

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**TITLE OF COURT** : FULL BENCH

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE -v- BRENNAN [2010] WASC 198

**CORAM** : MARTIN CJ  
MURRAY J  
HALL J

**HEARD** : 26 JULY 2010

**DELIVERED** : 26 JULY 2010

**PUBLISHED** : 2 AUGUST 2010

**FILE NO/S** : LPD 1 of 2010

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

DAMIEN GERARD BRENNAN  
Respondent

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*Catchwords:*

Legal practitioners - Disciplinary proceedings - Removal from Roll of Practitioners - Practitioner convicted of stealing from a client and the Public Trustee and fraud

*Legislation:*

*Criminal Code (WA), s 378*

*Legal Profession Act 2008 (WA)*, s 438(1), s 438(2)(a), s 444(1), s 621(3), s 622,

*Result:*

Practitioner struck off Roll of Practitioners

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms P Le Miere  
Respondent : No appearance

*Solicitors:*

Applicant : Legal Practice Board  
Respondent : No appearance

**Case(s) referred to in judgment(s):**

A Solicitor v Law Society (NSW) (2004) 216 CLR 253; [2004] HCA 1  
Barristers' Board v Darveniza (2000) 112 A Crim R 438  
In re Davis (1947) 75 CLR 409; [1947] HCA 53  
Legal Practitioners Complaints Committee v De Pardo [2007] WASC 266  
Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119  
Legal Practitioners Complaints Committee v Palumbo [2005] WASCA 129  
Legal Practitioners Complaints Committee v Pepe [2009] WASC 39  
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9  
Legal Profession Complaints Committee and Brennan [2010] WASAT 46  
Legal Profession Complaints Committee v A Practitioner [2010] WASC 13  
Prothonotary of the Supreme Court of New South Wales v Leon Nikolaidis  
[2010] NSWCA 73  
Re Maraj (a practitioner) (1995) 15 WAR 12  
Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97  
CLR 279; [1957] HCA 46

**MARTIN CJ:** (This judgment was delivered extemporaneously on 26 July 2010 and has been edited from the transcript.)

1           The Legal Profession Complaints Committee (the Committee) moves the court for an order that Damien Brennan (the practitioner) be struck off the Roll of Practitioners and that he be ordered to pay the costs of and incidental to the application.

2           The court has received a report from the State Administrative Tribunal (the tribunal) pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA) (the LPA). Pursuant to s 444(1) of the Act, the report is to be taken to be conclusive as to all facts and findings contained in the report. Although the conduct of the practitioner giving rise to the proceedings before the tribunal occurred prior to the commencement of the LPA, by s 622 LPA pt 13 LPA applies to conduct of a practitioner whether the conduct occurred before or after the commencement of the LPA and applies to conduct consisting of a contravention of the *Legal Practitioners Act 1893* (WA) or the *Legal Practice Act 2003* (WA). Further, by s 621(3) LPA a complaint may be made under pt 13 LPA, notwithstanding that the conduct giving rise to the complaint occurred before the commencement of the LPA.

3           The motion before the court is made pursuant to s 444(2) LPA. That section provides that upon reading a report from the tribunal, the court may make a variety of orders including the removal from the Roll of the name of a practitioner.

### **The history of the proceedings**

4           The Committee sought a finding by the tribunal pursuant to s 438(1) LPA that the practitioner had engaged in professional misconduct by illegal conduct and seeking that the tribunal make a report to the Supreme Court with a recommendation that the practitioner's name be removed from the Roll of legal practitioners.

5           The conduct the subject of the complaint was that:

- (1) Between 17 August 2001 and about 10 February 2006, the practitioner stole a total of \$767,245.30 the property of Josef Kopec;
- (2) Between about 10 February 2006 and 3 May 2007 the practitioner stole a total of \$129,542 the property of the Public Trustee; and

(3) On 30 May 2007 at Busselton, the practitioner with the intent to defraud, by deceit or fraudulent means attempted to gain a benefit for himself, namely, the sum of \$73,790.02 being the proceeds of the sale of shares held in the name of Josef Kopec. (see the tribunal's decision: *Legal Profession Complaints Committee and Brennan* [2010] WASAT 46 [3]).

