

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PRACTICE ACT 2003 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and LIM [2006] WASAT 90

MEMBER : JUSTICE M L BARKER (PRESIDENT)
MR D R PARRY (SENIOR MEMBER)
MR J MANSVELD (MEMBER)

HEARD : 3 MARCH 2006

DELIVERED : 10 APRIL 2006

FILE NO/S : VR 401 of 2005
VR 402 of 2005
VR 403 of 2005
VR 404 of 2005
VR 405 of 2005
VR 406 of 2005

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

SZE MING LIM
Respondent

Catchwords:

Legal practitioner – Professional behaviour – Legal Practitioners Complaints Committee allegations of illegal conduct and unsatisfactory conduct and neglect and undue delay in course of practise of law and unsatisfactory conduct by

neglect or undue delay in the course of legal practice - Practitioner admitted six allegations of conduct contravening s 29A of the *Legal Practitioners Act 1893* (WA) – Tribunal findings of guilt against practitioner - Tribunal decision not to exercise powers of discipline under s 187 *Legal Practice Act 2003* – Tribunal to transmit report to Supreme Court (full bench) pursuant to s 185(2)(a) *Legal Practice Act 2003* – Report finding practitioner is not a fit and proper person to remain a member of the legal profession

Legislation:

Legal Practice Act 2003 (WA), s 185(2), s 185(3), s 194

Legal Practitioners Act 1893 (WA), s 29A, s 29A(2)

Limitation Act 1935 (WA)

Workers' Compensation and Rehabilitation Act 1981 (WA)

Result:

The practitioner is suspended from practice and the Tribunal transmits a report on its findings to the Supreme Court (full bench) and the practitioner is to pay costs fixed in the sum of \$9 300.

Category: B

Representation:

Counsel:

Applicant : Mr Goetze
Respondent : Mr Urquhart

Solicitors:

Applicant : Minter Ellison
Respondent : Hylton Quail Barristers and Solicitors

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

Legal Practitioners Complaints Committee and Cullen [2005] WASAT 211

New South Wales Bar Association v Cummins (2001) 52 NSWLR 279

Re A Barrister and Solicitor (1979) 40 FLR 1

Re A Practitioner (Unreported, Supreme Court of Western Australia, Library
Number 970354, delivered 18 July 1987 at 12-13).

Re Wheare [1893] 2 QB 439

Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97
CLR 279

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 In professional disciplinary proceedings under the *Legal Practitioners Act 1893* (WA) and the *Legal Practice Act 2003* (WA) instituted by the Legal Practitioners Complaints Committee against Sze Ming Lim (practitioner) the practitioner admitted six allegations of conduct contravening s 29A of the *Legal Practitioners Act 1893*.

2 As a result, the Tribunal made the following findings of guilt against the practitioner:

1. In VR 401 of 2005, neglect and undue delay in the course of the practice of law and unsatisfactory conduct by neglect or undue delay in the course of legal practice.
2. In VR 402 of 2005, unprofessional conduct and unsatisfactory conduct.
3. In VR 403 of 2005, unprofessional conduct.
4. In VR 404 of 2005, illegal conduct.
5. In VR 405 of 2005, unprofessional conduct.
6. In VR 406 of 2004, neglect and undue delay in the course of the practice of the law and unsatisfactory conduct by neglect or undue delay in the course of legal practice.

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 act on the Tribunal's findings.

5 The Tribunal made the following orders:

1. The Tribunal makes and transmits a report on the findings it has made to the Supreme Court (full bench), which report is constituted by these reasons for decision.
2. Pending the determination of the Supreme Court (full bench) in relation to the report transmitted to it by the Tribunal, the practitioner is suspended from practice.

3. The practitioner shall pay to the Legal Practitioners Complaints Committee its costs of and incidental to the hearing and determination of the proceedings in the Tribunal which are fixed in the sum of \$9 300.

Allegations made against and admitted by practitioner

6 By applications made by the Legal Practitioners Complaints Committee in these proceedings, the Committee makes six serious allegations concerning the practitioner's conduct that are each said to contravene the professional conduct requirements laid out in s 29A of the *Legal Practitioners Act 1893* (WA).

7 At all material times when the practitioner acted in the manner alleged, his professional conduct was governed by the *Legal Practitioners Act 1893*.

