QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Legal Services Commissioner v McDonald* [2018] QCAT 82
PARTIES:	**LEGAL SERVICES COMMISSIONER (Applicant/Appellant)** **v** **LUKE JAMES McDONALD (Respondent)**
APPLICATION NUMBER:	OCR061-15
MATTER TYPE:	Occupational Regulation Matters
HEARING DATE:	6 October 2017
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody** **Assisted by:** **Mr Kenneth Horsley, Legal Panel Member** **Dr Margaret Steinberg AM, Lay Panel Member**
DELIVERED ON:	15 March 2018
DELIVERED AT:	Brisbane
ORDERS MADE:	**THE TRIBUNAL ORDERS THAT THE RESPONDENT, LUKE JAMES McDONALD IS:** **1. Publicly reprimanded for professional misconduct.** **2. Ordered to pay a fine in the sum of $20,000.** **3. Prohibited from applying for or obtaining a certificate to practice as a principal for five (5) years after being granted an employee level practicing certificate.** **4. To pay the commissioner's costs on the standard basis assessed under the QCAT rules or as agreed.**

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY CONDUCT – OTHER MATTERS – where the practitioner systematically falsified electronic timesheet entries submitted by junior legal staff under his supervision – where the intended and practical effect was overcharging the firm's clients more than $515,000 over an 18 month period – where the substantiated conduct supports a professional misconduct finding – where honesty is central to ethical legal practice – where an appropriate sanction is needed to show disapproval, deters repetition and meets public accountability demands – whether these objects can only be met by removal of the practitioner's name from the roll – where the practitioner is not assessed as being probably permanently unfit to practice law – where a public reprimand, sizable fine and conditional practicing certificate adequately satisfy the purposes of disciplinary sanctions appropriate in all the circumstances

Legal Profession Act 2007 (Qld) ss 5(1)-(2), 9(1), 21(1)(a)-(b), 24(1), 27(2), 28, 30, 31, 35(2)(a)(ii), 45(2), 46(1)-(2), 49(1), 51(4)(b), 51(5)(b), 52, 59, 64(1), 418, 419, 452, 453, 456(2)(a)-(e), 456(4)(a)-(j), 457(4)

Attorney-General v Bax [1999] 2 Qd R 9
Baker v Legal Services Commissioner (No 2) [2006] 2 Qd R 249
Blatch v Archer (1774) 1 Cowp 63; 98 ER 970
Bolton v Law Society [1994] 1 WLR 512
BRJ v Council NSW Bar Association (2016) NSWSC 146
CDJ v VAJ (No 1) (1998) 197 CLR 172
Chandra v Queensland Building and Construction Commission [2017] QCA 4
Clyne v New South Wales Bar Association (1960) 104 CLR 186
Council of the New South Wales Bar Association v Sahade [2007] NSWCA 145
Council of the Queensland Law Society Incorporated v Whitman [2003] QCA 438
Ex parte Lenehan (1948) 77 CLR 403
Ex parte Macaulay (1930) 30 SR(NSW) 193
Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41

Janus v Queensland Law Society Inc [2001] QCA 180
Jensen v Legal Services Commissioner [2017] QCA 189
Kotowicz v Law Society of New South Wales (No 2) (Unreported, New South Wales Supreme Court – Court of Appeal, 7 August, 1987)
Law Society of New South Wales v Farr [2009] NSWADT 108
Law Society of New South Wales v Foreman (No 2) (1994) 34 NSWLR 408
Law Society of New South Wales v Jones (Unreported, New South Wales Court of Appeal, 27 July 1978)
Law Society of New South Wales v Stormer (No 2) [2011] NSWADT 9
Legal Practitioners Admission Board v Doolan [2016] QCA 331
Legal Practitioners Complaints Committee v De Pardo [2007] WASC 266
Legal Practitioners Conduct Board v Ardalich (2005) SASC 478
Legal Practitioners Conduct Board v Boylen [2003] SASC 241
Legal Practitioners Conduct Board v Hannaford (2002) 83 SASR 277
Legal Practitioners Conduct Board v Jones (2010) 272 LSJS 529
Legal Practitioners Conduct Board v Kerin (2006) 246 LSJS 371
Legal Services Commissioner v Keddie [2012] NSWADT 10
Legal Services Commissioner v Madden [2008] QCA 301
Legal Services Commissioner v Madden (No 2) [2009] 1 Qd R 149
Legal Services Commissioner v Quinn [2012] QCAT 618
Legal Services Commissioner v Shand [2017] QCAT 159
Legal Services Commissioner v Sorban [2009] LPT 5
Legal Services Commissioner v Woodman [2017] QCAT 385
Legal Services Commissioner v XBN [2016] QCAT 471
McBride v Walton [1994] NSWCA 199
New South Wales Bar Association v Harman [1999] NSWCA 404

New South Wales Bar Association v Murphy (2002) 55 NSWLR 23
Prothonotary of the Supreme Court of New South Wales v Fitzsimons [2012] NSWSC 260
Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320
Prothonotary of the Supreme Court of New South Wales v Pangallo (1993) 67 A Crim R 77
Purkess v Crittenden (1965) 114 CLR 164
Queensland Law Society v Priddle [2002] QCA 297
Queensland Law Society v Wakeling [2004] QCA 42
Quinn v Law Institute of Victoria Ltd [2007] VSCA 122
Re a Solicitor [1952] VLR 385
Re Application by Giles (Unreported, Supreme Court of the ACT, Miles CJ, Gallop and Sheppard JJ, 17 June 1994)
Re B [1981] 2 NSWLR 372
Re Davis (1947) 75 CLR 409
Re Harrison (1992) 168 LSJS 84
Re Maraj (1995) 15 WAR 12
Re Mahoney (a practitioner) (Unreported, Supreme Court of South Australia, Cox, Matheson and Duggan JJ, 11 December 1996)
Watts v Legal Services Commissioner [2016] QCA 224
Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 278

APPEARANCES and REPRESENTATION (if any):

APPLICANT/APPELLANT	Ms DA Holliday instructed by the Legal Services Commissioner
RESPONDENT	Mr J Bell QC instructed by Bartley Cohen, Solicitors for the respondent

REASONS FOR DECISION

[1] The commissioner applies for an order recommending removal of the practitioner's name from the local roll[1] for professional misconduct.

