
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE -v- OUD [2019] WASC 287

CORAM : QUINLAN CJ
KENNETH MARTIN J
SMITH J

HEARD : 31 JULY 2019

DELIVERED : 31 JULY 2019

PUBLISHED : 9 AUGUST 2019

FILE NO/S : LPD 1 of 2019

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

NICHOLAS NEIL PETER OUD
Respondent

Catchwords:

Legal practitioners – Disciplinary proceedings – Removal from Roll of Practitioners – Professional misconduct – Unsatisfactory professional conduct – Recklessly breaching undertaking as to trust account funds – Dishonestly concealing conduct – Misleading correspondence to the court – Misleading correspondence to other practitioners – Improperly attempting to avoid investigation of conduct

Legislation:

Legal Profession Act 2008 (WA)

Legal Profession Regulations 2009 (WA)

Result:

Order that the practitioner's name be removed from the Roll of Practitioners

Category: B

Representation:

Counsel:

Applicant : P Yovich SC

Respondent : In Person

Solicitors:

Applicant : Legal Profession Complaints Committee

Respondent : In Person

Case(s) referred to in decision(s):

Legal Profession Complaints Committee and Oud [2018] WASAT 119

Legal Profession Complaints Committee v Brickhill [2013] WASC 369

Legal Profession Complaints Committee v Detata [2012] WASCA 214

Legal Profession Complaints Committee v Waters [2015] WASC 141

JUDGMENT OF THE COURT:

1 On 31 July 2019 the court ordered that that the name of the
respondent, Nicholas Neil Peter Oud (the practitioner), be removed
from the roll of legal practitioners. These are our reasons for making
that order.

2 The Legal Profession Complaints Committee (the Committee)
applied by motion for orders that the practitioner be removed from the
roll and that he pay the costs of the application, to be taxed.

3 On 22 January 2019, the State Administrative Tribunal (the
Tribunal) made orders that it make and transmit a report to this Court in
relation to findings of unsatisfactory professional conduct and
professional misconduct it made in relation to the practitioner.¹ The
report was provided with a recommendation that the practitioner's name
be removed from the roll of legal practitioners.²

4 Pursuant to s 444(1) of the *Legal Profession Act 2008* (WA)
(*Legal Profession Act*), the report is to be taken as conclusive as to all
facts and findings mentioned or contained in the report.

The findings against the practitioner

5 The facts and findings of the Tribunal are set out in the Tribunal's
reasons for decision in *Legal Profession Complaints Committee and
Oud*.³ The report, which was formally transmitted to this Court on the
day of the hearing of the Committee's motion, included the Misconduct
Decision and the Penalty Decision.

6 The Tribunal's facts and finding may be summarised as follows.

7 The Committee made a number of allegations of professional
misconduct and unsatisfactory professional conduct arising from his
acting for a Mr Oxlade, and related entities, from March to May 2016.

8 The context of those allegations concerned the proposed purchase
of platinum involving a number of persons, including Mr Oxlade and
another client of the practitioner's, Dr Fiore, together with companies

¹ *Legal Profession Act 2008* (WA) s 438(2)(a).

² *Legal Profession Act*, s 438(4)(b).

³ *Legal Profession Complaints Committee and Oud* [2018] WASAT 119. The Tribunal delivered two sets of reasons: *Legal Profession Complaints Committee and Oud* [2018] WASAT 119 (Misconduct Decision), on 5 November 2018 and *Legal Profession Complaints Committee and Oud* [2018] WASAT 119 (S) (Penalty Decision), on 22 January 2019.

associated with those individuals. In the course of the proposed purchase an issue arose in relation to the holding of loan funds to be advanced by a corporation, Credit Solutions Group Pty Ltd (CSG), from whom the practitioner's clients were proposing to borrow \$300,000.

9 The \$300,000 was ultimately received into the practitioner's trust account, subject to his undertaking to CSG that he would not deal with, transfer, move or utilise the funds, 'without the expressed written consent of David Cacciola (the managing director of CSG) and Colin Oxlade jointly'.⁴

10 In that context, the Tribunal made the following findings of professional misconduct and unsatisfactory profession conduct as alleged by the Committee:⁵

Ground 1

That [the practitioner] between 23 March 2016 and 30 March 2016, in connection with acting for Mr Colin Oxlade and/or Dr Peter Fiore, or alternatively Irongrow Corporation Pty Ltd (Irongrow), in respect of a proposed purchase of platinum, engaged in professional misconduct ... by disbursing from the firm's trust account \$300,000 (CSG loan funds) which had been received into trust on behalf of Credit Solutions Group Pty Ltd (CSG) for use in connection with the purchase of the platinum, in circumstances where:

- (1) the practitioner undertook to CSG not to deal with, transfer, move or use the CSG loan funds without the expressed written consent of Mr David Cacciola on behalf of CSG, and Mr Oxlade (the undertaking);
- (2) the practitioner disbursed the CSG loan funds without the expressed written consent of Mr Cacciola, and contrary to purported written consents he had received;
- (3) in releasing the CSG loan funds the practitioner acted in reckless disregard or with reckless indifference as to whether he was in breach of his undertaking by doing so.