8 However, the applications were properly brought pursuant to *Legal Practice Act 2003* (WA): see discussion in *Legal Practitioners Complaints Committee and Cullen* [2005] WASAT 211 at [5] – [9].

9 The allegations made against the practitioner, which he admits in each case, is that he is guilty of:

- 1) two counts of neglect and undue delay in the course of the practice of the law and unsatisfactory conduct by neglect or undue delay in the course of legal practice (VR 401 of 2005 and VR 406 of 2005);
- 2) two counts of unprofessional conduct (VR 405 of 2005, and VR 403 of 2005);
- 3) one count of unprofessional conduct and unsatisfactory conduct (VR 402 of 2005); and
- 4) one count of illegal conduct (VR 404 of 2005).

10 The full names of the clients for whom the practitioner acted at material times have not been used in these reasons. The public interest does not require that the names of the clients be published. For that reason they will be referred to by their initials.

VR 401 of 2005 and VR 402 of 2005 – Client Mrs MO

11 The conduct of the practitioner which is the subject of VR 401 of 2005 and VR 402 of 2005 arises out of the same matter and concerns the same former client of the practitioner.

12 The practitioner acted for Mrs MO in respect of a claim for personal injuries sustained at her workplace. In respect of VR 401 of 2005 the practitioner admits that he was guilty of neglect in respect of the conduct of that claim. The practitioner was advised by the Director of the Conciliation and Review Directorate on or about 20 January 2000 that the form filed by the practitioner on behalf of the client to elect to retain the right to seek common law damages was inadequate. The practitioner neglected to inform his client of this advice. Save and except for forwarding to the client a copy of a medical report on 23 February 2000 the practitioner failed to progress the client's claim between 23 February 2000 and 10 March 2003, a period of approximately three years.

13 Further, the practitioner prepared and filed a writ of summons in respect of the client's claim on or about 12 September 2003. Between 12 September 2003 and the termination of the practitioner's instructions on or about 20 March 2004, the practitioner failed to progress the client's claim or take any action in respect of the writ of summons. The period of neglect in this respect was a period of approximately six months.

14 The periods of neglect in respect of the client's claim were significant and there do not appear to be any mitigating factors in the practitioner's favour.

15 In respect of VR 402 of 2005 the practitioner admits he is guilty of misleading the client as to the payment of fees for a medical report.

16 On or about 5 September 2005 Dr W advised the practitioner that a report commissioned by the practitioner in relation to the client would be provided on payment of his fee of \$800 and provided an invoice for that amount.

17 Between 21 November 2003 and 3 March 2004 the practitioner falsely advised the client that he was awaiting receipt of an invoice from Dr W, that he had sent a cheque to Dr W in payment of the report fee and was awaiting receipt of the report in circumstances where the invoice had been received and the report fee had not been paid. The statements by the practitioner in this regard were false and misleading.

VR 403 of 2005 – client Mr AM

18 The conduct of the practitioner the subject of VR 403 of 2005 involves the misleading of his client, Mr AM, and the client's father, Mr BM, in respect of a claim by the client for damages for personal injury

suffered by the client in a work accident. The practitioner admits he is guilty of misleading the client and the client's father in this matter.

19 In the course of acting for the client the practitioner issued a writ on or about 6 March 2001 which was not issued either within the time limit prescribed in the *Limitation Act 1935* (WA) or by leave of the court as required by the *Workers' Compensation and Rehabilitation Act 1981* (WA). The practitioner failed to advise the client that the writ was statute barred and that he had not obtained the leave of the court.

20 In or about November 2002, the practitioner prepared a document purporting to be a memorandum of advice from Mr N of counsel in respect of the claim and forwarded that memorandum of advice to the client. The practitioner falsely advised the client that the memorandum was prepared by Mr N. The practitioner falsely advised the client that Mr N was proposing to meet with the defendant's insurers in relation to his claim. The practitioner prepared a further document purporting to be a memorandum of advice from Mr N and forwarded that to the client's father, again falsely advising that it was from Mr N.

21 On or about 30 May 2003 the practitioner falsely advised the client's father that Mr N had made an offer to the defendant's insurer to settle the client's claim in the sum of \$200 000 and that the defendant's insurer had counter offered the sum of \$40 000. The practitioner then falsely advised the client's father the insurer's offer had been increased to \$50 000 and then \$70 000. In fact no offer had been made by the defendant's insurers. The client accepted the offer of \$70 000. In late 2003 the practitioner paid to the client the sum of \$70 000 from an unknown source in settlement of the client's claim.

