

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE FULL COURT (WA)

**CITATION** : RE A PRACTITIONER [2001] WASCA 154

**CORAM** : ANDERSON J  
STEYTLER J  
PARKER J

**HEARD** : 2 MAY 2001

**DELIVERED** : 2 MAY 2001

**PUBLISHED** : 16 MAY 2001

**FILE NO/S** : LPD 1 of 1997  
LPD 2 of 2001

**MATTER** : *Legal Practitioners Act 1893 (WA)*

And

A Practitioner

And

Reports by the Legal Practitioners Disciplinary  
Tribunal to the Full Court under s 29A(2)(a) and s 30  
of the *Legal Practitioners Act 1893*

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*Catchwords:*

Professions and Trades - Legal Practitioner - Disciplinary proceedings - Illegal conduct - Convicted on indictment of false pretences and stealing - Whether fit and proper person to remain a practitioner

*Legislation:*

Nil

*Result:*

Practitioner struck off the roll

**Representation:**

*Counsel:*

Legal Practitioners

Complaints Committee : