her call in relation to the "S" matter. The call was not returned.
20.	11 December 2018	Email to the practitioner advising he is in default and confirming intention to recommend an application to suspend practising certificate in relation to the "S" matter.
21.	11 December 2018 at 1.07pm	Email from the practitioner undertaking to respond to the notice in relation to the "S" matter, and with respect to all other matters by 5.00pm on 20 December 2018.
22.	13 December 2018 at 12.36pm	Email from the Commissioner to the practitioner acknowledging the undertaking to respond to the notice by 5.00pm on 20 December 2018.
23.	7 January 2019	Email to the practitioner requesting a response in relation to the "M" complaint within 7 days. No response received.

Item	Date	Communication
24.	16 January 2019	Notice to the practitioner pursuant to subclause 4(1) of Schedule 4 of the <i>Legal Practitioners Act 1981</i> (SA) personally served on the practitioner in relation to the complaint of “B”. The notice required a reply by 4 February 2019.
25.	29 January 2019	Notice to the practitioner pursuant to subclause 4(1) of Schedule 4 to the <i>Legal Practitioners Act 1981</i> (SA) personally served on the practitioner in relation to the complaint of “W”. The notice required a reply by 5.00pm on 19 February 2019.
26.	30 January 2019	Application to suspend the practitioner’s practising certificate on an interim basis filed by the Commissioner.
27.	1 February 2019 at 10.13am	<p>Email (entitled: Non-Compliance with Schedule 4 Notice) from the Commissioner attaching a letter to the practitioner notifying service of:</p> <ul style="list-style-type: none"> • Commissioner’s Application to suspend practising certificate • Interlocutory application • Affidavit of the Commissioner sworn 25 January 2019 • Draft Minutes of Order <p>And, notifying the practitioner of the Court return date, Friday 15 February 2019 at 10.15am. Read receipt as at 1 February 2019 at 10.46am provided.</p>
28.	14 February 2019 at 4.24pm	Email marked URGENT from the Commissioner to the Supreme Court Civil Registry, cc: the practitioner attaching the Second Affidavit of the Commissioner and amended Draft Minutes of Order, by way of service on the practitioner.
29.	15 February 2019 at 12.14pm	Email entitled: “URGENT – Application for Suspension of your Practising Certificate” from the Commissioner to the practitioner notifying of the orders made on 15 February 2019. Read receipt as at 15 February 2019 at 12.36pm provided.
30.	15 February 2019 at 12.33pm	Email entitled: “Legal Professional Conduct Commissioner v [the practitioner] (SCCIV-19-113)” from Judge’s chambers to the Commissioner, cc: the practitioner attaching the Record of Outcome containing the orders made on 15 February 2019.
31.	15 February 2019 at 1.05pm	Email entitled: “SCCIV-19-113: [the practitioner] – Minutes of Order” from the Commissioner to the Supreme Court and the practitioner attaching the Minutes of Order made on 15 February 2019.
32.	20 February 2019	Ms Burke attended the practitioner’s offices but was unable to meet with the practitioner.
33.	21 February 2019 at approximately 9.15am	Email from the practitioner to Ms Burke notifying her of travel plans due to a family emergency and expressing a wish to speak with her early the following week.

Consideration and conclusion

13 The Commissioner has a statutory obligation to pursue the investigations he has embarked upon. Without the cooperation of the practitioner, these investigations have been stultified at the earliest stage. The two statutory notices, on the basis of which the application for interim suspension was allowed, required of the practitioner, *inter alia*, that he produce the various documentation listed in a schedule to each notice which included the practitioner's file in relation to each and every matter in which he had been instructed by the relevant complainant together with a response to the Commissioner's letter earlier provided setting out the nature of the complaint and calling for the practitioner's submissions.

14 In each case, I am satisfied that the practitioner was provided with a reasonable time for compliance. In any event, the "S" statutory notice was served on 26 November 2018 and the "B" statutory notice complaint was served on 16 January 2019. As at the court hearing on 21 February 2019, there had been no attempt of any sort at compliance by the practitioner in accordance with his legal obligation pursuant to subclause 4(3) of Schedule 4.

15 It is a common understanding that this Court, when engaged in its supervisory role with respect to admitted legal practitioners, is to be guided by two primary considerations: the protection of the public; and the maintenance of confidence in the legal profession and the practice of the law, of which practitioners are an integral part. It plainly is important that the six complaints currently under investigation be properly investigated and that the practitioner's conduct in failing to engage with the Commissioner over a lengthy period of time also be properly investigated with a view to ensuring that the public is properly protected and that there can be the maintenance of confidence in the legal profession and the practice of the law.

16 It is also of significant concern that having been notified of the two court hearings on 15 February and 21 February 2019 respectively, the practitioner failed to attend either and did not communicate any acceptable reason for this apart from, perhaps, the somewhat desultory communication to Ms Burke only minutes before the second hearing (21 February) was listed to commence at 9.30am.

17 I accepted the Commissioner's submission that, at this stage of proceedings, he had little or no alternative, if he were to pursue the investigation process, but to seek an order for interim suspension of the practitioner's right to practice whilst the failure by the practitioner to comply with his legal obligations continued. In my view, the practitioner's failure to comply with the "S" and "B" statutory notices when viewed against the background of the practitioner's lack of cooperation over many months, as demonstrated by the above chronology, amply justified the making of an order in the terms made pursuant to the power available under subclause 5(7) of Schedule 4 to the Act.

18 In addition and whilst I can make no findings in this respect on the evidence presently available, there is a very real concern given the practitioner's total lack of engagement, that something more serious is afoot with respect to either the practice generally or the practitioner's health. The intervention of a practice manager may assist in either identifying or allaying the fears of any such residual concern.

19 For these reasons I made the orders as set out earlier.