6 Mr Kopec was a client of the practitioner and the money stolen from the Public Trustee was from Mr Kopec's estate. The practitioner held an Enduring Power of Attorney (EPA) which enabled him to manage Mr Kopec's affairs. Pursuant to that EPA, the practitioner was able to operate the client's bank account and buy and sell property in the name of the client.

7 The transcript of criminal proceedings on 29 April 2008 before McKechnie J was provided to the tribunal (and has also been provided to the Supreme Court). Before McKechnie J the practitioner pleaded guilty to 71 of the 103 counts brought against him, and those pleas were accepted by the prosecution in satisfaction of the indictment. The practitioner was convicted of 60 indictable offences under s 378 of the *Criminal Code* of stealing the property of Josef Kopec, 10 indictable offences under s 378 of the *Criminal Code* of stealing the property of the Public Trustee and one indictable offence under s 409(1)(c) of the *Criminal Code* for attempting to gain a benefit by fraud.

8 On 29 April 2010, the practitioner was sentenced to 7.5 years imprisonment. For the purposes of this application, it is unnecessary to go into further detail about the offences committed by the practitioner. A summary of the admitted facts was prepared by the Committee for the tribunal and can be seen at par [5] of the tribunal's decision to which I have already referred.

9 The tribunal found the respondent guilty of professional misconduct by illegal conduct and has transmitted a report to the Supreme Court with a recommendation that the practitioner's name be removed from the Roll of legal practitioners. The tribunal stated at [9]:

In sentencing Mr Brennan, McKechnie J noted that the evidence overwhelmingly showed that the 71 offences were not impulsive but purposeful. He described the crimes as representing 'the worst possible offences for a solicitor'. His Honour said at [t:80]:

The offences must be seen in context. You were a solicitor engaged for the very purpose of protecting the financial affairs of Mr Kopec. You betrayed that trust for your own greed and gain.

Moreover, you are not a first offender. You were a first offender in August 2001 but by May 2007 you were a serial offender.

With respect, we agree with his Honour's observations. This is a case of the clearest kind where the nature of the offences for which Mr Brennan has been convicted demonstrates unfitness to remain on the roll of local practitioners.

### **The principles to be applied**

10 The principles to be applied in an application of this kind are well established. The jurisdiction of the court to remove a practitioner from the Roll is exercised not for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the legal profession (*Re Maraj (a practitioner)* (1995) 15 WAR 12, 25; *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 286; [1957] HCA 46; *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9, [43]; *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39, [5] - [12] and *Legal Profession Complaints Committee v A Practitioner* [2010] WASC 13, [25]).

11 Where an application is made for an order removing a practitioner's name from the Roll, the critical question to be addressed by the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner (*Ziems*, 297 - 298, *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253; [2004] HCA 1, [15] and *Thorpe*, 43). Fitness to practise law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges (*Thorpe* at [43]; *In re Davis* (1947) 75 CLR 409, 420; [1947] HCA 53). Malcolm CJ in *Re Maraj* (at 25) identified some of the minimum standards expected of practitioners:

Integrity, reliability and an appropriate level of efficiency in the administration of money held on trust are all qualities which any reasonably experienced practitioner may be expected to demonstrate, in addition to being professionally competent in pursuing his or her clients' interests.

12 Not all convictions, even serious convictions, will automatically result in a finding that the practitioner is not a fit and proper person (*Ziems*, 283; and more recently *Prothonotary of the Supreme Court of New South Wales v Leon Nikolaidis* [2010] NSWCA 73 at [26]).

