

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and McCLEAN [2011] WASAT 199

MEMBER : JUDGE T SHARP (DEPUTY PRESIDENT)
MR J MANSVELD (MEMBER)
MR S ELLIS (SENIOR SESSIONAL MEMBER)

HEARD : 21 OCTOBER 2011

DELIVERED : 9 DECEMBER 2011

FILE NO/S : VR 135 of 2011

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

ALEXANDER JASON McCLEAN
Respondent

Catchwords:

Legal practice - Legal practitioner - Disciplinary proceedings - Practitioner guilty of professional misconduct - Penalty Recommendation to Full Court that practitioner's name be removed from the roll

Legislation:

Criminal Code Act Compilation Act 1913 (WA), s 409(1)(c)
Legal Profession Act 2008 (WA), s 438(a), s 438(2)(a), s 439(c)

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

Result:

Reference to Supreme Court (full bench) with recommendation that the Practitioner be struck off the Roll of Practitioners

Category: B

Representation:

Counsel:

Applicant : Mr S Vandongen SC
Respondent : Mr G Watson SC

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : Tottle Partners

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

A Solicitor v Council of the Law Society of New South Wales (2004)
216 CLR 253
Council of New South Wales Bar Association v Sahade [2007] NSWCA 145
In Re Davis (1947) 75 CLR 409
Legal Practitioners Complaints Committee and Benari [2005] WASAT 213(S)
Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9
McLean v The State of Western Australia [2011] WASCA 60
The Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211
Ziems v Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 In 2010, a legal practitioner, Alexander Jason McClean, was found guilty in the District Court of Western Australia of two counts of intent to defraud, by deceit or fraudulent means by gaining a benefit. The practitioner was sentenced to a total period of two years and eight months imprisonment.

2 The Legal Profession Complaints Committee brought an application to the Tribunal seeking a finding that the practitioner had engaged in professional misconduct and submitting that the Tribunal make a report to the Supreme Court (full bench) with a recommendation that the practitioner's name be removed from the Roll of Practitioners.

3 The Tribunal considered that the nature of the practitioner's conduct was such that a report should be transmitted to the Supreme Court.

Introduction

4 In June 2010, the respondent (**Practitioner**) was sentenced to serve two years and eight months imprisonment for two offences while he was employed as a solicitor in a law firm (**Firm**). The details of these offences are set out later in these reasons.

5 The Legal Profession Complaints Committee (**Committee**) submits that the Tribunal should make a finding that the Practitioner engaged in professional misconduct by illegal conduct.

6 The Practitioner accepts that his conduct constitutes professional misconduct, and agrees that the Tribunal should make a finding to that effect.

7 The Committee also seeks an order that a report be transmitted to the Supreme Court (full bench) under s 438(2)(a) of the *Legal Profession Act 2008* (WA) (**LP Act**) with a recommendation that the Practitioner be struck off the Roll of Practitioners.

8 The Practitioner contends that he should be allowed to maintain his local practising certificate and that instead conditions be imposed on his local practising certificate under s 439(c) of the LP Act.

Facts

9 The facts in this matter are not in dispute. The background is summarised in the decision of the Court of Appeal in *McLean v The State of Western Australia* [2011] WASCA 60 at [8] - [13] as follows:

At all material times, the appellant was an employed solicitor in the litigation department of a law firm. His clients included a number of major banks. In addition to work he performed for clients of that law firm, he also acted as the solicitor, on an unpaid basis, for the Ukrainian Association of Western Australia (the Association). He was, at times, the secretary of that body. The Association was in financial difficulty, which arose out of the construction of a new function centre in a Perth suburb.

The first offence occurred after a bank had paid to the appellant's law firm unclaimed moneys that the bank had received from mortgagee sales of property. The moneys were the balance of funds received from those sales after repaying the sums secured by the mortgages and the costs of the sales to the bank. The appellant directed that \$115,672.66 of these moneys be held in the trust account of the law firm for the Association. Between 24 December 2002 and 5 August 2003, funds from that account were disbursed as various payments made on behalf of the Association. On 12 August 2003, the balance of the funds, \$65,314.42, was forwarded to the Association.

At the time of the second offence, the appellant was handling a mortgagee sale by a bank with respect to property belonging to a deceased estate. The bank authorised the firm to hold \$116,475.03 in trust, and then pay those funds to the Sheriff's Office for the benefit of the deceased estate. On 8 September 2005, contrary to the bank's authority, the appellant forwarded a cheque to the Sheriff's Office from the firm's trust account in the sum of \$116,475.03 directing that the money be applied to the Association for a writ of execution against it. On the same day, a debenture was issued by the Association to the appellant for an identical sum.

