# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

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| CITATION: | *Legal Services Commissioner v McKenzie* [2021] QCAT 377 |
| PARTIES: | **LEGAL SERVICES COMMISSIONER**<br>(applicant)<br><br>**v**<br><br>**CAMERON JAMES MCKENZIE**<br>(respondent) |
| APPLICATION NO/S: | OCR388-20 |
| MATTER TYPE: | Occupational regulation matters |
| DELIVERED ON: | 1 December 2021 |
| HEARING DATE: | 2 November 2021 |
| HEARD AT: | Brisbane |
| DECISION OF: | Hon Duncan McMeekin QC, Judicial Member<br>Assisted by:<br>Ms Annette Bradfield<br>Mr Keith Revell |
| ORDERS: | **1. Pursuant to s 456(2)(a) of the *Legal Profession Act 2007* (Qld), an order is made recommending that the name of the respondent be removed from the local roll.**<br><br>**2. The respondent shall pay the applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a matter in the Supreme Court of Queensland.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – CRIMINAL OFFENCES – where the respondent was a legal practitioner – where the respondent was convicted in the District Court of a charge of extortion – where the respondent served a term of imprisonment – where the applicant has filed a discipline application in the Tribunal – where the respondent engaged in professional misconduct – where the respondent has shown a continued refusal to accept wrongdoing – where the respondent pled not guilty in the District Court and sought to appeal that conviction – where reports of treating psychologist and psychiatrist indicate the respondent has not |

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| | yet rehabilitated – whether the respondent ought be removed from the local roll |
| | *Legal Profession Act 2007* (Qld), s 5, s 6, s 418, s 419, s 452, s 456, s 462 |
| | *Attorney-General of the State of Queensland v Legal Services Commissioner; Legal Services Commissioner v Shand* [2018] QCA 66<br>*Barristers' Board v Darveniza* [2000] QCA 253<br>*Legal Services Commissioner v Ioannides* [2020] QCAT 479<br>*Legal Services Commissioner v McDonald* [2018] QCAT 82<br>*Legal Services Commissioner v Munt* [2019] QCAT 160<br>*Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320<br>*R v Li; R v McKenzie; R v Pisasale* [2020] QCA 39<br>*Stanoevski v The Council of the Law Society of New South Wales* [2008] NSWCA 93 |
| APPEARANCES & REPRESENTATION: | |
| Applicant: | M Lester (legal officer) instructed by Legal Services Commissioner |
| Respondent: | C Upton (counsel) instructed by PPCS Lawyers |

**REASONS FOR DECISION**

[1] This is a discipline application brought pursuant to s 452 of the *Legal Profession Act 2007* (Qld) ("LPA"). The respondent is Cameron McKenzie. He was admitted to the local roll on 7 September 2009. It is not in issue that Mr McKenzie is guilty of professional misconduct. The only issue between the parties concerns the appropriate order that should be made pursuant to s 456(2) of the LPA. The Commissioner contends that the Tribunal should recommend that Mr McKenzie's name be removed from the local roll. Mr McKenzie opposes that course.

[2] Mr McKenzie faces two charges:

(a) Charge 1 – Between 15 January 2017 and 3 February 2017 he engaged in conduct which was likely, to a material degree, to bring the profession into disrepute, contrary to rule 5.1.2 of the *Australian Solicitors Conduct Rules 2012* ("ASCR").

(b) Charge 2 – that on 24 July 2019, he was convicted in the District Court of Queensland at Brisbane of a serious offence.

**Overview of the facts**

[3] There is a Statement of Agreed Facts.

[4] On 24 July 2019, Mr McKenzie was convicted by a jury of a charge of extortion. Judge Farr sentenced him to 18 months' imprisonment, suspended after 9 months, with an operational period of two years.

[5] The offence, and these charges, arose out of events that occurred in January and February 2017. At that time Mr McKenzie was an Australian lawyer as defined in s 5(1) of the LPA and an Australian legal practitioner as defined in s 6(1).

