

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and MASTEN [2010] WASAT 47 (S)

MEMBER : JUSTICE J A CHANEY (PRESIDENT)
MR J MANSVELD (MEMBER)
MR M ODES QC (SENIOR SESSIONAL MEMBER)

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 8 APRIL 2010

**SUPPLEMENTARY
DECISION** : 2 NOVEMBER 2010

FILE NO/S : VR 75 of 2009

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

PAUL ERNEST MASTEN
Respondent

Catchwords:

Professional misconduct - Penalty - Findings of dishonest and illegal conduct

Legislation:

Legal Practice Act 2003 (WA)

Legal Profession Act 2008 (WA), s 216(1)(a), s 226(1), s 227(1), s 228(3)(b),
s 438(3), s 444

Sate Administrative Tribunal Act 2004 (WA), s 11(8)

Result:

Report to be made to the Supreme Court

Category: B

Representation:

Counsel:

Applicant : Ms P Cahill SC
Respondent : Mr M McCusker QC

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : Fairweather & Lemonis

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

A Solicitor v The Council of the Law Society of NSW 2004 216 CLR 253
Barristers' Board v Darveniza [2000] QCA 253; (2000) 12 A Crim R 438
Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211
Legal Practitioners Complaints Committee v Pepe [2009] WASC 39
Legal Profession Complaints Committee and Masten [2010] WASAT 47

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 By orders made on 8 April 2010, the Tribunal found a legal practitioner, Mr Paul Ernest Masten guilty of professional misconduct. The Tribunal ordered that it would hear submissions on penalty and costs on a date to be fixed. Subsequently, the Tribunal directed that the parties file written submissions on penalty on the basis that the question of penalty would be dealt with on the papers.

2 The Legal Professional Complaints Committee sought to have the practitioner referred to the Supreme Court (Full Court), with a recommendation that his name be removed from the roll of practitioners. The practitioner maintained that removal from the roll was not necessary for the protection of the public or to ensure the good standing of the profession.

3 The Tribunal considered the relevant authorities, the submissions of the parties, and the nature of the findings made against the practitioner. It concluded that the appropriate course, in light of the findings made against the practitioner, was that the Tribunal should make and transmit a report on the findings to the Supreme Court to enable it to consider whether his name should be removed from the roll of practitioners.

Background

4 On 8 April 2010, the Tribunal, constituted by Deputy President Judge Eckert, Member Mr J Mansveld, and Senior Sessional Member Mr Odes QC, delivered reasons for decision following a three day hearing in February 2010 of allegations of professional misconduct by Mr Paul Ernest Masten - see ***Legal Profession Complaints Committee and Masten [2010] WASAT 47*** (reasons). The reasons concluded with findings that the practitioner engaged in professional misconduct between 10 April 2009 and 12 May 2009 comprising:

- a) dishonest conduct;
- b) illegal conduct, namely stealing and fraudulent falsification of records; and
- c) contravention of the *Legal Practice Act 2003* (WA) and an intentional breach of trust.

5 The matter was then listed for hearing on the question of penalty and costs on 17 May 2010. On that day, Mr Masten sought to adjourn the hearing on penalty on the basis that criminal charges relating to the matters which had been the subject of the Tribunal's decision, were pending. The practitioner submitted that the question of penalty should not be determined until the criminal proceedings were completed. In light of the fact that the hearing of the matter had been brought on at the practitioner's request, notwithstanding that the criminal charge was then pending, the Tribunal declined the request to defer the penalty hearing and gave directions that the parties should file submissions on penalty and costs. Those submissions were subsequently filed in accordance with the Tribunal's directions.

6 By reason of the unavailability of Judge Eckert, the President of the Tribunal altered the constitution of the Tribunal pursuant to s 11(8) of the *State Administrative Tribunal Act 2004* (WA), by substituting himself in place of Judge Eckert for the purposes of determining the question of penalty.

The parties submissions as to appropriate action

7 The Legal Profession Complaints Committee (Committee) submits that the Tribunal should:

- a) order that a report be transmitted to the Supreme Court (Full Bench) with a recommendation that the practitioner be struck off the roll of practitioners;
- b) order that the practitioner be suspended from practice until further order; and
- c) order that the practitioner pay the Committee's costs in the sum of \$38,502.25.