The function centre, which was at the centre of the Association's financial problems, was sold on 10 February 2006. The appellant was paid from the proceeds of that sale \$116,475.03 in satisfaction of the debenture. He deposited some of those moneys into his bank account and some into a credit card account in his name.

In March 2008, a solicitor acting on behalf of the deceased estate contacted the firm. By then, the appellant was a non-equity partner in another law firm. The appellant was interviewed by a partner of the (former) firm and later that day the appellant sent a bank cheque in the sum of \$116,475.03 to the firm.

A commercial settlement was reached with respect to the repayment of the amount the subject of count 1, while the sum the subject of count 2 was, as I have already set out, repaid in full.

Practitioner's response to the LPCC's investigations

10 On 16 June 2008, the Practitioner's employers at the relevant time (**Firm**) wrote to the Legal Practice Board notifying it of the conduct detailed above relating to the second offence and its subsequent investigations (**the Firm's letter**). The Firm's letter was referred to the Committee for investigation and on 18 June 2008, the Committee wrote to the Practitioner providing him with a copy of the Firm's letter and seeking his full substantive response to the conduct identified in the Firm's letter.

11 The Practitioner, by letters in response to the Committee's enquiries, provided information that was not true and which the Practitioner knew not to be true. In particular, the Practitioner:

- i. maintained that the payment to the Sheriff in favour of the Association was a mistake due to an administrative error by his secretary;
- ii. claimed that the executor of the deceased estate signed an authority instructing him to pay the amount of \$116,475.03 to the Sheriff's Office;
- iii. claimed that he signed the second page of letter to the Sheriff dated 8 September 2005 in advance and left it for his secretary Ms D to insert the amount of payment and send to the Sheriff's Office without his further input; and
- iv. claimed that Ms D incorrectly prepared the 8 September 2005 Debenture.

Criminal charges

12 On 1 June 2010, the Practitioner was found guilty on his own plea of an indictable offence under s 409(1)(c) of the *Criminal Code Act Compilation Act 1913 (WA)* (**Code**) of intent to defraud, by deceit or fraudulent means by gaining a benefit, namely the sum of \$115,672.66, for the Association and was sentenced to one year and four months imprisonment.

13 On the same day, the Practitioner was found guilty on his own plea of an indictable offence under s 409(1)(c) of the Code of intent to defraud,

by deceit or fraudulent means by gaining a benefit, namely the sum of \$116,475.03, for the Association and was sentenced to one year and four months imprisonment for the second conviction.

14 The sentences imposed were ordered to be served consecutively.

The Tribunal's finding as to conduct

15 The Tribunal finds that the Practitioner by reason of his admission is guilty of professional misconduct by illegal conduct.

16 Senior Counsel representing both parties then made submissions on the appropriate penalty.

Principles to be applied as to penalty

17 The Committee has referred to a number of authorities outlining well-known principles to be followed in recommending a striking off. None of these principles are disputed or contested by the Practitioner and we summarise those principles below.

18 The jurisdiction of the Court to remove a practitioner from the Roll is exercised, not for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the legal profession; see ***Legal Practitioners Complaints Committee v Thorpe*** [2008] WASC 9 at [43]. Where an order for removal from the Roll is contemplated, the ultimate question is whether the material demonstrates that the Practitioner is not a fit and proper person to remain a legal practitioner; see ***A Solicitor v Council of the Law Society of New South Wales*** (2004) 216 CLR 253 at [15].

19 Honesty, fairness and integrity are essential prerequisites to the right to practice law. A willingness to engage in dishonest behaviour is of central relevance to an assessment of a practitioner's fitness to practise; see ***Legal Practitioners Complaints Committee v McKerlie*** [2007] WASC 119 at [8] and ***Council of New South Wales Bar Association v Sahade*** [2007] NSWCA 145 at [58]. Further, fitness to practise requires that a practitioner must command the personal confidence of his or her clients, fellow practitioners and judges; see ***In Re Davis*** (1947) 75 CLR 409 at [420].