13 Where the alleged conduct is constituted by the commission of criminal offences, the court noted in *Nikolaidis* (at [26]) that it is

necessary to assess the nature and quality of the criminal conduct and its seriousness. In that case the practitioner was convicted of a crime of dishonesty, in particular, the offence of making a false instrument with the intention of using it to induce another person to accept it as genuine. The court summarised the conduct concerned at [4] of its reasons in these terms:

The essence of the matter was that between 1996 and 1998, when the respondent [practitioner] and Mr Preston (a former client) were in dispute about legal fees going back many years, the respondent caused a back-dated copy of a letter purportedly from him to Mr Preston dated 1984 to be created by a secretary and placed on one of the files in dispute. The letter purported to be a copy of an agreement about fees (in 1984) supportive of the position being taken by the respondent in his then current dispute with Mr Preston. At the time the document was created, a costs assessor (Mr Hattersley) had been appointed by the Supreme Court to assess the contested costs. The assessor was intended to find the letter (as he did) and act on it in the assessment.

14 The court in that case held that the relevant conviction established unfitness to practise because of the 'planned dishonesty involved in the offence for personal gain'. The same description can be applied to the alleged conduct of the practitioner before this court, which was of course much more protracted.

15 Conduct involving dishonesty, whether it occurs within or outside the profession and whether it results in a criminal conviction or not, has generally been regarded very seriously by the court (*Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129, [23]; and *Legal Practitioners Complaints Committee v De Pardo* [2007] WASC 266, [14]). Honesty and integrity are essential prerequisites to the right to practice law (*Palumbo*, [23]; and *Legal Practitioners Complaints Committee v McKerlie* [2007] WASC 119, [8]). In this regard, 'the quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practises' (*Barristers' Board v Darveniza* (2000) 112 A Crim R 438, [33]).

16 In the case at hand, the practitioner has engaged in the relevant professional misconduct in the course of legal practice; the conduct continued for a period of just under seven years; and, the practitioner betrayed the trust of his client for his own financial gain in a situation where the client was unable to call the practitioner to account. The relevant professional misconduct showed a lack of honesty and integrity,

and a demonstrated propensity to use his position as a practitioner to take advantage of a vulnerable client in order to advance his own interests. Relevant also is the extent of premeditation and the fact that the crimes demonstrate a tendency to vice and lack of probity. The sentencing judge found that the offences were not impulsive but purposeful and that by August 2007 the practitioner was a 'serial offender'. This is relevant to the assessment of the risk of further transgressions and leads to the conclusion that the risk may be significant. Further, the practitioner refused to co-operate with the inquiries of the Committee.

17 It follows that neither this court nor the community can have the confidence in Mr Brennan that is required of its practitioners. The convictions demonstrate that Mr Brennan is not a fit and proper person to be a legal practitioner of the court, in particular due to the lack of the essential personal qualities of honesty and integrity.

### **Costs of the application**

18 In relation to costs, the Committee has applied for an order that the respondent pay the costs of and incidental to this motion. It appears from the submissions of the Committee that this application is based on the fact that the practitioner refused to co-operate with the Committee's inquiries which resulted in additional costs to the Committee. It can also be said I think with some justification that this is a case in which the practitioner has by his own conduct over a period of years put in train the sequence of events that has led to this application. On the other hand, it should be noted that the practitioner has not opposed this application and that we are also told by counsel appearing for the Committee that there appears to be no realistic prospect of the practitioner paying any costs that he is ordered to pay as a result of these proceedings.

19 In those circumstances, it seems to me to be appropriate to regard the costs of these proceedings as part of the cost of regulating the profession and to make no order as to the costs. For those reasons, I would order that the name of the practitioner be removed from the Roll of Practitioners but make no order as to the costs of the application.

20 **MURRAY J:** I agree that the practitioner's name should be struck from the Roll for the reasons given by the Honourable Chief Justice, and that there should be no order as to costs.

*HALL J*

21           **HALL J:** I agree with the Chief Justice and the orders that he proposes.