[2] The practitioner was admitted in 1998 and practiced as a solicitor specialising in planning and environment law. By July 2007 he was a supervising partner in a top tier Brisbane law firm. On 14 October 2013 he

[1] The public register of persons admitted to the legal profession as a lawyer in Queensland; LPA s 37(1).

self-referred to the commissioner for disciplinary investigation and voluntarily surrendered his practicing certificate.

[3] In terms of professional status he is still enrolled as a solicitor but not allowed to practice as one.[2]

Lawyers and legal practitioners

[4] Since enactment of the *Legal Profession Act 2007* (Qld),[3] an important distinction has been kept between fitness to practice as a legal practitioner, on the one hand, and suitability to remain on the roll as a lawyer, on the other.[4] There is no material distinction between barristers and solicitors in this context.

[5] The Supreme Court admits lawyers to the legal profession. The regulatory bodies for the relevant branch (law society for solicitors and bar association for barristers) decide the eligibility of Australian lawyers for practice by granting, refusing or amending practicing certificates based on statutory criteria.[5]

[6] The same suitability matters[6] govern both admission and the right to practice. Eligibility for continued enrolment ends with removal or on ceasing to be an Australian lawyer. Practicing certificates can be applied for at any time by a person admitted to the legal profession for as long as his or her name remains on the roll or he or she remains an Australian lawyer.[7]

[7] There are two levels of practicing certificate available to solicitors: principal and employee (restricted or unrestricted).[8] Restricted employee certificates are usually granted to practitioners who have to meet supervision requirements.[9] The holder of an employee practicing certificate is not permitted to engage in legal practice as a principal.

[8] The difference between the court's admitting and the regulatory body's practice certificate issuing functions may not always matter much outside disciplinary proceedings[10] because both Australian lawyers and legal practitioners have to be "fit and proper"[11] and are officers of the Supreme Court but it does mean that a person can still be enrolled as a solicitor or barrister[12] yet be unfit or unsuitable for legal practice. Great care, therefore,

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2 *Legal Profession Act 2007* (Qld) s 5(1)-(2). Cf. s 6(1)-(2), 24(1), 27, 28, 31, 44.
3 Unless otherwise indicated all future references are to this Act.
4 *Legal Practitioners Admission Board v Doolan* [2016] QCA 331.
5 LPA ss 9(1), 21(1)(a)-(b), 24(1), 28, 30, 31.
6 LPA ss 9(1), 31(1), 35(2)(a)(ii), 46(1)-(2), 49(1), 51(4)(b), 51(5)(b).
7 LPA s 64(1).
8 LPA ss 45(2), 52.
9 LPA s 59; *Queensland Law Society Administration Rule 2005 (v34)* r 15.
10 *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23 [111].
11 *Re B* [1981] 2 NSWLR 372, 381.
12 cf. LPA ss 5(1)-(2), 6(1)-(2), 9(1)(m), 46(2).

needs to be taken in holding out as suitable to be an officer of the court any person "…whose character has borne the stain of serious misconduct".[13]

The disciplinary process

[9] There are two statutory categories of prescribed conduct. Behaviour falling short of the prevailing standard that a member of the public is entitled to expect in the delivery of legal services is unsatisfactory professional conduct.[14] More serious or sustained instances of substandard performance in a professional setting and any other behaviour justifying a current unsuitability finding (including in purely personal or private affairs) is professional misconduct.[15]

[10] If satisfied that the practitioner engaged in either form of unacceptable conduct the tribunal – advised by the panel – is conferred with power to "make any order as it thinks fit" and may impose any sanctions it considers necessary and appropriate.[16] Examples of the range of options are stated in s 456(2) including removal from the roll, admonition, fine, suspension with an automatic resumption date, cancellation, amendment or postponement of meeting or granting of a practicing certificate application.

[11] The statutory jurisdiction to take disciplinary action against an existing or former legal practitioner (or lawyer)[17] including making a removal recommendation depends on substantiation and characterisation of alleged prescribed conduct and discretionary considerations.

Substantiation

[12] The practitioner admits the allegations stated in the disciplinary application and in doing so substantiates each of them. In brief, he systematically forged (by adding false hours) 914 electronic timesheet entries submitted by legal staff under his supervision with the intended and practical effect of overcharging 23 of the firm's clients a total of more than $515,000 over an 18 month period in the 2012-13 financial years.

[13] By July 2013 the practitioner had become "obsessed" with overcharging. His "loss of reasoning and … sense of proportion had … failed … so that … his billings had escalated many times over (from a budget realisation rate of 83.5% to 99.1%) drawing the attention of accountants and senior partners …".[18] Client A alone paid fees of $136,415 more than were genuinely incurred.

[14] The practitioner clearly remembers "doing the increased billing" from 2012 but cannot recall now what he was thinking about at the time. He

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13 *Re Harrison* (1992) 168 LSJS 84, 90.
14 LPA s 418.
15 LPA s 419.
16 LPA ss 452, 453, 456(2)(a)-(e), 456(4)(a)-(j).
17 LPA ss 27(2), 452(1)(a), 453, 456, 457(4).
18 Dr Molnar's report, 17 March 2014, 3.

nonetheless accepts that he was not acting consciously and that there were multiple reasons, but none that justify or excuse, why he acted as he did.

[15] Although at a loss to fully explain his motivation the practitioner accepts full responsibility for his actions. He does not suggest that the fault element was lacking[19] or that the practitioner was not in full control of his actions across the period of professional misconduct.[20] Indeed, the formal admissions necessarily acknowledge fraudulent intent and the fact that no client incurred any financial loss due to the practitioner's "status seeking" does not alter the objective character of his misconduct.[21]

[16] The practitioner's hearing affidavit describes the situation in which he found himself in 2012-2013 in these terms:[22]

> 5. By the standards of (the firm), I was very young (35-36 years old) to be the head of a workgroup and to have the supervision and other responsibilities that I had. I was, as I now recognise under enormous pressures at work. That pressure had steadily been increasing. By late 2011/early 2012 my position as the head of Planning and Environment workgroup for the firm was increasingly required me to travel interstate for national firm matters. I was spending more time at work and on work related travel and less time at home. By this time, I was working 12-13 hours each weekday and, usually, one day on each weekend.
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> 6. My home life was also under increasing pressure during this period, including because of the substantial hours that I was working and the periods of time that I was away from home as (my wife) and I tried to raise our young family. (My wife) experienced some significant health difficulties during her pregnancy with (our son), including an ovarian cancer scare and a painful condition which required surgical intervention.
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> 7. In late 2011, (our son) who was then just a baby began to suffer from convulsions. It was necessary for him to be taken to hospital by ambulance where he was kept for monitoring for several days. (My wife), who was still unwell, and I monitored his sleeping every night. I did not have any opportunity to exercise, relax or catch up on sleep given my responsibilities with (the children) during the times that I was home from work.
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> 8. In about 2012, (my wife) and I separated very abruptly. (She) remained in the family home with the children. Unless I was away for work, I had the children from Friday evening until Monday morning. I began working longer hours during the week so that I could spend that time with my children. I was probably at work 13

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19 *BRJ v Council NSW Bar Association* (2016) NSWSC 146; *Legal Services Commissioner v XBN* [2016] QCAT 471.