Ground 2

That [the practitioner] in March and April 2016 engaged in unsatisfactory professional conduct ... by failing to keep his firm's trust records in a way that disclosed the true position in relation to withdrawals from trust of the CSG loan funds, in that the trust records

⁴ Misconduct Decision [93].

⁵ Penalty Decision [5].

did not accurately record the names of the persons who received the funds and the names or BSB numbers of the bank accounts into which the funds were paid as required by reg 45 of the *Legal Profession Regulations 2009* (WA) and s 228(3)(b) of the *Legal Profession Act 2008* (WA).

Ground 3

That [the practitioner] in March and April 2016 engaged in unsatisfactory professional conduct ... by failing to deliver to CSG's solicitor Mr Paul Reese the original receipt made out by the practitioner for the receipt of the CSG loan funds into his trust account when requested to do so by Mr Reese by emails sent to the practitioner on 22 March 2016 and 28 April 2016, in breach of reg 41(2) and reg 41(6) of the *Legal Profession Regulations 2009* (WA).

Ground 4

That [the practitioner] in or about April 2016 engaged in professional misconduct ... in responding to an email from Mr Reese requiring the CSG loan funds to be returned from the practitioner's firm's trust account to Mr Reese's trust account, when the practitioner sent a series of emails to Mr Reese on 28 and 29 April 2016 which:

- (1) did not disclose the fact that he no longer retained the CSG loan funds in his firm's trust account;
- (2) implied that the practitioner did retain the CSG loan funds and was in a position to return the CSG loan funds to Mr Reese's trust account,

and which conveyed the impression that the CSG loan funds were retained in his firm's trust account and were available to be returned to Mr Reese's trust account when, in truth, the practitioner had disbursed the CSG loan funds and was not in a position to effect the return of the CSG loan funds to Mr Reese's trust account, and which impression the practitioner permitted to remain uncorrected in circumstances where the practitioner knew the emails were misleading in a material respect.

Ground 5

That [the practitioner] on 9 May 2016 engaged in professional misconduct ... by conveying an offer from Mr Oxlade to Mr Reese to repay the CSG loan funds that was contingent upon Mr Reese withdrawing a complaint he had made to Legal Profession Complaints Committee against the practitioner in relation to the practitioner's breach of his undertaking with respect to the CSG loan funds.

11 As is apparent from these findings, the practitioner's misconduct included:

- (a) recklessly breaching an undertaking by disbursing funds from his trust account contrary to that undertaking to the person (CSG) who provided the funds;
- (b) dishonestly concealing that conduct by failing to disclose the true state of affairs in relation to the funds he had disbursed to the solicitor for CSG; and
- (c) improperly attempting to avoid the investigation of his conduct by conveying an offer to CSG contingent upon the withdrawal of a complaint.

12 In a separate, but related, allegation of professional misconduct, the Committee alleged that the practitioner knowingly sent misleading correspondence to the Federal Circuit Court of Australia and a firm of solicitors in respect of persons facing a creditor petition in the Federal Circuit Court (Mr and Mrs Warming).

13 This allegation was related to the other allegations made by the Committee by reason of the fact that the correspondence was sent by the practitioner at the request of Mr Oxlade. In essence the allegation was that Mr Oud had cut and paste a draft letter prepared by Mr Warming, without substantive amendment.⁶ The Tribunal's finding, in terms of the allegation, was as follows:

That [the practitioner] between 29 March 2016 and 3 April 2016 inclusive, in connection with a creditor's petition in respect of John and Jennifer Warming (Mr & Mrs Warming) filed in the Federal Circuit Court in Adelaide ADG453/2015 (creditor's petition), engaged in professional misconduct ... by preparing and sending:

- (1) a letter addressed to the Federal Circuit Court in Adelaide dated 29 March 2016 (the 29 March 2016 letter) that contained the following statements (together, the 29 March 2016 statements):
 - (a) that the practitioner acts for ICBC Capital Pty Ltd (ICBC), which statement was false and misleading as, in truth, the practitioner did not then and never had acted for ICBC, and ICBC at that time was in liquidation;
 - (b) that the practitioner is currently holding \$300,000.00 cleared funds in his trust account, which statement was false and misleading as, in truth, the practitioner was

⁶ Misconduct Decision [259].

holding \$138,662.80 in his trust account as at 29 March 2016;