20 A practitioner's failure to understand the impropriety of his or her conduct may be a factor of great importance in determining whether they should be permitted to stay on the Roll; see ***The Legal Practitioners Complaints Committee v Lashansky*** [2007] WASC 211 at [35]. While

not every incidence of unprofessional or illegal conduct will require the extreme penalty of striking off, there will be cases where the seriousness of the conduct demands such a disposition because it demonstrates unfitness to practice: *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298

The parties' submissions as to penalty and the Tribunal's findings

21 The Practitioner, with his submissions, filed a number of supporting documents.

22 We have examined the report of the Practitioner's treating psychologist which states that the Practitioner has been attending psychotherapy consultations since August 2008. She, it should be said, states that there is an 'absence of any identifiable or clinically classifiable pathology'.

23 We have also reviewed the references provided by the Practitioner from Ms Jennifer Young, Ms Elizabeth Lawton, Mr Gavin Crocket and Ms Georgina Lacson. There is no doubt that the Practitioner is well regarded by those people who speak highly of his legal abilities. Ms Lawton said that his actions were out of character and that she would offer him a senior position should the opportunity arise. Mr Crocket also says that he would employ the Practitioner. Ms Lacson's letter was written in January 2009, prior to the Practitioner's sentencing, and says that what the Practitioner 'is alleged to have done is totally out of character'.

24 These references do not assist the Tribunal. There is undoubtedly support for the Practitioner, but that in itself does not absolve him of his conduct.

25 The Tribunal accepts that the Practitioner was not motivated by personal pecuniary considerations in committing the offences. However, as the sentencing judge said, this does not excuse the Practitioner's offending.

26 The Practitioner maintains that the offences were, effectively, isolated incidents in circumstances which 'will never be present again'. However, the Tribunal does not consider that it is appropriate to regard the incidents in that way. The first incident occurred in December 2002, the second incident in September 2005 and there is a significant period of time between those two dates, during which the deception continued. Further, some funds were repaid by the Association to the Practitioner in

February 2006. The Practitioner did not take any immediate steps to repay the party entitled to the money. Also, the Practitioner attempted to maintain his innocence in his dealings with the Committee by placing blame on his secretary and others.

27 Although the Tribunal is reasonably confident in agreeing with the Practitioner that the situation with regard to the Association is unlikely to arise again, it cannot go so far as to say that the Practitioner might never be confronted by pressures of the same magnitude in the future.

28 We note that the sentencing judge, while taking into account such matters as the Practitioner's early pleas of guilty, his remorse, his prior good character and his contributions to the community, and the counselling which the Practitioner has taken since the offences had come to light, was nonetheless of the view that the offences were so serious that the only appropriate penalty was terms of imprisonment.

29 The Tribunal's conclusion is that, when a practitioner misappropriates his or her client's funds and serves a prison sentence for so doing, it would only be in the most extraordinary circumstances that the result would be anything other than a recommendation is made that the practitioner be struck off the Roll of Practitioners. Those circumstances do not exist in this case.

30 The Practitioner submits that, should the Tribunal decide to transmit a report to the Supreme Court, then leave should be given to him to apply for readmission in a period of time to be determined by the Tribunal. With respect, however, the Tribunal does not consider that it has the power to do so, even if it was so inclined.

Costs

31 Notwithstanding the general position espoused in s 87(1) of the *State Administrative Tribunal Act 2004* (WA), where disciplinary proceedings have been commenced in the public interest by a vocational regulatory body and the vocational regulatory body has been successful in the prosecution of those proceedings, the affected person should be ordered to contribute to the cost of the proceedings incurred by the vocational regulatory body; see *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213(S) at [25] (*Benari*).

32 The contribution the affected person should be required to make lies in the discretion of the Tribunal, having regard to all of the circumstances

of the case. Special matters can be taken into account to determine what is a fair and reasonable costs order; see *Benari* at [26] - [27].

33 The Practitioner submits that an order for costs should not be made against him because he has not derived any income during the period of his incarceration and therefore does not have the means to meet those costs.

34 There is no doubt that the Tribunal can take into account the Practitioner's circumstances. However, the Tribunal considers that it is appropriate that the Practitioner makes some contribution towards the Committee's costs. The complaint against the Practitioner is a serious one and the Tribunal considers that it was appropriate for the Committee to brief senior counsel. We accordingly order costs in the sum of \$1,500 to be paid within 30 days of the date of the orders below. The Committee's costs amounted to \$4,840.

Orders

1. The Practitioner, Alexander Jason McLean, is guilty of professional misconduct by illegal conduct.
2. Pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA), the Tribunal makes and transmits a report to the Supreme Court (full bench) in the form of its reasons published on 9 December 2011.
3. The Practitioner is to pay towards the Committee's costs the sum of \$1,500 within 30 days of the date of these orders.

I certify that this and the preceding [34] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE T SHARP, DEPUTY PRESIDENT