20 see also *Legal Practitioners Complaints Committee v De Pardo* [2007] WASC 266 [12].

21 *Legal Practitioners Conduct Board v Boylen* [2003] SASC 241 [32].

22 Statement of Mr Luke McDonald, 3 February 2017, [5]-[8].

> or 14 hours a day during the week and sometimes longer. I then spent my weekends with and caring for my children.

[17] It almost goes without saying that increasing billing time partly to "look better" [23] within the firm showed a complete disregard for the clients' best interests and was a gross breach of the fundamental fiduciary duties of honesty and undivided loyalty. By any measure the overcharging was disgraceful, dishonourable and disreputable. Although no criminal proceedings have been taken or are proposed and all defrauded clients were fully refunded with interest by the firm, the conduct demonstrated a deplorable lack of discipline and betrays a degree of infidelity to the lawyer-client relationship antithetical of someone held out by the profession as a person who can be trusted by clients with absolute confidence.

Characterisation

[18] Clients have to be able to trust their legal advisers "to the ends of the earth."[24] For this reason equity imposes a normative ethical obligation of honesty[25] (or loyalty) on lawyers in a position of power and privilege vis-a-viz clients requiring them not to secretly profit, even indirectly, in financial dealings with clients beyond a reasonable fee for service.

[19] The tribunal finds the substantiated conduct meets the definition of professional misconduct under the statute and at common law. The scale, duration and repetition of the conduct are just too significant to conclude otherwise.[26] It involved the substantial or consistent failure to reach or keep reasonable professional standards in connection with the practice of law and alternatively is such as to justify (without necessarily compelling) a current unfitness finding according to the statutory suitability criteria governing admission and the issue or renewal of local practicing certificates.[27]

[20] When a professional misconduct finding will be followed by an unfitness finding was explained by Powell JA in *McBride v Walton*,[28] a medical malpractice case with overlapping relevance, as depending on whether it:

- is intrinsically unbefitting;
- was an error of judgment rather than a defect of character;
- was an isolated episode and hence atypical of the practitioner's normal qualities and behaviour;

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23 Report by Dr Reddan, 15 November 2016, 3.

24 This remark from *Bolton v Law Society* [1994] 1 WLR 512, 519 is as valid today as it was when first made more than 20 years ago and applies as much to Australian lawyers as to their counterparts in the UK.

25 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

26 *Baker v Legal Services Commissioner (No 2)* [2006] 2 Qd R 249.

27 LPA ss 9(1), 419(1)(b), 419(2).

28 [1994] NSWCA 199.

- was motivated by personal gain or some other uncontrolled impulse;

- has been followed by exemplary conduct showing that public and professional confidence may be reposed in the practitioner to "uphold and observe the high standards of moral rectitude required ..." despite the lapse.

[21] The dividing line between unfitness that does and does not call for expulsion, however, is a separate and more complex inquiry and is "by no means an easy task".[29]

[22] What is to be decided is a question of fact or a value judgment about what, if anything, the practitioner's past conduct relevantly says about his current and ongoing character[30] and overall professional capacity.

[23] There are, no doubt, some kinds of misconduct involving a degree of turpitude and failure to live up to bedrock professional values that of their own force carry the "stigma"[31] of permanent unfitness[32] and, in the case of some violations, it will be difficult to contemplate any circumstances in which the culprit's name will be retained on or restored to the roll.[33]

[24] Furtively charging for work not done or hours not spent on a file is a serious breach of the solicitor's ethical duty usually amounting to professional misconduct indicating unfitness[34] because it is, by nature, incompatible with the "essential" requirements of legal practice[35] and irrespective of its causes[36] or the circumstances,[37] invariably reflective of a disreputable character.[38]

[25] In *Ex parte Macaulay*,[39] for instance, where a solicitor had been proved guilty of theft Street CJ said he should not, except in very exceptional circumstances, ever be allowed again to be held out to the public as trustworthy.

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29 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 278, 298.

30 *Ex parte Lenehan* (1948) 77 CLR 403, 422 (Latham CJ, Dixon and Williams JJ).

31 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 278, 298.

32 cf. *McBride v Walton* [1994] NSWCA 199.

33 *Kotowicz v Law Society of New South Wales (No 2)* (Unreported, New South Wales Supreme Court – Court of Appeal, 7 August, 1987) 23 (Kirby P).

34 *Baker v Legal Services Commissioner (No 2)* [2006] 2 Qd R 249.

35 *Re Davis* (1947) 75 CLR 409, 420; *Law Society of New South Wales v Jones* (Unreported, New South Wales Court of Appeal, 27 July 1978) [12].

36 *Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277; *Legal Practitioners Conduct Board v Kerin* (2006) 246 LSJS 371; *Law Society of New South Wales v Stormer (No 2)* [2011] NSWADT 9.

37 *Legal Practitioners Conduct Board v Ardalich* (2005) SASC 478 [49].

38 *Legal Services Practitioner v Woodman* [2017] QCAT 385 citing *Hilton v Legal Profession Admission Board* [2016] NSWSC 1617 [6].

39 (1930) 30 SR(NSW) 193, 194.

[26] Even so, each case is facts dependant and while there are guiding principles there are no forgone conclusions at the penalisation stage.

[27] It is uncommon but not unheard of for financial dishonesty in a professional connection to result in no more than a suspension for a finite period.

Sanction

[28] The commissioner's counsel, Ms Holliday (who presented the case objectively and even-handedly), contends, in effect, that because of character flaws (that just took a while to emerge) the practitioner not only was, but is and probably always will be, unsuitable for legal practice and nothing short of total incapacitation by disbarment will mitigate the risk of future repetition or meet reasonable community expectations.