22 The memoranda of advice were false and misleading and constitute conduct of the utmost seriousness. The advice given to the client and his father concerning the offers by the insurer was also false and misleading and is also of the utmost seriousness.

VR 404 of 2005 – client Mr SW

23 The conduct of the practitioner the subject of VR 404 of 2005 constitutes illegal conduct and arises out of instructions given to the practitioner by his client Mr SW in respect of an Enduring Power of Attorney.

24 The practitioner previously acted for the client in respect of a claim for damages for personal injury. In respect of that claim the practitioner

received on behalf of the client monies representing an award of damages of approximately \$4 million.

25 The client appointed the practitioner as his Enduring Power of Attorney on 28 November 2001 and 4 December 2003.

26 Between 8 July 2002 and 9 March 2004 the practitioner drew 27 cheques on a Macquarie cash management account in the name of the client in the total sum of \$176 430.01. The cheques were drawn without the client's authority.

27 The practitioner has made restitution in the sum of \$176 430.00.

28 The practitioner admits that he is guilty of illegal conduct in stealing in respect of this matter. The practitioner's conduct represents a fundamental breach of the practitioner's fiduciary duty to the client. The conduct is of the utmost seriousness.

VR 405 of 2005 and VR 406 of 2005 – client Mr RH

29 The conduct of the practitioner the subject of VR 405 of 2005 and VR 406 of 2005 arises out of the same matter and concerns the same former client for whom the practitioner acted.

30 The practitioner acted for Mr RH in respect of a claim by him against his employer, State Ships, for workers' compensation arising out of a work injury.

31 In respect of VR 405 of 2005 the practitioner admits he is guilty of misleading the client as to the institution of proceedings against State Ships in relation to the client's potential workers' compensation claim and the progress of that claim.

32 The client instructed the practitioner to pursue a potential workers' compensation claim against State Ships in or about April 1999. On or about 29 July 2003, the practitioner advised the client that he was waiting for the Administrative Appeals Tribunal (AAT) to list a conference in relation to the claim at which time the parties would be ordered to file Statements of Fact and Contention. The practitioner further advised the client on or about 11 August 2003 that the AAT was waiting for the respondent (State Ships) to file a document and that thereafter the claim was ready to proceed to a conference. The practitioner further advised the client on or about 26 September 2003 that a directions hearing for programming orders was listed in the AAT and the matter would then proceed to a negotiation discussion. The practitioner further advised the

client on 22 October 2003 that the parties were proceeding with standard processes in the AAT. All statements made by the practitioner in this regard were false and in fact no application had been made to the AAT by the practitioner on behalf of the client.

33 In respect of VR 406 of 2005 the practitioner admits he was guilty of neglect or undue delay in the course of the practice of the law and unsatisfactory conduct by neglect or undue delay in the course of legal practice.

34 In about April 1999, the client instructed the practitioner to pursue a potential claim against his former employer, State Ships, for workers' compensation. The practitioner neglected to write to State Ships requesting its advice as to its view on liability in respect of the client's claim until 27 July 2001.

35 By letter dated 4 September 2001 the solicitors for State Ships requested that the practitioner advise, among other things, details of any claim by the client against a subsequent employer in respect of the same injury.

36 By letter dated 22 July 2002, the practitioner forwarded various medical reports concerning the client's claim to the solicitors for State Ships but neglected to provide details of the client's claim against his former employer. The practitioner thereafter neglected to provide these details as requested.

37 Further, the practitioner neglected to commence any proceedings on behalf of the client in respect of the client's potential claim for workers' compensation and neglected to take any action to advance his claim or provide his client with advice as to the merits of such a claim.

38 The period of neglect or undue delay in respect of this matter was significant and totalled almost 5 years. There do not appear to be any mitigating factors in favour of the practitioner.

Findings of Tribunal

39 The practitioner admits each of the allegations made against him as well as the facts as set out above.

40 In those circumstances, the Tribunal finds the practitioner guilty of the following allegations:

1. In VR 401 of 2005, neglect and undue delay in the course of the practice of law and unsatisfactory conduct by neglect or undue delay in the course of legal practice in the manner alleged.
2. In VR 402 of 2005, unprofessional conduct and unsatisfactory conduct in the manner alleged.
3. In VR 403 of 2005, unprofessional conduct, in the manner alleged
4. In VR 404 of 2005, illegal conduct, in the manner alleged
5. In VR 405 of 2005, unprofessional conduct, in the manner alleged
6. In VR 406 of 2004, neglect and undue delay in the course of the practice of the law and unsatisfactory conduct by neglect or undue delay in the course of legal practice, in the manner alleged.

Penalty

41 While each of the applications leading to the findings against the practitioner is made under the *Legal Practice Act 2003* (WA), the conduct in respect of which the findings made preceded that Act coming into operation and is governed by the *Legal Practitioners Act 1893* (WA). Under the *Legal Practitioners Act 1893*, the Tribunal is empowered to impose disciplinary penalties on a practitioner when findings such as these are made. However, where the Tribunal considers that the appropriate penalty requires the practitioner's name to be struck off the Roll of Practitioners, or that a practitioner be suspended for a period in excess of two years, the Tribunal is obliged, pursuant to s 29A(2) of the *Legal Practitioners Act 1893* (and s 185(2) and (3) of the *Legal Practice Act 2003*), to make and transmit a report of its findings to the Supreme Court (full bench), and may, pending the determination by the Supreme Court (full bench) suspend the practitioner from practice.

42 Having regard to the factual circumstances that underlie the six findings made against the practitioner, whether taken separately or as a whole, the Tribunal considers only one penalty to be appropriate, namely that the name of the practitioner be struck from the Roll of Practitioners.

43 The primary function of a disciplinary penalty is not so much "to punish" a practitioner (as the heading to s 194 of the *Legal Practice Act 2003* suggests) as to ensure that appropriate professional standards are

upheld and the interests of members of the public who deal with the legal profession are fully protected: see *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at 289; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 288.

44 In assessing the appropriate penalty, the Tribunal should have regard to the whole of the practitioners conduct, including those facts which were additional to the facts required to prove the offences for which the practitioner should be convicted: see *Ziems* at 288 and *Re A Practitioner* (Unreported, Supreme Court of Western Australia, Library Number 970354, delivered 18 July 1987 at 12-13).

45 It is appropriate to consider whether, in the Tribunal's view, the practitioners conduct giving rise to the Tribunal's findings is "of such a personally disgraceful character that he should not remain a member of an honourable profession": *Re Wheare* [1893] 2 QB 439 at 446.

46 Legal practitioners occupy a privileged and important position in our society. They act on behalf of persons who are required to invest considerable trust and confidence in them. The relationship between a lawyer and client is of a fiduciary nature, and a lawyer owes exacting duties of loyalty to a client. In this case, the practitioner has fundamentally breached that fiduciary and ethical relationship by lying to his clients, stealing the money of one of his clients, and failing to act in the best interests of other clients by unduly delaying the prosecution of matters he undertook to deal with expeditiously on their behalf.

47 All in all, the practitioner is not a fit and proper person to remain a member of the profession: see *Re A Barrister and Solicitor* (1979) 40 FLR 1 at 24 – 25.

48 There is no alternative, in the view of the Tribunal, other than that the practitioner's name should be struck from the Roll of Practitioners in Western Australia.

49 To his credit, the practitioner, through his counsel, acknowledges that this outcome is inevitable.

50 Accordingly, the Tribunal will transmit a report of its findings and recommendations in this regard to the Supreme Court (full bench).

51 The Tribunal will also make an order that pending the determination of the Supreme Court (full bench) in this reference, the practitioner will be suspended from practice.

52 The practitioner will also be required to meet the costs of the Legal Practitioners Complaints Committee in prosecuting this disciplinary matter.

Orders

53 The Tribunal makes the following orders:

1. The Tribunal makes and transmits a report on the findings it has made to the Supreme Court (full bench), which report is constituted by these reasons for decision.
2. Pending the determination of the Supreme Court (full bench) in relation to the report transmitted to it by the Tribunal, the practitioner is suspended from practice.
3. The practitioner pay to the Legal Practitioners Complaints Committee its costs of and incidental to the hearing and determination of the proceedings in the Tribunal fixed in the sum of \$9 300.

I certify that this and the preceding [53] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE M L BARKER, PRESIDENT