[6] On 16 January 2017, and in the course of his practise, Mr McKenzie engaged in a phone call from the now disgraced and former mayor of Ipswich, Paul Pisasale. Mr Pisasale asked Mr McKenzie to send letter of demand on behalf of one Ms Yutian Li to a person named Xin Li (described in the statement of agreed facts as "the Victim"). In the course of the call Mr Pisasale conveyed the following:

(a) Ms Yutian Li had discovered she had been lied to by the Victim;

(b) Mr Pisasale had called the Victim the day before, pretended to be a private investigator, and demanded costs from the Victim;

(c) Mr Pisasale wanted Ms Yutian Li "to get about seven grand";

(d) He wanted Mr McKenzie to do a letter of demand saying, "these are all the costs", of which the respondent's costs were to be "two grand" and "investigation costs five grand"; further it was to be paid into the respondent's trust account, from which "I'll pay your costs then I'll give her the rest";

(e) Mr Pisasale proposed the form of the letter, including the threat to go to court; and

(f) Mr Pisasale asked the question "That's not blackmail is it?", and the respondent responded, "No it's not blackmail ... that's simply ... a letter to him ... saying hey if you pay my costs I'll walk away, otherwise ... I'll claim everything I'm entitled to".

[7] On 1 February 2017, the respondent sent Mr Pisasale an email proposing the wording of the letter of demand. The email said that his client (wrongly given the name of Xin Li's second wife, LSW) demanded that the Victim reimburse her $10,000.00 for expenses incurred as a result of his malicious deceit, failing which an application would be filed against the Victim in the Federal Court.

[8] On 2 February 2017, the respondent sent a letter of demand to the Victim under the letterhead of his firm and signed personally by him which said:

(a) the respondent's client was LSW;

(b) that the Victim had "now been divorced several times according to court records";

(c) the client and the Victim met in a taxi, and as a taxi driver the Victim owed "a duty of care to your passengers" and "you have breached your duty of care to our client and abused the relationship of trust";

(d) it accused the Victim of "malicious deceit" causing "significant life changes and ... significant loss" to the client;

(e) that had "caused our client to engage an agent to investigate your affairs";

(f) demanded that the complainant "reimburse her $8,400.00 for expenses incurred as a result of the above (made up of $6,100.00 for investigator, $1,500.00 miscellaneous charges and $800.00 legal costs as at today)";

(g) gave the trust account details for payment;

(h) threatened that an application in the Federal Court would be filed if the offer was not accepted; and

(i) recommended that the offer be accepted "as your actions being discovered in a court of law may lead to you being criminally prosecuted".

[9] These matters came to light as a result of an investigation into the affairs of Mr Pisasale by the Crime and Misconduct Commission.

[10] Following the trial Mr McKenzie exercised his right of appeal. He sought bail pending appeal but that was refused the judge commenting that his prospects of success on the appeal were not strong. The appeal was unsuccessful. An appeal against sentence was filed but not pursued. One submission made was that the sentencing judge had not fully considered the personal circumstances, namely that Mr McKenzie would lose his career as a legal practitioner. Mr McKenzie then applied for special leave to appeal to the High Court which was refused. He then sought legal aid to assess the merits of making an application to the Governor for a pardon. Nothing is known of the outcome save that there was no pardon granted.

[11] The trial and appeal received extensive media attention with Mr McKenzie being prominently identified as an Ipswich lawyer.

[12] The appeal was heard on 21 November 2019 and the decision dismissing the appeal delivered on 10 March 2020. Mr McKenzie was discharged from prison on 24 April 2020.