[29] Ms Holliday identifies the aggravating features as:

(a) a protracted 18 month period of a serious form of dishonesty in the course of professional work which ended only when detected;

(b) nearly 2 dozen unsuspecting clients were overcharged more than $500,000;

(c) the practitioner was acting in a supervisory role when he lapsed and acted intentionally, even inexplicably, every time he made a lie of another lawyer's timesheet;

(d) an indirect financial benefit in terms of promotion and status within the firm was received;

(e) while he may be apologetic, ashamed and contrite the practitioner has not sought enough insight oriented psychotherapy in the three and a half years since to fully identify, own and address the root causes.

[30] The practitioner freely acknowledges that a fitting sanction is warranted to show disapproval specifically, generally deter repetition and meet public accountability demands but does not agree his behaviour, as bad as it was, necessarily means that he is either unsuitable to remain on the roll as a member of the legal profession or unfit to practice law.

[31] Recognising that any return to practice would be conditional he is willing to accept "any conditions" including the successful completion of the QLS ethics course or equivalent study, an indefinite employee level restriction plus vigilant supervision, mentoring and a strict reporting regime.

[32] Mr Bell QC (who has said everything that can possibly be said for the practitioner) asserts that the commissioner has not proven current (or likely future) unfitness and submits that the practitioner should be allowed to return to practice as an employee. He relies on the following mitigating factors:

(a) his success and significant achievement as a partner in a major firm on a stellar career path;

(b) the full cooperation given to the firms internal audit and the profession generally by resigning from his position and reporting himself to the regulator for investigation;

(c) his candid and unqualified admissions;

(d) the important fact that no clients suffered uncompensated financial loss because the full amounts were repaid by the firm (with interest);

(e) a significant penalty has already been suffered in that a proud reputation built up over many years has effectively been destroyed. He will have to start again to rebuild his career. Also, the financial loss resulting from resignation of his partnership has been very substantial;

(f) the lack of any direct financial motive or gain;

(g) the loss of his career and reputation;

(h) early plea, remorse and demonstrated insight;

(i) reoffending is unlikely;

(j) a return to practice will allow him to properly provide for his young family, his dependant ex-wife and himself;

(k) the mutual advantage of permitting a talented, productive and ethical member to re-join the profession;

(l) the character references and other evidence showing that his aberrant conduct does not reflect his true character;

(m) the continued support of clients and peers alike;

(n) he has not been previously investigated or disciplined.

[33] The most significant mitigation relied on, however, is the resolution of a psychiatric disorder induced by sustained stress explaining the uncharacteristic misconduct.[40] Practitioners appearing in QCAT's occupational regulation jurisdiction frequently attribute unprofessional conduct or ethical lapses to severe personal and work pressure, fatigue, depression, addiction and personality disorders.

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40 *Quinn v Law Institute of Victoria Ltd* [2007] VSCA 122 [35]-[36].

[34] As a general rule external pressures, even dramatic life events, never completely absolve a lawyer from disciplinary liability for professional fraud because they do not change either the objective character of the conduct or the protective purpose of disciplinary orders. Unlike plants, bad behaviour for humans is a matter of free choice with each of us held fully accountable (personally and professionally) for the natural consequences.

[35] The practice of the law is inherently stressful and it is incumbent on a practitioner to have an effective strategy for adequately coping with its heavy demands[41] especially in difficult times. Working longer and harder is not one of them.[42] However, extraneous causal conditions are relevant to overall suitability.[43]

[36] Dr Elizabeth Molnar, a professor in psychiatry, was consulted by the practitioner on three occasions within a few months of his resignation. She concluded at page 9 of her report that he displayed "signs and symptoms of a prolonged stress-related or adjustment disorder … compulsive personality traits … which explain his vulnerability to acting out his inner conflicts, by inappropriate professional conduct".[44] She describes the contrary conduct as a complete aberration, inconsistent with his personal and professional conduct over many years and not reflective of some inherent defect or default in his character.

[37] In Dr Molnar's opinion her clinical findings "support the hypothesis that from early 2010, especially during the first part of 2013, he suffered a psychiatric impairment, with a masked depressive disorder with features of agitation and anxiety, associated with fatigue, sleep deprivation and chronic anxiety".[45]

[38] Dr Reddan examined the practitioner for the commissioner on 10 November 2016 or more than three years after the conduct in issue and, admittedly, when the stressors which Dr Molnar considered to be significant were no longer operating.

[39] Dr Reddan disagrees with Dr Molnar's conclusions. She "found no evidence that the practitioner was or is suffering from a specific psychiatric disorder". So called "stressors" in Dr Reddan's opinion are never the sole explanation for conduct of this kind. She says there always has to be some degree of weakness of the conscience, a weakness of ethical or professional awareness, disregard of ethical and professional behaviour and notes that despite the prevalence of similar stressors the vast majority of professionals do not behave improperly even in the face of serious personal problems. In her estimation there is no "purely psychiatric" obstacle to a return to practice and no therapy is indicated.

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41 *Law Society of New South Wales v Farr* [2009] NSWADT 108 [38].

42 GE Dal Pont, 'Too much work – too little time' (2006) 80(3) *Law Institute Journal* 78.

43 GE Dal Pont, Lawyers Professional Responsibility, (Thomson Reuters, 5th ed, 2013) 762 [23.145].

44 Report by Dr Elizabeth Molnar, 17 March 2014, 9.

45 Report by Dr Elizabeth Molnar, 17 March 2014, 4.

[40] Dr Molnar was cross-examined on her opinion but Dr Reddan was not.

[41] In Mr Bell QC's submission the tribunal could not reasonably prefer Dr Reddan's opinion that the misconduct is reflective of "some inherent defect or default in his character" over Dr Molnar's diagnosis of psychiatric impairment to the required degree of certainty.

[42] The panel takes the view that whatever extraneous causes and personality traits were at play the misconduct in issue was substantially the product of a latent, possibly dormant, "weakness of conscience" and a degree of ethical failure (perhaps even hubris). To use his own words "the switch that should have gone off" telling him that he was behaving improperly did not work.[46]

[43] It is unable, however, to rule out psychiatric impairment as a partial explanation. Assuming the correctness of Dr Molnar's findings he was not psychiatrically fit to practice during the period of misconduct but based on Dr Reddan's report, we find that he is now.

[44] The next question is whether the practitioner is a fit and proper person to stay enrolled as a lawyer or not.

The removal principles

[45] Disciplinary penalties discriminate between unsuitable practitioners[47] and unacceptable behaviours.