8 The practitioner submits that the case does not call for a report to be transmitted to the Supreme Court with a recommendation that he be struck off the roll, and that in all the circumstances an appropriate penalty would be a suspension of practice for a period of 12 months. The practitioner does not oppose the application for costs, nor the quantum of costs claimed, but seeks a period of three months within which to pay the costs.

The relevant principles

9 Where an order for removal from the roll is contemplated, the ultimate question is whether the material demonstrates that the

practitioner is not a fit and proper person to remain a member of the legal profession - *A Solicitor v The Council of the Law Society of NSW 2004 216 CLR 253* at [15].

10 In *Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211* at [19], the Court observed:

The Court's task, in these proceedings, is that of determining whether the respondent is a fit and proper person to remain on the Roll of Practitioners. In broad terms, the principles underlying proceedings of this kind are clear, and we do not understand them to be in dispute. Proceedings of this kind are not instituted in order to punish the practitioner, but to protect the public and maintain proper standards in the legal profession. Since the object is to protect the public and the reputation of the profession, the consequences for the practitioner may be either more or less severe than they would be if the only object of the proceedings was one of punishment (see *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, *Re A Barrister and Solicitor* (1979) 40 FLR 1, *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12).

11 In *Legal Practitioners Complaints Committee v Pepe [2009] WASC 39 (Pepe)*, Murray and Beech JJ were guided by the judgement of Thomas J A, McMurdo P and White J in *Barristers' Board v Darveniza [2000] QCA 253; (2000) 12 A Crim R 438* at 446 - 447 [38] where it was said:

'Striking off is of course reserved for the very serious cases where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice. Suspension is a less serious result, firstly because a limited period is specified and secondly because the right to resume practice is then preserved without any further onus upon the practitioner to prove that he or she is now a fit and proper person to practice.

The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner. (In *Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ.)'

12 In *Pepe* at [37] Murray and Beech JJ said:

Legal practice is not only a great privilege, but if the profession of the law is to maintain its capacity to serve the community in the way described, its practitioners must accept that they are subject to rigorous ethical standards.

They must merit the trust and confidence in their propriety, of their clients, other legal practitioners, the courts and the community as a whole.

The practitioner's submissions

13 The practitioner submits that, whilst the Tribunal found breaches of s 216(1)(a), s 226(1), s 228(3)(b), and s 227(1) of the *Legal Profession Act 2008* (WA) (LP Act), essentially there was one offence being the unauthorised use of trust monies. It is submitted that there was no suggestion that the practitioner had any intention to permanently deprive the estate of the funds withdrawn, or that he attempted to conceal the withdrawal, or falsely pretend that it was for the estate's purposes. Rather, he agreed when the matter was first raised that the duty had been debited in error, and that that error should be corrected. It is noted that the estate did not ultimately suffer any financial loss.

14 Counsel for the practitioner submits that the offence was entirely out of character for the practitioner who had practised for over five years, with no offence or complaint.

15 The practitioner's submissions contain three references, one from a professional colleague, one from a businessman and sometime client of Mr Masten and one from a close personal friend. All three references are written in the knowledge that Mr Masten 'is the subject of disciplinary proceedings ... and is also subject to a criminal charge.' It is not apparent that any of the referees had read the Tribunal's reasons published prior to the date of each reference. Nevertheless, each referee expresses the view that the 'allegations' are out of character, and that Mr Masten otherwise enjoys a good reputation. The references suggest that Mr Masten has made a significant contribution to various community organisations.

16 Two of the references support the finding of the Tribunal at [153] of the reasons that, at the relevant time, the practitioner was subjected to considerable stress arising from relationship breakdowns in both his personal and professional life.

17 It is against that background that the practitioner submits that, notwithstanding that the unauthorised use of trust money constituted a serious matter, in this case, an order for suspension is an appropriate disposition.