[13] There is no issue about the conduct, no issue that the charges are properly brought and no issue that the conduct amounts to professional misconduct as defined in s 419 of the LPA:

> **419 Meaning of *professional misconduct***
>
> (1) ***Professional misconduct*** includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
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> (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

[14] To enliven the jurisdiction vested in the Tribunal by s 456 of the LPA it is necessary that this Tribunal be satisfied that the conduct is so characterised – it is not simply a matter of agreement by the parties. To use one's legal practise to extort money from another contrary to the *Criminal Code* is plainly conduct that would justify a finding that the practitioner is not a fit and proper person to practise law. The enquiry is to be made as at the time of the impugned conduct not at the time of this hearing and should be judged "without reference to subsequent events and, in particular, the practitioner's subsequent rehabilitation or reformation of character".[1]

[15] As the Commissioner submits, the crime of extortion being an indictable offence under the *Criminal Code* is a "serious offence" as defined in Schedule 2 to the LPA and the conduct plainly brought the profession into disrepute in several ways. The Statement of Agreed Facts sets out four of those ways:

(a) engaging in illegal conduct as particularised;

(b) using his status as a legal practitioner and his law practice letterhead to engage in the conduct;

(c) compromising his position as an officer of the court whose duty is to obey and uphold the law; and

(d) being charged with, and convicted of, the crime of extortion, resulting in a period of imprisonment and actual custody.

[16] We find that the respondent engaged in professional misconduct.

[17] So far as relevant here, s 456 of the LPA provides:

> **456 Decisions of tribunal about an Australian legal practitioner**
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> (1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.
>
> (2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate—
>
> (a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
>
> (b) an order that the practitioner's local practising certificate be suspended for a stated period or cancelled;
>
> (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period;
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> (d) an order that—
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> (i) imposes stated conditions on the practitioner's practising certificate granted or to be issued under this Act; and

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[1] *Attorney-General of the State of Queensland v Legal Services Commissioner; Legal Services Commissioner v Shand* [2018] QCA 66, [20] (McMurdo JA) ("*Shand*").

(ii) imposes the conditions for a stated period; and

(iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;

(e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;

(f) an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years—

(i) employ or continue to employ the practitioner in a law practice in this jurisdiction; or

(ii) employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.

…

(4) The tribunal may, under this subsection, make 1 or more of the following—

(a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than $100,000;

(b) a compensation order;

(c) an order that the practitioner undertake and complete a stated course of further legal education;

(d) an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;

(e) an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;

(f) an order that the practitioner stop accepting instructions as a public notary in relation to notarial services;

(g) an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions;

(h) an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period;

(i) an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice;

(j) an order that the practitioner must not apply for a local practising certificate for a stated period.

(5) To remove any doubt, it is declared that the tribunal may make any number of orders mentioned in any or all of subsections (2), (3) and (4).

…

**Mr McKenzie's submissions**

[18] Mr McKenzie's submissions were summarised in the written submissions filed as follows (omitting footnotes):

> 2. In globo, and in the Respondent's ultimate submission, the Respondent is not a candidate to have his name removed from the Roll because the conduct of the Respondent which is now sought to be relied upon to justify that outcome:
>
> (a) is explicable by a confluence of environmental factors which coincided to impair the judgment of the Respondent, but which: are not presently active; are manageable by a combination of medication and psychological treatment; and do not bespeak an innate unfitness in the Respondent rendering him permanently unfit to practice law;
>
> (b) was not systematic or repeated conduct, the type of which would speak to the Respondent's general behaviour or inherent attributes;
>
> (c) whilst it was conduct engaged in in the course of legal practice, did not involve: the misuse of trust monies; the misuse of a client's confidential information; misleading a court or a fellow practitioner; an inability to deal fairly within the legal system; and other legal practitioners, aware of the Respondent's conviction, have come forward and sworn to their observations of the Respondent as an ethical practitioner whose conduct was out of character;
>
> (d) was not charged or convicted of an offence involving an element of dishonesty;
>
> (e) there are compelling mitigating factors against the Respondent's name being permanently removed from the roll of solicitors being, the Respondent:
>
> (i) has no previous criminal history, prior to the conviction the subject of these proceedings;
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> (ii) has no previous disciplinary history;
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> (iii) was co-operative with authorities after detection;
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> (iv) voluntarily surrendered his practicing certificate (in September 2019);
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> (v) has suffered the ignominy of a criminal conviction, having served actual custody and the deterrent element contained therein;
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> (vi) admitted the two charges early in this disciplinary proceeding and agreed to a statement of facts, thereby avoiding the need for a full hearing;
>
> (vii) is remorseful, contrite and embarrassed about his conduct; and
>
> (viii) there is clear and convincing evidence about the Respondent's insight into how the conduct breached his

> ethical obligations and the stress sending the letter of demand would have caused the victim.