[46] As the statutory expressions "fame and character" and "the inherent requirements of legal practice" in s 9(1)(a) and (m) imply, the character and capacity of the practitioner, or those aspects of it relevant to the office of a solicitor,[48] are the decisive suitability considerations.

[47] Fame refers to reputation. Character denotes innate moral virtue. It differs from repute in that it is based on nature not perception. It is best tested in bad not the good times. The same person can lack the attribute of good fame while having a good character.

[48] A lawyer's "intrinsic character" is regarded as more important than his good fame "whether within the legal tradition or the wider community". [49] On this basis, being an inherently good person with an undeserved bad reputation is much more morally desirable than being held in good regard and landed by others for your integrity while being rotten to the core.[50]

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46 Report of Dr Reddan, 15 November 2016, 3.
47 *Legal Services Commissioner v Madden* [2008] QCA 301.
48 *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 444-445, 449.
49 *Janus v Queensland Law Society Inc* [2001] QCA 180 [12].
50 *Re Harrison* (1992) 168 LSJS 84, 90.

[49] There are certain personal and professional values[51] that an ethical lawyer simply cannot do without. Basic honestly is one of them. This is not a characteristic "… ordinarily acquired through experience, or by lengthy practice of trying one's best to be honest".[52] Rather it is attained by what Aristotle called habituation; that is, always doing the right thing and repeatedly making the deliberate choice not to be dishonest every time even when no one else knows but yourself.

[50] The sanction inquiry is not confined to assessment of the likelihood of reoffending and it is important to keep firmly in mind that a disbarring order is:

> … in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege. [53]

[51] Protective considerations, therefore, carry much more weight than they do where the primary purpose is punitive[54] so as to overwhelm the interests of individual practitioners and even their dependants who may plead that he or she has already suffered enough.

[52] As the commissioner rightly points out, however, public protection is only part of the equation. Public perception is also important.

[53] A credible regulatory system simply cannot afford to give the impression that there is one rule for lawyers and another for everyone else. Overlooking or underestimating slippage in the ethical standards, will eventually, as surely as dripping water wears away a stone, erode the dignity, reputation and credibility of the profession in the public eye and, in turn, diminish faith in the integrity of the legal system in general.[55]

[54] A more severe disciplinary order may be legitimately called for to avoid the risk of adverse public reaction than if its protection was the sole concern but the tribunal cannot be "held hostage to the presumed sense of community outrage"[56] either.

[55] Based on the rule that it is unjust to impose the most severe penalty when a lesser one is just as appropriate on the facts and otherwise adequately meets all relevant policy purposes (the so called parsimony principle) the Queensland Court of Appeal held in *Chandra v Queensland Building and Construction Commission*[57] and *Watts v Legal Services Commissioner*[58]

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51 Justice Susan Keifel, 'Ethics and the Profession of the Lawyer' (Speech delivered at the Queensland Law Society, The Vincents' 48th Annual Symposium 2010, 26 March 2010).

52 *Attorney-General v Bax* [1999] 2 Qd R 9, 13 (McPherson JA).

53 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 201-202.

54 *Quinn v Law Institute of Victoria Ltd* [2007] VSCA 122 [35]-[36] (Maxwell P).

55 *Prothonotary of the Supreme Court of New South Wales v Pangallo* (1993) 67 A Crim R 77, 79.

56 *New South Wales Bar Association v Harman* [1999] NSWCA 404.

57 [2017] QCA 4.

58 [2016] QCA 224 at [33], [45]-[52].

that removal should not be ordered (or recommended by the tribunal) without a specific finding of probable permanent (or, at least, indefinite) not just past or even current unfitness[59] being made. It follows that lifetime bans are to be reserved for the limited category of cases where nothing less than banishment will provide adequate and appropriate public protection[60] or preserve the profession's reputation for integrity in the eyes of the public. [61]

[56] However, while it is true to say that even after a passage of years and despite every effort having been made to redeem his or her reputation,[62] practitioners guilty of serious dishonesty committed over an extended period, with deliberate intent and resulting in substantial financial losses by clients, have had their names restored to the roll only infrequently. Disbarment (or recommending it) is not quite as final as Chandra and Watts make it sound.

[57] Eligibility for restoration to the roll is judged at the time applied for according to exactly the same criteria as those governing admission and the issue of practicing certificates. Consequently, a person can be suitable for readmission despite a prior adverse suitability finding.[63]

[58] The ultimate onus of showing probable permanent unfitness at the time of a disciplinary (or restoration) hearing is on the regulator, but a practitioner claiming redemption[64] is expected to point to, and if necessary, present evidence of positive change to rebut the presumption of continuance and avoid an ongoing unsuitability finding.[65]

[59] It has long been a principle in law that all evidence is weighed according to the proof which it was in the power of one side to produce and the other to have contradicted.[66] A practitioner is in the better position to rebut the inference of ongoing unsuitability and he has the onus of proving relevant facts within his peculiar knowledge[67] especially about his "good fame and character", behavioural changes and improved capacity to satisfactorily carry out the inherent requirements of legal practice.

[60] Solid and substantial (or strong) evidence of insight and transformation is usually required to rebut the presumption of disqualifying unfitness based on gross client fraud. The greater the fall from grace the more the ground there is to recover.

[61] Specific evidence demonstrating rehabilitation, such as a proven history of dealing with clients honestly where the temptation he succumbed to in the

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59 *Re a Solicitor* [1952] VLR 385, 389.

60 Ultimately, the purpose of disciplinary sanctions is to protect the public as a whole not just at risk clients.

61 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 278, 286.

62 *Bolton v Law Society* [1994] 1 WLR 512, 518.

63 LPA s 31(3).

64 *Re B* [1981] 2 NSWLR 372, 381.

65 *Ex parte Lenehan* (1948) 77 CLR 403, 422.

66 *Blatch v Archer* (1774) 1 Cowp 63 at 65-6; 98 ER 970.

67 *Purkess v Crittenden* (1965) 114 CLR 164, 167-8.

past was habitually resisted, is capable of showing that the character flaw responsible for misconduct has been fully addressed. Employment in the legal industry in some relevant capacity is naturally more probative of a fit and proper character than working elsewhere.[68]

[62] Likewise, contrition, repentance, good intentions and the passage of time itself are required but seldom enough.

[63] Admitting responsibility and being sincerely sorry for what is probably the worst professional thing he has ever done is not a guarantee against it never happening again if the opportunity arises.

