

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : FULL BENCH

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE -v- MASTEN [2011] WASC 71

CORAM : MARTIN CJ
MURRAY J
EM HEENAN J

HEARD : 9 FEBRUARY 2011

DELIVERED : 24 MARCH 2011

FILE NO/S : LPD 3 of 2010

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

PAUL ERNEST MASTEN
Respondent

Catchwords:

Legal practitioners - Disciplinary proceedings - Removal from Roll of Practitioners - Whether practitioner fit and proper person to remain member of legal profession - Unauthorised withdrawal of trust funds

Legislation:

Legal Profession Act 2008 (WA), s 216(1), s 226(1), s 227(1), s 228(3)(b), s 438(1), s 438(2)(a), s 444(1), s 444(2)

Result:

Practitioner to be removed from Roll of Practitioners

Category: B

Representation:

Counsel:

Applicant : Ms P Le Miere
Respondent : In person

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : In person

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

A Solicitor v The Council of the Law Society of New South Wales [2004] HCA 1; (2004) 216 CLR 253

Attorney-General and Minister for Justice (Qld) v Priddle [2002] QCA 297

Barristers' Board v Darveniza [2000] QCA 253; (2000) 112 A Crim R 439

Council of the Queensland Law Society Inc v Cummings; Ex parte Attorney-General of Queensland and Minister for Justice [2004] QCA 138

Council of the Queensland Law Society Inc v Wakeling [2004] QCA 42

Dupal v The Law Society of New South Wales (Unreported, NSWCA, 26 April 1990)

In re Davis (1947) 75 CLR 409

Law Society of New South Wales v Jones (Unreported, NSWCA, 27 July 1978)

Legal Practitioners Complaints Committee v Camp [2010] WASC 188

Legal Practitioners Complaints Committee v De Pardo [2007] WASC 266

Legal Practitioners Complaints Committee v Edward [2007] WASC 287

Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211

Legal Practitioners Complaints Committee v Palumbo [2005] WASC 129

Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9

Legal Practitioners Conduct Board v Jones [2009] SASC 347

Legal Practitioners Conduct Board v Kerin [2006] SASC 393

Legal Profession Complaints Committee and Masten [2010] WASAT 47
Legal Profession Complaints Committee and Masten [2010] WASAT 47 (S)
Legal Profession Complaints Committee v Brennan [2010] WASC 198
Re Maraj (a legal practitioner) (1995) 15 WAR 12
Ziems v Prothonotary of the Supreme Court of New South Wales [1957] HCA
46; (1957) 97 CLR 279

1 **JUDGMENT OF THE COURT:** The Legal Profession Complaints
Committee (the Committee) moves the court for an order that Paul Masten
(the practitioner) be struck off the Roll of Practitioners (the Roll).

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 Act). 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.

3 The motion before the court is made pursuant to s 444(2) the Act.
That section provides that upon reading a report from the Tribunal, the
court may, without any further evidence, make a variety of orders
including the removal of the name of a practitioner from the Roll.

The history of the proceedings

4 The matters out of which the report arises, and the findings made by
the Tribunal upon which the report is founded, are set out in the reasons of
the Tribunal in *Legal Profession Complaints Committee and Masten*
[2010] WASAT 47 (*Tribunal decision*).

5 The Committee sought a finding by the Tribunal pursuant to s 438(1)
of the Act that the practitioner had engaged in professional misconduct by
illegal and dishonest conduct and intentional breach of trust, arising from
the practitioner's conduct related to a trust account and, in particular, the
unauthorised withdrawal of trust money which the practitioner used for
his own benefit.

6 The practitioner was the sole director and principal of a small
incorporated legal practice, Denning Deane Masten Pty Ltd. The
practitioner was appointed executor and trustee under a will made by his
client. The client passed away ten days later and probate of the will was
granted to the practitioner. The practitioner's firm maintained a trust
account ledger with respect to the trust money received on behalf of the
deceased's estate.

7 Noble House Holdings Pty Ltd, a company directed solely by the
practitioner, purchased a block of land on 24 November 2008 acting as
trustee of a trust of which the practitioner was a beneficiary. Settlement
of the purchase occurred on 22 December 2008. Stamp duty in respect of
the purchase was assessed at \$11,115. The practitioner had some
financial difficulties at the time and that amount remained outstanding
until about 10 April 2009. At that time, the practitioner authorised the
Office of State Revenue to deduct \$11,115 from the firm's trust account.

An entry was made on 26 April 2009 in the trust account ledger of the client's estate which debited that account \$11,115 purportedly in payment of stamp duty liability.

8 In early May 2009, the entry in the trust account ledger was discovered by a solicitor at the firm and brought to the practitioner's attention. The practitioner alleged that the entry was due to a mistake by the firm's bookkeeper. The practitioner did not report the errors to the Board or act to rectify the errors prior to 12 May 2009 (the day after the Committee commenced its investigation). The practitioner submitted he did not report the errors due to the immense stress that he was under in both his professional and personal life. On 12 May 2009, the practitioner deposited \$11,115 into the trust account.

9 The Committee alleged that the practitioner engaged in professional misconduct between 10 April 2009 and 12 May 2009 by withdrawing without authority and using for his own benefit funds from the trust account. The Committee also alleged that the practitioner made or caused a false entry to be made in the trust account ledger of a client of the firm and that he failed to report any irregularities to the Board.

10 The Tribunal held that the charges had been proven to the requisite standard. The practitioner admitted authorising the payment of \$11,115 from the trust account, despite there being no funds in the trust account for this payment. The practitioner also conceded that an entry into the trust account ledger of the estate could only have been made by himself or by the firm's bookkeeper under his direction. The practitioner asserted that he had directed the bookkeeper to debit the money from the trust account ledger for the Office of State Revenue and she had erred in debiting the money from the trust account ledger of the estate.

11 The Tribunal found that the practitioner knew at all times that the payment to the Office of State Revenue was outstanding and that no funds had been transferred into the trust account either by the company which owed the stamp duty or by himself to meet the liability. The Tribunal found in relation to the practitioner's submissions that 'the improbability of his entire version of events led the Tribunal to the inevitable conclusion that the practitioner's evidence could not be relied on nor accepted': *Tribunal decision* [155].

12 The Tribunal found that the practitioner engaged in professional misconduct between 10 April 2009 and 12 May 2009, namely:

- (a) dishonest conduct;

- (b) illegal conduct namely stealing and fraudulent falsification of records;
- (c) contravention of the Act; and
- (d) an intentional breach of trust.

13 The Tribunal held that the practitioner contravened:

- (a) s 216(1) of the Act which obliges a legal practice to disburse trust money only in accordance with a direction of a person on whose behalf the trust money is held;
- (b) s 226(1) of the Act which prohibits a practitioner, without reasonable excuse, from causing a deficiency in any trust or trust ledger;
- (c) s 228(3)(b) of the Act pursuant to which a practitioner must keep trust records in a way which at all times discloses the true position in relation to trust money received on behalf of any person; and
- (d) s 227(1) of the Act pursuant to which a practitioner must report an irregularity relating to the practice's trust accounts to the Board.

14 In the Tribunal's sentencing decision, *Legal Profession Complaints Committee and Masten* [2010] WASAT 47 (S) (*Sentencing decision*), the Tribunal suspended the practitioner's practising certificate pending the outcome of these proceedings and ordered that the practitioner pay the costs of the Committee, amounting to \$38,502.25.

15 The practitioner was recently found guilty of one count of stealing the sum of \$11,115 in the property of the estate after a trial by jury in the District Court of Western Australia: Bowden DCJ, WADC, IND 1068 of 2010, 7 February 2011, ts 473 (*District Court decision*). The practitioner was sentenced to 9 months imprisonment, suspended for 12 months. In his Honour's sentencing remarks, Bowden DCJ observed that the offence committed by the practitioner was so serious that only a sentence of imprisonment adequately reflected the culpability of the practitioner, although his Honour exercised the discretion to suspend the term to be imposed: *District Court decision* ts 479 - 480.

Relevant principles

16 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 not exercised 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 legal practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ, Kennedy & Franklyn JJ agreeing); *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279, 286 (Dixon CJ, McTiernan, Fullagar & Kitto JJ agreeing); *Legal Profession Complaints Committee v Brennan* [2010] WASC 198 [10] (Martin CJ, Murray & Hall JJ agreeing). 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: *Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 [19].

17 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 The Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253 [15]; *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 [43]. Fitness to practise law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges: *In re Davis* (1947) 75 CLR 409, 420 (Dixon J), *Thorpe* [43], and *Brennan* [11]. The personal circumstances of the practitioner may be relevant to explain the conduct of the practitioner, which is discussed in further detail below.

18 Striking off 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': *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 112 A Crim R 439 [38]. In that case, Thomas JA observed that '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' [33].

19 Honesty and integrity are essential characteristics required of legal practitioners. The court has generally taken a very serious approach to cases in which a practitioner's conduct has involved dishonesty: see *Brennan* [15], *Legal Practitioners Complaints Committee v Palumbo* [2005] WASC 129 [23]; *Legal Practitioners Complaints Committee v De Pardo* [2007] WASC 266 [14]. Honesty is particularly important where practitioners are dealing with monies entrusted to them by their

clients. Some of the minimum standards expected of practitioners in respect of money held on trust are set out by Malcolm CJ in *Re Maraj*:

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 (25).

20 In this context, the Tribunal correctly stated that the public is entitled to expect that practitioners will act 'with meticulous care and complete honesty and accountability': *Sentencing decision* [21].

21 As observed by the Tribunal the misuse of trust funds by a legal practitioner is an extremely serious matter: *Sentencing decision* [21]. However, there have been several cases in which the inability to keep a trust account adequately has not lead to the practitioner being struck off the roll: see *Council of the Queensland Law Society Inc v Cummings; Ex parte Attorney-General of Queensland and Minister for Justice* [2004] QCA 138; *Attorney-General and Minister for Justice (Qld) v Priddle* [2002] QCA 297; *Legal Practitioners Complaints Committee v Edward* [2007] WASC 287. Importantly, in these cases the lack of dishonesty on behalf of the practitioner was a significant factor in the decision to impose a lesser penalty.

22 In contrast, the courts will generally strike off defaulting practitioners in serious cases of trust account defalcation, particularly where dishonesty is a factor: *Cummings* [22] (McMurdo P, Davies JA & Fryberg J agreeing); see also *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42; *Brennan*. The need for such an approach was emphasised in the oft-cited passage of Street CJ in *Law Society of New South Wales v Jones* (Unreported, NSWCA, 27 July 1978):

Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities belonging to a solicitor. Members of the public, many of them wholly inexperienced and unskilled in matters of business or of law, inevitably must put great faith and trust in the honesty of solicitors in the handling of moneys on their behalf. The Court must ensure that this trust is not misplaced (10).

23 Where a practitioner has dishonestly misused trust monies, authority clearly establishes that, almost inevitably, the most appropriate order will be to strike the practitioner off the Roll.

Application to this case

24 The Tribunal found that the practitioner was dishonest; that he withdrew the sum from the trust account knowing that the trust account did not hold any money to which either Noble House or the practitioner was entitled: *Tribunal decision* [176] - [177]. The dishonest conduct continued over a period of time; namely, from the authorisation of the payment in 10 April 2009 (which was debited from the account on 26 April 2009) until the trust money was repaid on 12 May 2009 (the day after the Legal Profession Complaints Committee commenced its investigation). The practitioner had numerous opportunities between those dates to rectify the default but did not do so. In fact, upon discovery of the incorrect debiting of the estate's trust account, the practitioner left Perth to attend a birthday party in Melbourne and to inspect his thoroughbred broodmares: *Tribunal decision* [172]. The Tribunal concluded that the practitioner lacked the character and trustworthiness which are necessary attributes of a legal practitioner: *Sentencing decision* [23].

25 The practitioner's conduct could not be described as a temporary lapse of standards of honest behaviour. The conduct clearly establishes his unfitness to practice by seriously breaching the trust placed in him by his client to deal with trust money in an honest manner, and not for his own benefit. Further, the practitioner has demonstrated an absence of insight into, or acceptance of, his dishonest conduct. Although the practitioner repeatedly asserted before this court that he fully accepts the gravity of his actions, and that he recognises the seriousness of the offence, he continues to maintain that he had no dishonest intent. In this respect, the court endorses the Tribunal's observation, namely that the description by the practitioner of his conduct as an 'error' glosses over the nature of the findings against him: *Sentencing decision* [23]. This is not a case where the practitioner has accepted full responsibility for his actions and has immediately attempted to rectify those failures. The practitioner's dishonesty is heightened by the fact that he failed to report irregularities to the Board, and falsely asserted that the bookkeeper had erroneously debited the money to the trust account ledger of the estate.

Personal circumstances

26 The practitioner has submitted his single offence is entirely out of character. The practitioner has provided the court with numerous examples of pro bono legal services and other positive contributions he has made to the community, and has provided numerous positive character references. The practitioner has submitted that his behaviour may be explained by his personal circumstances of stress, the break down

of his marriage, his mental health problems and financial difficulties. The practitioner relied upon the District Court's recent findings that the practitioner suffered from an adjustment disorder and that the stress he was under was a contributing and causative factor of the commission of the offence: *District Court decision* ts 480.

27 In proceedings of this kind, personal circumstances of the practitioner are not to be ignored; these circumstances are relevant where they can satisfactorily explain the practitioner's conduct: *Legal Practitioners Conduct Board v Kerin* [2006] SASC 393 [19] - [23] (Gray J). However, the court cannot go beyond the findings of the report from SAT or 'draw any conclusions or inferences inconsistent with its contents': *Legal Practitioners Complaints Committee v Camp* [2010] WASC 188 [70].

28 In *Legal Practitioners Conduct Board v Jones* [2009] SASC 347, Layton J found that the Tribunal had attached too great a weight to the circumstances of stress asserted by the practitioner. Layton J explained:

[D]uring this whole period of stress, the respondent appeared to be able to conduct his other legal functions and duties as part of his legal practice. Further, it is one thing for the respondent to say he fell down on his administrative duties, it is another to say that the stress could account for or even properly explain the use which he made of monies for business and personal expenses when he knew that he was not entitled to use that money. Stress may explain technical non-compliance matters, but it does not explain or excuse the use of monies to which the respondent knew he was not entitled [39].

29 The weight given to personal circumstances cannot override the fundamental obligation of the court to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice.

30 The Tribunal accepted that the practitioner was under 'tremendous stress', partially as a result of his marital problems: *Tribunal decision* [153]. In *Kerin*, the practitioner submitted that the stress of his matrimonial situation had contributed to his poor judgment in overcharging his client by approximately \$12,000. White J stated:

[T]he practitioner's matrimonial situation may have affected his judgment. I agree that this circumstance does extenuate the practitioner's conduct to some extent. However, I do not regard it as being appropriate to attach much weight to this factor in this case. Practitioners are expected to maintain high standards of conduct even in times of personal stress [44].

31 Similarly, Williams JA observed in *Wakeling*:

Whilst one can sympathise with the respondent in view of the problems he experienced in his personal life, such factors are not sufficient to absolve him from the consequences of his dishonesty. He was not deprived of the capacity to understand that he was acting dishonestly and the mitigating considerations do not, in my opinion, absolve him from the ordinary consequences of his dishonest behaviour [47].

32 The same observations can be made, with equal force, to this case. The Tribunal accepted the evidence of Dr Golic that neither the practitioner's judgment nor his insight was impaired and that despite suffering this stress, he continued to cope and function well: *Tribunal decision* [154]. The District Court may have made other findings in respect of the practitioner's mental health and its relation to the offence; however this court is bound by the findings of the Tribunal, which have not been appealed.

33 For these various reasons, while the court takes full account of the various matters that the practitioner has advanced in mitigation of his conduct, in a case involving dishonesty and abuse of trust, such as this, these matters will necessarily be of limited weight, and subordinate to the overriding obligation to protect the public interest.

34 This case clearly falls into the category of serious cases in which striking the practitioner's name from the Roll is the only appropriate order. The court makes this order with the intention that the effect of the decision, as envisaged by Kirby P in *Dupal v The Law Society of New South Wales* (Unreported, NSWCA, 26 April 1990), 'should be such as to leave no doubt in the mind of a practitioner in financial difficulties, exposed to the temptation of using without clear authority the funds of another, the consequences that will flow for the right to practise when such misuse of funds is discovered' (1).

Costs of the application

35 Given the practitioner's financial situation, the Committee does not seek costs in this matter. In these circumstances, it seems 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.

Conclusion

36 For those reasons, the court orders that the name of the practitioner be removed from the Roll of Practitioners but makes no order as to the costs of the application.