3. By reason of the above mentioned facts, matters and circumstances:

   (a) it is not probable the Respondent is permanently unfit for practice;

   (b) there is no unacceptable risk to the public from this Respondent being able to return to legal practice; and

   (c) in the proper exercise of the Tribunal's discretion, the Tribunal would suspend the Respondent from legal practice for a period of time, but would not remove his name from the Roll.

[19] Further it was submitted:

> The fact that the opponent has a conviction for a serious offence is not necessarily sufficient reason for an order striking that person off the Roll. The Court needs to consider the conduct involved in the conviction and see whether it is of such personally disgraceful character that the practitioner should not remain a member of an honourable profession.

[20] These submissions were supplemented by extensive written and oral submissions. Mr Upton, who appeared for the respondent, said all that could be said to support Mr McKenzie. The bulk of those submissions, so far as they assert matters of fact, can be accepted. Some submissions overstate matters. We will address those issues below.

[21] The respondent's case was supported by some 25 character references and three affidavits from fellow professionals. The references and affidavits all spoke well of Mr McKenzie's character and that this criminal conduct was out of character. Many spoke of his youth, inexperience and naivety.

[22] As well, reports from Mr McKenzie's treating psychologist, Mr Topping, and a psychiatrist, Dr Palk, were tendered. The psychologist's report was based on ten consultations over the period from February to July 2021. Dr Palk had seen Mr McKenzie once in July 2021 for the purpose of preparing a report to place before this Tribunal. He followed up that visit with two phone calls to clarify information. Mr Topping was not prepared to make a diagnosis of a psychiatric condition pertaining in January and February 2017. Dr Palk thought that a diagnosis of an anxiety disorder and a major depressive disorder were justified at that time. Dr Palk proffered no explanation for that diagnosis. Arriving at a diagnosis of a psychiatric illness more than four years after the events in question, based on the self-report of the person seeking a favourable report, and without apparent examination of possible competing explanations, does not inspire confidence in the opinion. We note that Mr Topping has the advantage of having had a much greater opportunity of exploring matters with the respondent and getting to know him. Both agreed that the stresses that Mr McKenzie was under contributed to his "poor judgment" – stresses related to his practice, his marriage, and monetary problems consequent on setting up a relatively new practise and dealing with the fallout from his previous practise. Both came to the view that Mr McKenzie was at a low risk of re-offending. Mr Topping considered that Mr McKenzie's rehabilitation was ongoing. He concluded: "Future templates will also be installed to give him better stress management skills for any other future stressful events." Significantly Mr Topping recorded that Mr McKenzie was not accepting of

any wrongdoing involved in his conduct until some time after their sessions commenced.

**The Commissioner's submissions**

[23] The Commissioner submits that a finding should be made that Mr McKenzie is not currently a fit and proper person and that he is likely to remain so and hence, he should be removed from the roll of local practitioners. The principal points made are:

(a) Mr McKenzie is hardly youthful and inexperienced – he was 35 years of age at the time of the offending conduct and had been in practise for eight years. He had been an ILP legal practitioner director – a position of high-level responsibility – for two years and held positions at nine firms as an employed solicitor prior to that.

(b) The claimed remorse for his crime and acceptance of his wrongdoing should be judged against Mr McKenzie's conduct in pleading not guilty, appealing his conviction, seeking leave to appeal to the High Court, and then seeking to pursue a pardon. Judge Farr was sceptical of the claimed contrition at the time of sentence. Mr McKenzie's refusal to accept he had acted wrongfully continued into 2021, as noted by Mr Topping.

(c) In his conduct of his defence Mr McKenzie did not admit that Mr Pisasale had told him in the phone call of 16 January that he had pretended to be an investigator until he became aware that the call had been recorded. Judge Farr said: "I do not accept that you had merely forgotten that fact. That stretched the credulity beyond its limits." This has relevance to the claimed co-operation and so the claimed remorse and contrition.

(d) The claimed explanation for Mr McKenzie's conduct – poor judgment and not greed – ignores the fact that Mr McKenzie perceived a benefit to himself in blindly following Mr Pisasale's instructions. By currying favour with the mayor, he hoped for future advancement and a possible political career.

(e) While the respondent's references speak of the respondent's conduct being out of character, his character was also revealed by the offence. That character is so "indelibly marked" by the misconduct that he cannot be regarded as a fit and proper person to be upon the roll (citing *Shand* at [57]).

(f) On the materials in his own case – particularly Mr Topping's opinions – Mr McKenzie is not yet rehabilitated. The Commissioner quotes extracts from Mr Topping's report: "still addressing issues that predisposed him to commit the offence"; only "beginning to process the painful memories associated with the loss of his practice and being convicted and sentenced to gaol"; that he "still needs to completely process his painful memories"; and that he is "working on the issues that predisposed him to write a letter of demand".

(g) It is not necessary for the Commissioner to show that any present unfitness to remain on the roll will be permanent, in the sense of life long, citing the remarks of Daubney J in *Legal Services Commissioner v Ioannides* ("*Ioannides*").[2] Pertinently His Honour said: "this does not mean that the applicant has to prove that in no circumstances would the practitioner be fit to practise. Rather, it "has

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2 [2020] QCAT 479, [25]-[29].

the shade of meaning of being likely to be unfit to practice for the indefinite future" (at [27] of *Ioannides*, citing *Stanoevski v The Council of the Law Society of New South Wales.*[3]

(h) The decision here is not about punishment. The principle was explained by Daubney J in *Legal Services Commissioner v Munt* ("*Munt*"):[4]

> The respondent has already been punished in the criminal court for his offending conduct. This disciplinary hearing is not an occasion to punish him again; rather, the primary object of making orders under s 456 of the *LPA* is to seek to ensure that public confidence in members of the legal profession can be assured and maintained.

(i) Retention of Mr McKenzie's name on the roll of practitioners would tend to undermine community confidence in the profession and in the Court's endorsement of fit and proper practitioners.

**Discussion**

[24] The principles explained by Daubney J in *Ioannides* and *Munt* are, with respect, adopted as correct.

[25] To engage in a criminal offence through one's law practice in order to impose improper pressure on, and with the prospect of causing at least distress to, another citizen in order to curry favour with a powerful figure reveals a fundamental failing in Mr McKenzie's character. We do not accept that such conduct is explained away by the confluence of matters relied on and that this does not reveal an innate unfitness to practise. Nor is it proved that this flaw is necessarily manageable by a combination of medication and psychological treatment – that remains to be seen. At best, Mr McKenzie is in the very early days of rehabilitation.

[26] There is a great deal of force in the Commissioner's submission that Mr McKenzie's conduct gives greater insight into his attitudes than statements made to his psychologist and psychiatrist. His continued refusal to accept that he was guilty of any wrongdoing even years after the events in question and despite a comprehensive analysis of his conduct by Morrison JA in his judgment in the Court of Appeal is concerning.[5] Morrison JA summarised the matters that would justify the juries' view on the crucial issue as to whether there was reasonable cause to write the letter of demand:[6]

> [185] The jury may well have concluded that Mr McKenzie knew so little that he could not have had reasonable cause to make the demand and threat, in that he:
>
> (a) never met or spoke to his putative client; and knew so little that he named someone else entirely;
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> (b) only dealt with Mr Pisasale, for whom he was doing a favour on a no win, no fee pro bono basis;

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3 [2008] NSWCA 93, [53]–[54].
4 [2019] QCAT 160, [44].
5 *R v Li; R v McKenzie; R v Pisasale* [2020] QCA 39.
6 Ibid, (and omitting citations and footnotes).