[64] As Mahoney JA pointed out in *Law Society of New South Wales v Foreman (No.2)*:[69]

> A solicitor may affirm and sincerely believe that she will not offend again. But the character of the solicitor — demonstrated by the offence or otherwise — may be such that no sufficient reliance can be placed upon that affirmation.

[65] Because of the overriding need to maintain public satisfaction with the effectiveness of the regulatory framework, testimonials and character references from colleagues and clients are of limited assistance where the breach involves persistent dishonesty[70] and irrespective of the number, standing and force of the referees[71] their weight is necessarily lessened here by the years the practitioner was able to get away with largescale fraud without detection or even attracting suspicion.

[66] On the basis that – unless there is no other less extreme effective alternative option – a lawyer cannot be removed from the roll consistently with the decisions of Chandra and Watts for being temporarily unfit now or in the past, the preferred disciplinary response where misconduct is precipitated, wholly or partly, by treatable symptoms (as opposed to embedded character deficits) will often be suspension pending full resolution or practicing restrictions capable of changing what was or still is a degree of unfitness into full and lasting fitness. Training and supervision conditions on a practicing certificate can even be imposed for a specified post-suspension period.

[67] Precautionary practicing conditions seldom change truly bad characters and although preventative do not actually stop bad behaviour any more than stop signs stop cars but are only useful if a practitioner's professional disability or inadequacy can be remedied and the risk of relapse during any residual period of unfitness is within acceptable limits.

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68 *Re Application by Giles* (Unreported, Supreme Court of the ACT, Miles CJ, Gallop and Sheppard JJ, 17 June 1994) 15.

69 (1994) 34 NSWLR 408, 444.

70 *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 448-9 (Mahoney JA).

71 *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 [85] (Basten JA).

[68] Suspension is clearly the most appropriate course when a solicitor holding a practicing certificate has fallen below the exacting standards of the profession but not in such a way that he lacks the character and qualities of someone who can be trusted with the responsibilities of practice.[72] The fact that an order for suspension means that the solicitor would probably never be able to re-establish his practice is not a reason for substituting a lighter (less appropriate) alternative. [73] Where, however, the tribunal is uncertain about whether (or when) a mental infirmity has (or will) be resolved it may be inclined to strike off with a view to readmission on proof of recovery[74] instead of an indefinite suspension.

[69] Both counsel referred us to a number of recent decisions on the issue of when striking off is and is not warranted. Those and others that help in differentiating between when striking off is called for and when it is not will be discussed shortly.

[70] While consistency and treating like cases alike is one of the tribunal's stated objects perfect uniformity is unachievable. Past sanctions are not binding and there is no rule that later cases religiously follow earlier ones or that a sanction in one case is some kind of norm to be applied in similar cases.

[71] In balancing competing and often contradictory considerations the same body of evidence is often capable of supporting different, even opposite, but equally reasonable conclusions and choices within a range of acceptable possibilities with neither being undoubtedly right or manifestly wrong.[75]

[72] In *Re Mahoney (a practitioner)*,[76] for instance, cheques totalling about $300,000 or three years' worth of professional fees were banked into the practitioner's private account to avoid tax. There was no criminal charge or conviction. The matter was referred to the Full Court of the Supreme Court of South Australia to take the appropriate disciplinary response for professional misconduct. The court was divided. The majority (Matheson and Duggan JJ) opted to suspend the practitioner from practice for three years on the basis that an order striking off the practitioner would be too draconian in all the circumstances.[77] Cox J, by contrast, would have struck off the practitioner's name from the roll.

[73] Likewise, there were differing viewpoints in the High Court over the appropriateness of striking off a barrister convicted of manslaughter in *Ziems v Prothonotary of the Supreme Court of New South Wales.*[78] The majority judges, Fullagar, Kitto and Taylor JJ, reversed a decision of the Supreme Court of New South Wales and in lieu of disbarment, imposed a

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72 *Queensland Law Society v Priddle* [2002] QCA 297.
73 *Bolton v Law Society* [1994] 1 WLR 512.
74 *Queensland Law Society v Wakeling* [2004] QCA 42 [27]; *Legal Practitioners Conduct Board v Jones* (2010) 272 LSJS 529.
75 *CDJ v VAJ (No 1)* (1998) 197 CLR 172.
76 (Unreported, Supreme Court of South Australia, Cox, Matheson and Duggan JJ, 11 December 1996).
77 Ibid 20.
78 (1957) 97 CLR 279.

period of suspension for the duration of the barrister's imprisonment. In contrast, Dixon CJ and McTiernan J would have upheld the decision to strike the practitioner from the roll even though the conduct was not "in pursuit of the profession".[79]

The striking off cases

[74] In *Law Society of New South Wales v Foreman (No 2)*[80] a solicitor reconstructed timesheets to deceive for gain and confessed only after being confronted with damning evidence. The Court of Appeal emphasised the need to consider the impact of the relevant conduct on suitability to remain a member of a privileged group with high responsibilities based on a reputation and character of probity. Her name was removed from the roll.

[75] In *Re Maraj*[81] the practitioner (who had voluntarily ceased practice with no intention of ever resuming it) was disqualified indefinitely by a disciplinary tribunal instead of being struck off. On appeal Malcom CJ held that the tribunal had misunderstood the significance of the object in relation to the protection of the public saying:

> The significance is that in order to protect the public and the reputation of the profession the consequences for the practitioner may need to be more severe than they would be if the only object of the proceedings was one of punishment.
> …
> 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. In the present case, the findings of guilt made by the Tribunal and the circumstances described in the report indicate a failure of such a degree to demonstrate integrity, reliability and efficiency in the areas I have mentioned that compels the conclusion that the practitioner was unfit to remain a member of the profession. Not to make it clear that such conduct will not be tolerated and demonstrates unfitness would constitute a failure both to protect the public and to protect and maintain the reputation of the profession.

[76] In *Legal Services Commissioner v Quinn*[82] the managing partner of a practice paid operational expenses of more than $800,000 from trust money after having previously been disciplined for similar misconduct in 2001. The repetition led to a permanent unfitness finding warranting removal.

[77] In *Legal Services Commissioner v Keddie*[83] gross overcharging of a single client for legal work of an employed solicitor led to the firm's managing partner being struck off for professional misconduct.

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79 In *Myers v Elman* (1940) AC 282, 303.
80 (1994) 34 NSWLR 408.
81 (1995) 15 WAR 12, 23-25.
82 [2012] QCAT 618.
83 [2012] NSWADT 106.

[78] In *Prothonotary of the Supreme Court of New South Wales v P*[84] Young CJ (with whom Meagher and Tobias JJA agreed) summarised some of the major considerations for determining whether a practitioner should be struck from the roll as unsuitable for serious personal rather than professional transgressions. They include:

- lack of prior disciplinary record or criminal record;
- absence of motive for personal enrichment;
- honesty and cooperation with the authorities after detection;
- the offences being unrelated to the practice of law;
- the ignominy of having already suffered a criminal conviction and the deterrent element;
- no premeditation with respect to the commission of the crime;
- evidence of good character;
- voluntary self-imposed suspension or court imposed temporary suspension from practice;
- delay in commencing or completing disciplinary proceedings; and, most importantly,
- clear and convincing evidence of rehabilitation.

The non-striking off decisions

[79] In *Legal Services Commissioner v Madden (No 2)*[85] an order removing the appellant's name from the local roll was set aside on appeal after a finding of dishonestly was overturned. During the intervening three years the practitioner had continued in supervised legal practice without incident. He was allowed to continue to practice on conditions partly because of the low risk of repetition.

[80] The conduct involved in *Watts v Legal Services Commissioner*[86] was "borrowing" trust account money as needed to "keep the business afloat". Nobody was left out of pocket[87] but false entries were involved.

[81] The practitioner had an adjustment disorder which impaired his judgment and was labouring under significant stress at the time of the conduct. He engaged in insight orientated psychotherapy and had been receiving regular medical treatment and had developed a number of strategies to

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84 [2003] NSWCA 320 [24].
85 [2009] 1 Qd R 149.
86 [2016] QCA 224.
87 *Watts v Legal Services Commissioner* [2016] QCA 224 [22].

improve his ability to psychologically cope with pressure. His risk of re-offending was very low.

[82] In re-exercising the penalty discretion the Queensland Court of Appeal ordered a public reprimand and placed time and other conditions on the practitioner obtaining a practicing certificate including that any application for a practising certificate had to be accompanied by a contemporaneous report of a psychiatrist or psychologist.

[83] In a Victorian Court of Appeal decision[88] concerning over servicing for work not done – rather than overcharging as a consequence of concoction or deception – a man "… honest, not lacking in probity nor being in the least furtive in his activities" but who faltered due to personal failings (attributed to depression and family strains) was allowed to continue in legal practice on an indefinite undertaking to have all his bills independently assessed in the future. This was accepted as a more adequate safeguard against repetition than an unconditional finite suspension.

[84] In *Prothonotary of the Supreme Court of New South Wales v Fitzsimons*[89] a long standing practitioner with bipolar disorder, a gambling addiction and alcohol problems, jailed for a "very substantial" and methodical criminal misappropriation of estate funds in the five years between 2001-2006 was found to be guilty of professional misconduct but nonetheless fit for practice by 2012. His mental disorder was "unlikely to have an adverse effect on his conduct" because it was controlled by medication and treatment.

[85] In *Council of the Queensland Law Society Incorporated v Whitman*,[90] a practitioner was found guilty of professional misconduct including misappropriation of client trust funds and making false representations to the regulator.

[86] Balancing evidence of detriment to his physical and economic health and favourable character against the seriousness of the conduct and the lack of cooperation during investigations the Queensland Court of Appeal concluded that public protection did not require that a solicitor with an "unblemished" 25 years in practice name be struck off the roll[91] where there was no evidence (of loss) to clients. He was allowed to continue in practice provided any practicing certificate was conditional on remaining under the care of his GP, seeing any specialists he was referred to and complying with his medication and treatment regime. No detailed consideration was given to public perception.

[87] In *Legal Practitioners Conduct Board v Boylen*[92] the practitioner was 43 years old, married with two young children. He had conducted a busy workers compensation practice with responsibility for up to 550 current files.

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88 *Quinn v Law Institute of Victoria Ltd* [2007] VSCA 122.
89 [2012] NSWSC 260.
90 [2003] QCA 438.
91 *Jensen v Legal Services Commissioner* [2017] QCA 189 [181].
92 [2003] SASC 241 [54].

His work performance declined due to extra family demands on his time when his wife was recovering from cancer.

[88] The misconduct included:

- Mrs L – making an offer to settle without instructions, not relaying a counter-offer, consenting to judgment and costs without instructions, failing to tell Mrs L about the judgment;

- Mr C – failure to issue proceedings, misrepresenting when the matter would be resolved, drawing down $1000 for Mr C's car from a litigation loan, lying about offers made, fabricating offers;

- Mr M – failure to pay fees to Mr M as an independent adviser to Mr C, misrepresenting the possible resolution of Mr C's matter.

[89] Expert reports identified a failure to appreciate and deal with the personal stress and a proud man's fear of criticism rather than any psychiatric disability as reasons why he did not ask for the help he needed to meet professional commitments.

[90] He was still held in high regard by his partners he dealt with even though he had deceived them. They were all willing to retain his services for the firm.[93] He was seeing a psychologist on an ongoing basis as a preventative measure. Five clients continued to express confidence in him despite the disciplinary findings.

[91] Notwithstanding the grave moral blameworthiness of his offending conduct, and given the problems which led to the misconduct had been addressed, the low risk of repetition and his willingness and demonstrated capacity to adhere to the expected standards of honesty and integrity, the practitioner was censured, fined $20,000 and a three year supervision condition imposed on his practicing certificate to show the public and profession how seriously the conduct is viewed.

[92] Finally, in *Legal Services Commissioner v Shand*[94] the misconduct involved political corruption (payment of a $60,000 bribe) in a non-professional capacity. There was no evidence of personal gain and the politician was already corrupted. Removal was the sole issue. The practitioner served 4 months of the 15 month jail term. The offence was an isolated, aberrant life event by a person of otherwise outstanding character.

[93] After a 22 year career and unblemished record he had not practiced law since 1999 and in 2012 undertook never to do so again.

[94] Notwithstanding the seriousness of the offending the tribunal could not say on the facts that the practitioner was currently permanently unfit to practice

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93 *Legal Practitioners Conduct Board v Boylen* [2003] SASC 241 [58], [64].

94 [2017] QCAT 159.

or presented an unacceptable professional risk to the community, judiciary or profession.

Does the practitioner's misconduct imply probable permanent unfitness?