- (c) that his client was aware of current bankruptcy proceedings against Mr and Mrs Warming listed in the Adelaide Registry, and was prepared to assist the Debtors' position, which statement was false and misleading as, in truth, the practitioner did not and never had acted for ICBC, and he had no instructions to that effect;
 - (d) that the practitioner had been instructed to release upon settlement of a pending commodity transaction a minimum of \$200,000.00 to permit satisfaction of the petition amount, which statement was false and misleading as, in truth, the practitioner did not have any funds in trust at that time which were subject to such instructions;
- (2) a letter to solicitors Cowell Clarke dated 3 April 2016, which he knew was intended to be used by Mr Warming in connection with the hearing of the creditor's petition scheduled for 4 April 2016, that referred to the 29 March 2016 letter and contained the following statements (together, the 3 April 2016 statements):
- (a) that his reference to ICBC Capital Pty Ltd was a 'cut and paste error', and that he was in fact holding the trust funds (being a reference to the \$300,000.00 referred to in the 29 March 2016 letter) on behalf of Irongrow Corporation Pty Ltd / Mr John Buckby, a company unrelated to ICBC, which statement was false and misleading as, in truth, the practitioner was not at that time holding any trust funds on behalf of Irongrow Corporation Pty Ltd / Mr John Buckby;
 - (b) that the substance of the 29 March 2016 letter was otherwise correct, which statement was false and misleading as, in truth, the 29 March 2016 statements were all untrue,

in circumstances where, when making the 29 March 2016 statements and the 3 April 2016 statements, the practitioner well knew each of the 29 March 2016 statements and the 3 April 2016 statements was false and misleading and had the potential to mislead the Federal Circuit Court and/or the party which had presented the creditor's petition and/or Mr & Mrs Warming's solicitors, Cowell Clarke.

14 This finding, as is apparent, involved serious dishonesty, including deliberately misleading a court and other legal practitioners.

15 We will return to the seriousness of the practitioner's misconduct when addressing the application of the relevant principles to the present case.

Relevant principles

16 The principles to be applied in an application such as this are well established. They were summarised in decisions of this Court in *Legal Profession Complaints Committee v Brickhill*⁷ and *Legal Profession Complaints Committee v Waters*.⁸

17 Those principles include:

- (a) The court's jurisdiction with respect to the regulation of the legal profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession;
- (b) Where the motion is to remove a practitioner from the roll, the critical question for the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner;
- (c) Fitness to practice law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges;
- (d) Removal from the roll is an order reserved for very serious cases, where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice;
- (e) Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner.

18 In relation to findings of dishonesty, the courts have repeatedly recognised the particular significance of a finding that a practitioner has

⁷ *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369 [18] - [21] (Martin CJ, McKechnie & EM Heenan JJ).

⁸ *Legal Profession Complaints Committee v Waters* [2015] WASC 141 [7] - [8] (Martin CJ, McKechnie & Beech JJ).

intentionally misled a court. As this Court said in *Legal Profession Complaints Committee v Waters*:⁹

[A] finding that a practitioner has intentionally misled a court 'is a matter of the utmost seriousness' and 'raises serious questions as to the practitioner's fitness to practise'. As was said by the Court of Appeal in *Vogt v Legal Practitioners Complaints Committee*:

For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty. But the finding in the present case that the appellant intentionally misled the court is of particular significance. It goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice. We would respectfully adopt what was said in that respect by the Queensland Court of Appeal in *The Council of the Queensland Law Society Inc v Wright* [2001] QCA 58, a case involving a solicitor who (among other things) intentionally misled a court in relation to an affidavit relied upon to resist a summary judgment application and as to the availability of a witness. The court said:

A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others ... The lawyer's duty to the court includes candour, honesty and fairness. ... The effective administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it, no matter how new or inexperienced the practitioner. Breaches such as this are hard to detect and once established to the requisite standard are deserving of condign punishment, not only as a deterrent but also to reassure the public that such conduct on the part of lawyers will not be tolerated. (footnotes omitted)

19 Also of particular relevance to the present case, given the findings of the Tribunal, is the importance to be attached to legal practitioners performing their undertakings. As was said in *Legal Profession Complaints Committee v Detata*:¹⁰

⁹ *Legal Profession Complaints Committee v Waters* [2015] WASC 141 [8] (Martin CJ, McKechnie & Beech JJ).

¹⁰ *Legal Profession Complaints Committee v Detata* [2012] WASC 214 [48], [52]-[54] (Martin CJ, Pullin & Murphy JJA agreeing).

The importance of legal practitioners performing their undertakings cannot be overstated. The practice of giving, and relying upon, undertakings given by legal practitioners is widespread and serves an important public purpose.

...

The proffer of an undertaking binding upon a legal practitioner and his or her firm can be expected to enhance the reliability of the undertaking, and thereby the prospect that it will be accepted and relied upon by the party to whom it is proffered. In this way, the proffer of an undertaking binding upon a legal practitioner enhances the achievement of the various purposes to which I have referred, and thereby enhances the public interest. It is therefore vital that legal practitioners perform their undertakings, regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner concerned.

Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced.

For these reasons, the obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance. Failure to perform that obligation will generally be regarded as professional misconduct, and depending on the circumstances, will often be regarded as serious professional misconduct. (citations omitted)

Application to the present case

20 The practitioner's conduct, as revealed by the report from the Tribunal, fell well short of that which is to be expected of a legal practitioner in a number of respects. The Tribunal's findings reflect adversely on the practitioner's honesty, his trustworthiness and his judgement.

21 The seriousness of the practitioner's conduct admits of no other conclusion than that he is not a fit and proper person to remain a legal practitioner.

22 The practitioner's initial conduct, in recklessly breaching his undertaking in relation to the funds he held on trust, was itself of the utmost seriousness. It plainly involved a large sum of money, in relation to which the practitioner's integrity as a legal practitioner was the means by which the parties legitimately expected that their rights

would be protected. The practitioner dismally failed to meet those expectations, to the serious detriment of those involved.

23 Nor did this occur just once. The findings of the Tribunal reveal that the practitioner transferred the funds over a series of transactions on 23 March 2016 (a total of \$175,000) and 30 March 2016 (a total of \$125,000) on the basis of:

- (a) purported written consents which, in their terms, did not authorise the disbursement of the funds in the manner that occurred; and
- (b) oral instructions from Mr Oxlade.

24 At each stage of this process, the practitioner had the opportunity to verify or clarify whether he had the necessary consent to disburse the funds. He recklessly failed to take any such action.

25 Once it became clear to the practitioner that he had, through his own recklessness, breached his undertaking in relation to the funds, the practitioner compounded his misconduct by knowingly misleading a fellow practitioner, Mr Reese, as to the fate of the funds. That behaviour was, of course, not merely reckless but intentionally dishonest. It was the antithesis of ethical legal practice.

26 Nor were these acts of dishonesty isolated.

27 The practitioner's conduct in intentionally misleading the Federal Circuit Court, when he sent the letter dated 29 March 2016, was extremely serious. It would be incorrect to say that the practitioner 'wrote' the letter; he effectively copied (and adopted as his own) a false communication prepared by a person he did not know, apparently at the request of Mr Oxlade. The fact that the practitioner was so readily prepared to subordinate his ethical obligations, in such a serious way, demonstrates that the public could hold no confidence in his integrity.

28 In this regard, one aspect of the practitioner's evidence before the Tribunal deserves particular comment. The practitioner said on a number of occasions that he did not want to be 'accountable to two masters' (referring to his own client and Mr Cacciola respectively).¹¹ The remark is telling, and reveals a fundamental misunderstanding of the relationship between a legal practitioner and their client. A practitioner's client is not his or her 'master'. Legal practitioners, of

¹¹ Misconduct Decision [105], [195]

course, stand in a fiduciary relationship with their clients, and owe them important duties of fidelity and loyalty. Those duties must be understood, however, in the context of a practitioner's need to maintain professional independence and his or her paramount duty to the court and the administration of justice.¹²

29 In this case, the practitioner clearly lost sight of that paramount duty, in a manner that continued during the proceedings before the Tribunal. The Tribunal found that the practitioner, in the course of the proceedings before it, was dishonest in his evidence and that he displayed an almost complete lack of acceptance or appreciation of the gravity of his misconduct.

30 In particular, the practitioner's response to the proceedings before the Tribunal were characterised by attempts to blame others, rather than acknowledge his own conduct. That response suffered from the same lack of appreciation of his obligations that led to the misconduct itself. That the practitioner attempted to avoid detection, by seeking to have the complaint withdrawn as a condition of resolving the dispute with CSG, only served to confirm his lack of insight.

31 In the hearing before this Court, the practitioner submitted that he had come to a 'new realisation' and that he now unreservedly takes full responsibility for his actions and accepts all of the misconduct findings made by the Tribunal. Whether this new insight endures remains to be seen. It is to be hoped that it does.

32 For now, the practitioner accepted that his fate was to be removed from the roll of legal practitioners. This belated insight is to his credit.

33 For these reasons the court was satisfied that the appropriate order, in order to protect the public and maintain the reputation and standards of the legal profession, was that the practitioner's name should be struck from the roll of legal practitioners.

Costs

34 Although proposed in the originating motion lodged by the Committee, the Committee did not seek an order for the costs of the motion.

35 As the court has noted in previous cases, where the practitioner does not oppose the order sought by the Committee, it is appropriate to

¹² See e.g. *Professional Conduct Rules 2010* (WA), r 5 and 6(1)(d).

regard the costs of these proceedings as part of the costs of regulating the profession.

36 We, therefore, made no order as to costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JS

Research Associate to the Honourable Chief Justice Quinlan

9 AUGUST 2019