(c) was told that Mr Pisasale had called the complainant pretending to be a private investigator;

(d) never knew the name of the private investigator, nor saw any receipt or other documentation verifying who that was, or that the investigator's costs had been incurred as he was told;

(e) never saw any document that verified any of the costs had actually been incurred, and why the complainant was liable to reimburse them; this was particularly significant as Mr McKenzie justified the threat in the letter as simply being Ms Li stating she would claim "**everything I'm entitled to**"; the jury could have reasoned that Mr McKenzie had no basis for thinking that Ms Li was entitled to anything;

(f) was told varying sums by Mr Pisasale, who wanted to get her about "seven grand", and that Mr McKenzie's costs were to be "two grand" and "investigation costs five grand";

(g) made initial handwritten notes of what he was told by Mr Pisasale, listing the total costs as $7,100, split between legal costs of $2,100 and the investigation costs at $5,000; then drafted a letter seeking $10,000; then one that apportioned the costs as $6,100.00 for investigator, $1,500.00 miscellaneous charges and $800.00 legal costs;

(h) could not have reasonably thought the costs were already incurred, or could be explained away as initial estimates then corrected, as the variances continued;

(i) could not have reasonably thought that his client (Mr Pisasale's female friend) was LSW, because he had (at the time he drafted the letter): (i) a copy of LSW's New South Wales driver's licence dated August 2016, (ii) a Campsie Family Medical Centre letter dated 4 December 2015 in relation to LSW referring to her treatment in August 2015, (iii) a real estate agent's letter addressed to the complainant and LSW at Campsie, NSW, and dated September 2015, (iv) a Federal Circuit Court order dissolving the marriage of LSW and [another person], dated 30 June 2013, and (v) a letter from the NSW Department of Roads and Maritime Services to LSW at a Campsie, NSW, address dated 22 February 2016, listing what had to be done to her then existing NSW licence; yet according to what he was told by Mr Pisasale his client had been in a relationship with the complainant for only one year and had only recently arrived in Australia from China; and

(j) the documents referred to in the preceding subparagraph were evidently the source of the address for LSW in Mr McKenzie's files; there was ample time between the first contact by Mr Pisasale on 16 January and when the letter was sent on 2 February for a full examination of the documents.

[186] Further, the jury could have taken the view that the exchanges subsequently revealed the true nature of what was intended when the letter of demand was sent. On 13 February 2017 Mr Pisasale proposed another letter to the complainant to "scare the shit out of him" by alluding to the immigration defaults in relation to the complainant's identity. That letter was proposed in order to "scare him into" paying up, "give him the

> shits" and "poke and prod him". That purpose was repeated in conversations on 23 February 2017. When the second letter was drafted Mr Pisasale wanted it made milder "so we won't do it like it's blackmail" but still to "just scare the shit out of [him]", "We're not gonna go to court … we're just gonna have some fun", and "we'll scare him … poke the bear". Mr McKenzie shared those sentiments, or went along with them.
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> [187] In my view, it was open to the jury to be satisfied that Mr McKenzie did not have reasonable cause to make the demand and threat in the letter he sent.

[27] No explanation is offered as to what part of His Honour's analysis Mr McKenzie took issue with or could reasonably have taken issue with. We do not accept that there is "clear and convincing evidence about the Respondent's insight into how the conduct breached his ethical obligations and the stress sending the letter of demand would have caused the victim" as submitted. Through some undisclosed process in the psychologist's rooms, Mr McKenzie claims to have altered his obviously long held views that he did no wrong. Why this epiphany has come about is completely obscure. And this is no temporary error of judgment in the "confluence of events" – it was a long-held view that he had done no wrong.

[28] It is worth noting that, while the criminal conduct related to the writing of the letter of 2 February, Morrison JA's analysis demonstrates that the criminal act was undertaken in the context of a course of conduct over several weeks.