[95] It is common but not always fair to judge the veracity of what others claim about themselves by reference to what they have done in the past, but, as a matter of logic previous misconduct can, not must, justify disqualification[95] and a person may be unfit or have been in the past without necessarily being permanently so. [96]

[96] Against the backdrop of an unblemished career and exceptional work record pre-2012 the misconduct either, of itself, or taken in conjunction with other relevant suitability matters does not satisfy the tribunal that the practitioner is probably not a fit and proper person for legal practice either currently or in the future.

[97] For the reasons relied on his behalf by Mr Bell QC to resist a strike off recommendation the practitioner has demonstrated to the tribunal's reasonable satisfaction a full understanding of, as well as the willingness and ability to always abide by, the high standards the law requires of a solicitor when performing professional obligations in the future.

[98] It is accepted (but not without some hesitation) that the practitioner's safety switch is back on and he now has the strength of mind and character needed to safely resume restricted and conditional practice unhindered by the cumulative incapacities and deficiencies responsible for the past misconduct.

[99] To adopt the observations of Adams J in Fitzsimons:[97]

> … that (the practitioner) is now very different from the person he was when he committed his criminal offences, both in terms of his mental health and, more significantly, in his moral character … Although not all of his past conduct is sufficiently explained as the product of psychiatric illness … it may be that the protective function of the exercise of the Court's jurisdiction is met by less than unalloyed unfitness and removal.

[100] Professional misconduct involving dishonesty invariably, but not always, attracts a public reprimand and pecuniary penalty for deterrence.[98] The inclusion of a public reprimand will have a positive effect on the understanding in the profession and wider community of the professional standards expected of solicitors practicing in Queensland.

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95 *Legal Services Commissioner v Woodman* [2017] QCAT 385 [30].

96 *Re B* [1981] 2 NSWLR 372, 381.

97 *Prothonotary of Supreme Court of New South Wales v Fitzsimons* [2012] NSWSC 260 [67].

98 *Legal Services Commissioner v Sorban* [2009] LPT 5, 1-6-1-7.

[101] The orders proposed by or on behalf of the practitioner will provide the level of public protection needed.

[102] There is no justification for an order delaying the practitioner's conditional return to practice for a further substantial period under either s 456(2)(c) or s 456(4)(j) where full rehabilitation has been achieved in the three years of self-imposed exile.

[103] However, despite the unanimous psychiatric opinions that any non-character based impediments to the practitioner's ethical functioning have largely resolved and the assessed risk of relapse is low, a hefty fine is still called for in this case to emphatically demonstrate the disapproval of professional dishonesty and deceit and deter the practitioner and others from the practice of creating false documents with the purpose and effect of economically harming unsuspecting clients.

[104] The panel calculates an amount of $20,000 as commensurate with meeting these ends without causing undue financial hardship.

[105] As an enrolled lawyer the practitioner is eligible to reapply to the law society for a local practicing certificate but there are no guarantees.

[106] The law society has an independent responsibility for assessing his character and capacity if and when he even applies for a practicing certificate and to impose appropriate restrictions or conditions[99] so that, if, in its opinion, he is not already, the practitioner can be made, fully fit for legal practice.

[107] Obviously, any conditions must be directed at the type of conduct that brought about the practitioner's downfall in the first place.

[108] Some that immediately spring to mind are that he only engage in employee (restricted) level legal practice under the close personal supervision of another more senior legal practitioner and that he not have any role in client billing procedures, oversighting junior professional staff or approving their timesheets.

[109] Whether, when and on what conditions he is allowed to return to practice the practitioner should be barred from applying for a principal level certificate for a substantial period.

[110] A practitioner remaining in the very profession he has damaged with the expectation that they can command the necessary degree of confidence and respect of the court, clients and colleagues[100] is clearly problematic and a legitimate concern to the tribunal particularly the professional and community assessors. On the other hand, ending the career of a talented, hardworking and highly productive lawyer is too high a price to pay for public approval or appeasement. Where permanent unfitness is not demonstrated

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99 *Legal Services Commissioner v XBN* [2016] QCAT 471.

100 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 285-6.

by past misconduct or otherwise, the circumstances contributing to temporary professional incapacity are no longer present[101] and the public can be adequately protected against the risk of repetition pending the resolution of any residual suitability issues of regulatory significance.

[111] Nor does it give appropriate weight to the insightful remarks Kirby P made about restoring a solicitor to the roll in Foreman:

> Because the jurisdiction is for the protection of the public, regard also may be had, to the public's interests in the restoration to the Roll of such persons as have demonstrated, including by their work, activities and life, a fitness to be restored. For cultural and historical reasons, redemption and forgiveness are important attributes of the shared morality of our society. In part, this is because of the teachings of religious leaders who have profoundly influenced our community's perception of justice and fairness, reflected from earliest times in the courts: see, eg, *St Matthew's Gospel* 18, 11ff; *The Acts*, 3, 19. In part, it derives from the self-interest which any community has to encourage the rehabilitation of those who lapse and to hold out to them the hope that, by diligent and honourable efforts over a period, their past may be forgiven and they may be restored to the good opinion of their family, friends, colleagues and society. The public's interest also includes the economic interest which is involved in utilising, to the full, the skills of talented people who have undergone years of rigorous training but who, having misconducted themselves, have had to be removed for a time from positions of responsibility and trust. [102]

[112] The best safeguard against the possibility of misplaced public indignation at the thought of a dishonest lawyer being permitted to return to an honourable profession that values honesty and trust as highly as the legal profession does is for these reasons to be fully read and understood. We are optimistic that every reasonable person who takes the time and makes the effort to examine all the facts and weighs the rival considerations in this vexed case will accept if not fully agree with it as a fair and reasonable outcome for all concerned.

Orders

(a) The respondent, Luke James McDonald, is publicly reprimanded for professional misconduct.

(b) The respondent is ordered to pay a fine in the sum of $20,000.

(c) The respondent is prohibited from applying for or obtaining a certificate to practice as a principal for five

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101 cf. *Re Stokes* [2008] WASC 269.

102 *Law Society of New South Wales v Foreman* (*No. 2)* (1994) 34 NSWLR 408, 419; cf *Kotowicz v Law Society of New South Wales (No 2)* (Unreported, New South Wales Supreme Court – Court of Appeal, Kirby P, Samuels and Mahoney JJA, 7 August, 1987) 23.

years after being granted an employee level practicing certificate.

(d) The respondent is to pay the commissioner's costs on the standard basis assessed under the QCAT rules or as agreed.