

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and CHIN [2012] WASAT 77 (S)

MEMBER : JUDGE T SHARP (DEPUTY PRESIDENT)
MR J MANSVELD (MEMBER)
MR M ODES QC (SENIOR SESSIONAL MEMBER)

HEARD : DETERMINED ON THE DOCUMENTS
WRITTEN SUBMISSIONS 14 MAY 2012,
16 MAY 2012 AND 29 MAY 2012

DELIVERED : 24 APRIL 2012

PUBLISHED : 20 AUGUST 2012

FILE NO/S : VR 87 of 2009

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

NI KOK CHIN
Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct -
Unsatisfactory professional conduct - Penalty - Referral to Supreme Court
(full bench) - Recommendation that the practitioner be struck off the
Roll of Practitioners - Costs

Legislation:

Legal Practice Act 2003 (WA), s 137, s 231, s 232

Legal Profession Act 2008 (WA), s 28, s 438, s 441, s 441(m)

State Administrative Tribunal Act 2004 (WA), s 60(2), s 87(1)

Result:

Report transmitted to Supreme Court (full bench) with recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession

Costs awarded

Category: B

Representation:

Counsel:

Applicant : Ms R Fogliani with Mr R Fletcher

Respondent : Self-represented

Solicitors:

Applicant : Legal Profession Complaints Committee

Respondent : N/A

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

A Solicitor v The Council of the Law Society of NSW (2004) 216 CLR 253

In Re Davis (1947) 75 CLR 409

Legal Practitioners Complaints Committee and Benari [2005] WASAT 213(S)

Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119

Legal Practitioners Complaints Committee v Pepe [2009] WASC 39

Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9

Re Maraj (a Legal Practitioner) (1995) 15 WAR 12

The Council of the New South Wales Bar Association v Sahade
[2007] NSWCA 145

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 24 April 2012, the Tribunal delivered its decision that a legal practitioner, Ni Kok Chin, was guilty of numerous counts of professional misconduct and unsatisfactory professional conduct under the *Legal Profession Act 2008* (WA) in respect of conduct which occurred between July 2004 and June 2006.

2 The findings included disgraceful and dishonourable conduct, failing to reach and maintain the standards of competence and diligence that a member of the public is entitled to expect from a legal practitioner and failing to treat fellow practitioners and members of the public with courtesy.

3 The Tribunal considered that the only appropriate penalty to be imposed on the practitioner was that his name should be removed from the Roll of Practitioners as he was not a fit and proper person to remain a member of the legal profession.

4 As a result, the Tribunal made and transmitted a report of its findings to the Supreme Court (full bench) to enable the Court to make a determination on the Tribunal's findings.

Introduction

5 Under the *Legal Profession Act 2008* (WA) (**LP Act**) the applicant (**Committee**) alleged that the respondent (**Practitioner**) had engaged in professional misconduct and unsatisfactory professional conduct, based on numerous grounds. In a decision delivered on 24 April 2012 (*Legal Profession Complaints Committee and Chin* [2012] WASAT 77 (**Chin**)) the Tribunal made findings that the Practitioner was guilty of:

1. Professional misconduct between about July 2004 and March 2005, by:
 - (i) acting for his son and for the vendor in the purchase and sale of a business when the interests of all parties, including his own interests, would be in conflict and when he was a likely witness in relation to a dispute relating to that purchase and sale; and

- (ii) making a proposal to another practitioner that he avail himself of costs in relation to work that that practitioner did not perform, at the expense of the defendant in the case.
2. Professional misconduct on or before January 2005, by failing to treat a professional colleague with the utmost fairness and courtesy and by making allegations of improper conduct against fellow practitioners without a reasonable or proper basis for doing so.
3. Professional misconduct between May 2006 and August 2006, by making allegations that another practitioner had resorted to underhand tactics in falsifying a court document and by accusing that practitioner of deliberately misleading an officer of the court without a proper basis for doing so.
4. Professional misconduct between about July 2004 and August 2004, by:
 - (i) failing in a substantial way to reach or maintain a reasonable standard of competence and diligence in drafting a will and a trust deed on behalf of a client;
 - (ii) inserting additional provisions into a costs agreement with his client without his client's consent;
 - (iii) charging his client fees for work which were excessive;
 - (iv) using intemperate and offensive language in a letter to his client; and
 - (v) attempting to subvert the jurisdiction of the Committee.
5. Professional misconduct on or about 13 February 2006, by writing to a judicial officer seeking legal advice in relation to proceedings in which he was retained and in which the judicial officer concerned had delivered a judgment and, in any event, communicating directly with

a judicial officer in relation to proceedings in which he was retained without first advising or notifying the solicitors for the other party.

6. Unsatisfactory professional conduct in February 2005 and thereafter, by seeking to receive remuneration from a client which varies in accordance with the amount that may be recovered, in addition to costs obtained from the opposing party.
7.
 - (i) Professional misconduct between 14 March 2005 and 31 August 2005, by giving legal advice to and representing two parties in relation to criminal charges against each of them in circumstances where the interests of each accused were, or were potentially, in conflict; and
 - (ii) unsatisfactory professional conduct on 12 June 2006, by providing an inaccurate and misleading response to the Committee in relation to a specific matter.
8. Professional misconduct on or about 19 April 2006, by making allegations of improper conduct against a third party without a reasonable or proper basis for doing so.
9. Professional misconduct between February 2005 and February 2006, by:
 - (i) not maintaining a trust account within the meaning of s 137 of the *Legal Practice Act 2003* (WA) and failing to deposit trust monies to the credit of a trust account as required; and
 - (ii) failing to render an account in respect of legal services and failing to provide notices in accordance with s 231 and s 232 of the *Legal Practice Act 2003* (WA).

6. The Tribunal ordered the parties to file submissions in relation to penalty and costs and directed, subject to any further order, that these issues are to be determined entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

Statutory framework

- 7 Section 438(2) to (4) of the LP Act provides as follows:
- (2) If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may -
- (a) make and transmit a report on the finding to the Supreme Court (full bench); or
- (b) make any one or more of the orders specified in section 439, 440 and 441.
- (3) If the State Administrative Tribunal transmits a report in respect of a legal practitioner to the Supreme Court (full bench) under subsection (2)(a), the Tribunal may, pending the determination of the Supreme Court (full bench), make the following orders -
- (a) an order that the Australian legal practitioner's local practising certificate be suspended for a specified period;
- (b) an order that specified conditions be imposed on an Australian legal practitioner's local practising certificate restricting the entitlement of an Australian legal practitioner to practise for a specified period.
- (4) Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following -
- (a) a record of the evidence taken at the hearing;
- (b) a recommendation that the name of the practitioner be removed from the local roll.

8 The 'local roll' is the 'roll of persons admitted to the legal profession under [the LP] Act', known as the Roll of Practitioners, which the Supreme Court is required to maintain under s 28 of the LP Act.

9 The orders referred to in s 438(2)(b) that the Tribunal may make following a finding that a legal practitioner is guilty of unsatisfactory professional conduct or professional misconduct include the suspension of a practitioner's practising certificate, an imposition of conditions on a practitioner's practising certificate, the reprimand of a practitioner, the payment of a fine not exceeding \$25,000 and an order that a practitioner undergoes further legal education.

The parties submissions

10 The Committee seeks an order that a report be submitted to the Supreme Court (full bench) recommending that the Practitioner be struck off the Roll of Practitioners, contending that he is not a fit and proper person to remain a legal practitioner. The Committee points out that the Tribunal's findings in *Chin* were that the Practitioner had been found guilty of both professional misconduct and unsatisfactory professional conduct in respect of all but one of the complaints made against him and that these findings related to conduct which occurred in the relatively short period between July 2004 and April 2006. This, the Committee says, is 'cause for great concern and warrants a careful consideration of the penalty necessary to protect the public'. The Committee also points out that some of the findings are of dishonesty, while others demonstrate a lack of understanding on the part of the Practitioner of the most fundamental principles of legal practice.

11 The Committee also seeks an order that the Practitioner not apply for a local practising certificate until the Supreme Court (full bench) has considered and determined whether the Practitioner is fit to remain on the Roll. The Committee says that the Tribunal can make such an order under s 441(m) of the LP Act.

12 The Practitioner's submissions are contained in an email to the Tribunal dated 14 May 2012, before the Tribunal received the Committee's submissions of 16 May 2012. The Practitioner then provided further submissions in a letter to the Tribunal dated 29 May 2012.

13 In the Practitioner's email of 14 May 2012, he says that the reason why his submissions predate those of the Committee is that he is concerned that 'the LPCC and the SAT panel may be on the wrong tracks again ...'. He says that he is not guilty of any professional misconduct but 'only unsatisfactory conduct, absent any wilful misconduct or misappropriation of funds or dishonesty on my part which impinges on the issue of fitness to practise and removal from the roll'.

14 He also says that the Tribunal failed to establish 'mens rea for professional misconduct' which he maintains that 'the Committee [in *Chin*] must prove beyond reasonable doubt and not on the balance of probability'.

15 The remainder of the email is difficult to understand, but it appears to be a copy of a series of comments made by the Practitioner on his

web log or 'blogspot', in which he invites responses from others who may read his observations.

16 We do not find any of this to be of assistance.

17 The Practitioner's more formal submissions of 29 May 2012 are lengthy, extensively footnoted and extremely difficult to understand. The first 13 pages of the submissions are set out as a table of 'jurisdictional errors' contained in the decision in *Chin*. The Practitioner then proceeds to maintain his original contention (*Chin* at [4]) that the Committee, in pursuing the complaints against him, is acting in a vexatious manner.

18 The detailed challenge to the findings of the Tribunal in his email and in parts of his submissions is entirely inappropriate and serves to underline the contention of the Committee that the Practitioner has little or no appreciation of correct legal procedures.

19 The substance of the remainder of his submissions seems to be that from July 2004 to February 2005, the Practitioner was 'a trainee lawyer under supervision of his mentor' and that therefore in respect of his conduct during that period, he is 'not culpable or at the lower end of culpability'.

20 He states that he is 'culpable in the commission of the remaining EIGHT ALLEGED CULPABLE OFFENCES' but he argues that the penalty should 'depend on the Degree of Culpability or the Blameworthiness of [the Practitioner]'.

21 He also says that '[t]here is no justification for the removal [from the Roll] of [the Practitioner]' as he is 'a fit and proper person to practise law and is not a public danger nor does he destroy or tarnish the image of the legal profession.'

22 He then closes by providing his assessment of the Tribunal's findings in *Chin* and of the Committee's submission that a report should be made under s 438 of the LP Act.

The principles to be applied

23 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: *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 at [43].

24 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 legal practitioner: *A Solicitor v The Council of the Law Society of NSW* (2004) 216 CLR 253 at [15]; *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12.

25 Honesty, fairness and integrity are essential prerequisites to the right to practise law. A willingness to engage in dishonest behaviour is of central relevance to an assessment of a practitioner's fitness to practise: *Legal Practitioners Complaints Committee v McKerlie* [2007] WASC 119 at [8]; *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 at [58].

26 Further, fitness to practise 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 at 420.

27 In *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39, Murray and Beech JJ said the following at [10] - [12]:

... the purpose of the maintenance of proper standards in the legal profession for the protection of the public may require this court to consider matters, particularly the seriousness of the offending behaviour, which go beyond what might strictly be required to secure the outcome that the practitioner is appropriately punished and would be unlikely to offend in the same manner again. Not every instance of unprofessional or illegal conduct will require the extreme penalty of striking off, or even suspension from practice, but there will be cases where the seriousness of the conduct demands such a disposition because it demonstrates unfitness for practice: *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298.

In the final analysis, however, the question remains that with which this discussion of the applicable principles started - easy to state, but not always so easy to apply. As it was put by the High Court in *A Solicitor v Law Society (NSW)* [2004] HCA 1; (2004) 216 CLR 253 at 265 [15]:

Where an order for removal from the Roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court upon whose roll the practitioner's name presently appears.

It is plain that under the statute, the judgment of the Full Bench upon that issue is to be made as at the time when the court is called upon to exercise its disciplinary powers.

Where the choice presented is, as in this case, effectively between suspension and striking off, useful guidance can be obtained from the judgment of Thomas JA, McMurdo P and White J agreeing, in *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 12 A Crim R 438 at 446 - 447 [38]:

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).

The Tribunal's findings

28 The Tribunal has made some 13 findings of professional misconduct and 2 findings of unsatisfactory professional conduct against the Practitioner relating to his conduct between July 2004 and April 2006. The Tribunal finds that the multiplicity of findings within that relatively short period of time is in itself a cause for concern.

29 The Tribunal has formed the view that the Practitioner is not a fit and proper person to remain on the Roll of Practitioners. We have reached this conclusion for a number of reasons.

30 First, the findings against the Practitioner included findings that the Practitioner engaged in conduct that a practitioner of good repute and competence would regard as disgraceful and dishonourable (*Chin* at [52]) or dishonest (*Chin* at [126]). We also found that the Practitioner attempted to subvert the jurisdiction of the Committee (*Chin* at [146]) and misled the Committee (*Chin* at [196]). This kind of conduct is not acceptable.

31 Second, the Tribunal also made findings against the Practitioner for acting in situations where a conflict of interest could arise (*Chin* at [44] and [189]), with no appreciation of the legal principles involved (*Chin* at [45] and [187]). This, coupled with the Tribunal's findings elsewhere in

the decision in *Chin* of the Practitioner failing to understand the basic requirements of a valid codicil to a will (*Chin* at [114]), the fundamental principle that there should be no communication between a judge and one of the legal advisors of a party to a proceeding, otherwise than in the presence of, or with the previous knowledge and consent of, the other party (*Chin* at [162]), the concept of contingency fees (*Chin* at [175]) and the proper treatment of trust moneys (*Chin* at [275]), leads us to the conclusion that the Practitioner's level of competence is well below what is required of him to continue to practise. We are not persuaded that this situation could be remedied by the Practitioner undergoing further legal education.

32 Third, the Practitioner's manner and approach when writing to fellow practitioners, his own clients and to third parties (*Chin* at [68], [90], [102], [137] and [214]) does not give us any confidence that the Practitioner commands the respect of his fellow practitioners and the public generally.

33 Finally, the Practitioner's palpable lack of insight into his shortcomings as a practitioner is quite extraordinary. His submissions referred to earlier in these reasons demonstrate that this lack of insight is an ongoing issue. He expressly refutes any suggestion of dishonesty on his part, he persists in denying any wrongdoing and the contents of his submissions, which we will include with our report to the Supreme Court (full bench), continue to demonstrate in our view a lack of understanding of even basic legal principles. His contention that he was only 'a trainee lawyer under supervision' is rejected.

34 The cumulative effect of these findings leads us inexorably to the conclusion that the Practitioner is not a fit and proper person to remain on the Roll of Practitioners.

Proposed order under s 441(m) of the LP Act

35 As mentioned earlier in these reasons, the Committee not only seeks an order that a report be submitted to the Supreme Court (full bench) recommending that the Practitioner be struck off the Roll of Practitioners, it also seeks an order that the Practitioner not apply for a local practising certificate until the Supreme Court has considered and determined that issue.

36 However, we do not consider that it is open to us to make such an order. Under s 438 of the LP Act, the Tribunal can either make and transmit a report to the Supreme Court or make an order under, relevantly,

s 441, but not both. The order sought by the Committee is not one included in s 438(3). We therefore decline to make that further order.

Costs

37 Notwithstanding the general position set out in s 87(1) of the SAT Act, where disciplinary proceedings have been commenced in the public interest by a vocational regulatory body and the vocational regulatory body has been successful in the prosecution of those proceedings, the affected person should be ordered to contribute to the cost of the proceedings incurred by the vocational regulatory body; see *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213(S) at [25] (*Benari*).

38 The contribution the affected person should be required to make lies in the discretion of the Tribunal, having regard to all of the circumstances of the case. Special matters can be taken into account to determine what is a fair and reasonable costs order; see *Benari* at [26] - [27].

39 The Practitioner states the following in his submissions on costs:

[Section] 87(3) of the *State Administrative Act 2004* (the SAT Act) requires the Applicant and the Board to compensate the Respondent for closing down his legal practice and unreasonably causing him to incur *expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceedings was brought* including his loss of earnings without making findings of professional misconduct or unsatisfactory conduct first ...

40 This submission further illustrates the fact that the Practitioner has little understanding of legal processes. The Tribunal rejects the submission and we see no reason why the full costs claimed should not be awarded.

41 We accordingly order costs in the sum of \$16,721.42, the full amount claimed by the Committee, to be paid within 30 days of the date of this order.

Orders

1. Pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA), the Tribunal makes and transmits a report to the Supreme Court (full bench) in the form of its reasons published on 24 April 2012, these reasons and the Practitioner's submissions on penalty and costs, with a

recommendation that the Practitioner be struck off the Roll of Practitioners.

2. The Practitioner is to pay the Legal Profession Complaints Committee's costs fixed at \$16,721.42 within 30 days of the date of these orders.

I certify that this and the preceding [41] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE T SHARP, DEPUTY PRESIDENT