[29] Mr McKenzie pleads that his co-operation with authorities should be taken into account in his favour. The co-operation of course went only so far. The Commissioner's submissions set out in paragraphs 23(b) and (c) above are valid and compelling. This is not a case of a practitioner accepting the charge brought against him, pleading to the charge, and by his conduct throughout demonstrating remorse, contrition and concern for the victim. Until a date more than four years after the events – and until a date only months ago – there was no evidence of that remorse, contrition and concern for the victim at all.

[30] Having exhausted his remedies it can be said that Mr McKenzie has commenced his rehabilitation. How successful that will prove to be time will tell. There is no reason at all to think that he is rehabilitated, and no way of knowing if he will ever be.

[31] Nor can it be accepted that this criminal conduct does not reveal an inability to deal fairly within the legal system. That is precisely what occurred here.

[32] Mr McKenzie placed reliance on the decision of the NSW Court of Appeal in *Prothonotary of the Supreme Court of New South Wales v P*,[7] where Young CJ in Eq accepted and applied 10 propositions, which he considered could point to compelling mitigating circumstances. Those 10 points were:[8]

(a) absence of prior disciplinary record or criminal record;

(b) absence of motive for personal enrichment;

(c) honesty and co-operation with the authorities after detection;

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7 [2003] NSWCA 320.

8 Ibid, [24].

(d) the offences being unrelated to the practice of the law;

(e) the ignominy of having suffered a criminal conviction and the deterrent element;

(f) the absence of premeditation with respect to the commission of the crime;

(g) evidence of good character;

(h) any voluntary self-imposed suspension or court-imposed temporary suspension from practice;

(i) delay in commencing disciplinary proceedings; and

(j) most importantly, clear and convincing evidence of rehabilitation.

[33] Mr McKenzie's submission was that he satisfied several of those mitigating circumstances. That glosses over the circumstance that he does not satisfy several, particularly (b), (c) (the trial judge's "credulity" point above), (d), and (j). These factors are, of course, not exclusive and are not some form of score sheet with a pass being achieved by ticking several of the boxes. It is a question of weight and emphasis given the available evidence. And as the decision makes plain, most importantly, there needs to be clear and convincing evidence of rehabilitation.

[34] No two cases are exactly alike, and each set of facts requires close examination. Bearing that in mind, the parties each made submissions concerning the applicability of the approach in *Shand* to which we turn.

[35] It will be recalled that Mr Shand had been convicted of making a corrupt payment to a Minister of the Crown. He did not do so in the course of his legal practise but rather as a director of a private company. He gained nothing personally from the bribe, he was acting on the instructions of a third party and the major shareholder of the company that employed him. After trial Mr Shand was sentenced to a term of imprisonment of 15 months and served four months. Fifteen years after the corrupt payment the Commissioner sought to remove his name from the roll. On appeal his name was ordered to be removed. By that time Mr Shand had no intention of again practising. He had led a blameless life in the interim. Several references were tendered of the highest quality showing that Mr Shand was otherwise of good character. It was accepted that this was an isolated act of aberrant behaviour and that Mr Shand was unlikely to reoffend. The offence was a result of poor judgment and not greed.

[36] There are some obvious similarities between *Shand* and the present case. To the extent that there are differences they do not favour Mr McKenzie:

(a) his conduct was in the course of his legal practise;

(b) his criminal conduct was arguably more serious – both the maximum term of imprisonment provided for (fourteen years versus seven) and the actual sentence imposed were greater;

(c) there was a victim here who suffered harm as a result of his conduct;

(d) he cannot demonstrate 15 years of blameless conduct and so, greater confidence in his rehabilitation; and

(e) he has every intention of again practising.