The Committee's submissions

18 The Committee notes the finding of the Tribunal at [179] of the reasons where it found that 'the practitioner was dishonest, that his

conduct was illegal in that the records were fraudulently falsified and that his conduct constituted an intentional breach of his duty as the executor of the estate.' It also notes the following findings:

- a) that the practitioner knew that the withdrawal of funds from the trust account which he authorised on 10 April 2009 would be made against trust money to which Nobel House (the company controlled by the practitioner) was not entitled and that the withdrawal was for this personal benefit - reasons [157];
- b) the practitioner did not rectify the wrongful debit of the estate's trust account when, he says, it was first brought to his attention by Mr McNeil on 8 May 2009 (leaving to one side that he already knew of the wrongful debit), and did not do so until a day after he was informed of the Committee's investigation; and
- c) the Tribunal rejected the proposition that the practitioner did not have a dishonest intention, but rather found that the series of events was fully documented and that there was no way that the practitioner could conceal what had occurred so that the only alternative open to him was to 'confess and avoid' by stating that the entries were mistakes - reasons [171].

19 The Committee also notes that the dishonest conduct continued over a period of time, namely from the authorisation of the payment of money to the Office of State Revenue from Mr Masten's firm's Trust Account until he repaid the money into trust. The Committee notes that the practitioner had a number of opportunities between 10 April 2009 and 11 May 2009 to rectify the debit but did not do so. It submits that the practitioner engaged in that conduct in the course of legal practice, and the findings that the practitioner acted dishonestly, illegally and in breach of trust is inconsistent with the privileges of further practice. It submits that it is necessary for the protection of the public and the maintenance of the standards of the profession that the practitioner be referred to the Full Bench of the Supreme Court with a recommendation that his name be struck from the roll. In the interim, the Committee submits that the practitioner should be suspended from practice pending determination of the referral by the Supreme Court.

Consideration

20 In our view, the nature of the findings made by the Tribunal demands that a report be made to the Supreme Court in order for it to consider whether the name of the practitioner should be removed from the roll.

21 Honesty and integrity are essential prerequisites to the right to practice law. The public is entitled to expect that solicitors will deal with monies which they hold in trust with meticulous care and complete honesty and accountability. The misuse of trust funds by a legal practitioner is an extremely serious matter.

22 It is true that the estate concerned ultimately suffered no loss as a result of the practitioner's conduct. We are mindful, however, that whilst the practitioner had opportunities to reimburse the trust account after the discrepancy was initially noticed by others, it was not until after the Committee's involvement that he actually took that step.

23 The findings made by the Tribunal to which reference is made in the Committee's submissions set out above are particularly serious, and go directly to the question of the practitioner's fitness to practice. The description by the practitioner of his conduct as an 'error' glosses over the nature of the findings against him. In our view the findings suggest that the practitioner lacks the character and trustworthiness which are the necessary attributes of a legal practitioner.

24 In these circumstances, we consider it appropriate to make and transmit a report on the findings of the Tribunal to the Supreme Court (Full Bench) with a recommendation that the name of the practitioner be removed from the local roll. The reasons delivered on 8 April 2010, these reasons, and the transcript of evidence at the hearing, together comprise our report.

25 We agree with the Committee that, in view of our conclusions as to the gravity of the conduct, it is appropriate to make an order pursuant to s 438(3) of the LP Act that the practitioner's local practising certificate be suspended pending the determination of the Supreme Court under s 444 of the LP Act in relation to this report.

Costs

26 We consider that, in accordance with the usual practice of the Tribunal in relation to vocational regulatory proceedings, it is appropriate that the practitioner be ordered to pay the costs of the Committee in relation to the proceedings. The practitioner did not argue otherwise. We

consider that the amount claimed by the Committee is reasonable, and accordingly there should be an order that the practitioner pay the Committee's costs fixed at \$38,502.25.

Orders

1. The Tribunal orders that a report comprising the Tribunal's reason for decision published as *Legal Profession Complaints Committee and Masten [2010] WASAT 47* together with the transcript of the hearing and the Tribunal's decision on penalty reported as *Legal Profession Complaints Committee and Masten [2010] WASAT 47 (S)* be transmitted to the Supreme Court (Full Bench) pursuant to s 438(2) of the *Legal Profession Act 2008 (WA)*.
2. Pursuant to s 438(3) of the *Legal Profession Act 2008 (WA)* the respondent's local practising certificate is suspended pending the determination of the Supreme Court (Full Bench) of the matter in accordance with s 444 of the *Legal Profession Act 2008 (WA)*.
3. The respondent is to pay the applicant's costs fixed at \$38,502.25. Payment is to be made within three months of the date of these orders.

I certify that this and the preceding [26] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE J A CHANEY, PRESIDENT