[37] The decision of the Court of Appeal reversing the decision of the Tribunal and ordering that Mr Shand's name be removed from the roll is instructive in its emphasis on the wider issues, going beyond a focus on the errant practitioner. As McMurdo JA explained in *Shand*:[9]

> [52] The discretion conferred by s 456 is a broad one and, as noted by the Tribunal, not subject to any express constraint. It is to be exercised for the purposes which are established by the authorities. It is well established that the purpose is not to punish the respondent, but to protect the public.
>
> [53] The protection of the public, of course, is a purpose also served by an order which affects an existing or future practising certificate. By an order affecting a practising certificate, the public is immediately protected from the risks to which those who would encounter an unfit person would be exposed.
>
> [54] However the removal of the name of an unfit practitioner from the Roll serves the interests of the public in more extensive ways. In *Attorney-General v Bax*, Pincus JA said that the remedies of suspension or striking off are for the protection of the public and of the profession's standing and that further, there is also a deterrent element. And in *De Pardo v Legal Practitioners Complaints Committee*, French J (as he then was and with whom the other Members of the Full Federal Court agreed) said that:
>
> > [The protection of the public] extends beyond protection against further default by the particular practitioner to protection against similar defaults by other practitioners.
>
> [55] The reference by Pincus JA in *Bax* to the protection of the profession's standing is important. The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts, and the public is prejudiced. The Court's Roll of practitioners is an endorsement of the fitness of those who are enrolled.

[38] Those wider factors are relevant here.

[39] Mr McKenzie relied on the decision in *Legal Services Commissioner v McDonald* ("*McDonald*") as providing guidance on the appropriate response.[10] There the practitioner had systematically falsified electronic timesheet entries submitted by junior legal staff under his supervision with the intended and practical effect to overcharge the firm's clients more than $515,000 over an 18-month period. The Tribunal determined not to recommend that the practitioner be struck off the roll, but rather that he be reprimanded, fined $20,000, and prohibited from applying for or obtaining a certificate to practice as a principal for five years after being granted an employee level practising certificate. It was submitted the conduct in *McDonald* arguably involved an even bigger breach of trust than under consideration here.

[40] Four things might be said of the decision in *McDonald*. The first is that the significant mitigating feature was identified as the resolution of a previously existing psychiatric disorder induced by sustained stress, that disorder explaining the uncharacteristic

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9 [2018] QCA 66, (and omitting footnotes and citations).

10 [2018] QCAT 82.

misconduct. Here we are by no means persuaded that there existed a psychiatric disorder explaining the misconduct. Secondly, the practitioner there demonstrated a level of acceptance of wrongdoing, contrition and remorse that is not evident here. He provided full cooperation to the firm's internal audit and the profession generally by resigning from his position and reporting himself to the regulator for investigation, with an early plea showing remorse and insight. Thirdly, the decision predated the decision of the Court of Appeal in *Shand* with its emphasis on the wider issues, and indeed the approach of the Tribunal in *Shand* was cited as of some guidance - that approach being later reversed on appeal. Finally, as was observed in *McDonald*:[11]

> 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.

[41] The Commissioner cites the remarks in *Barristers' Board v Darveniza* as relevant and providing guidance here:[12]

> Generally speaking the quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices.

[42] That precisely describes Mr McKenzie's conduct and situation.

[43] We are acutely conscious that a decision here ending a career of a young man for at least the foreseeable future is a serious step. We have determined nonetheless that there is no evidence to justify the view that Mr McKenzie is or is likely to become a person fit to practise. There is no alternative available that will sufficiently protect the public and the reputation of the profession other than to recommend that Mr McKenzie's name be removed from the local roll.

[44] The applicant seeks costs. This order was opposed but on the basis that the applicant failed in obtaining the order it sought. That has not occurred, but even if that had been so, that would not show exceptional circumstances as the relevant section requires (see s 462(1) of the LPA).

**Orders**

[45] We order as follows:

1. Pursuant to s 456(2)(a) of the *Legal Profession Act 2007* (Qld), an order is made recommending that the name of the respondent be removed from the local roll,

2. The respondent shall pay the applicant's costs of and incidental to this discipline application, such costs to be assessed as if this were a matter in the Supreme Court of Queensland.

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11 Ibid, [70].

12 [2000] QCA 253, [33].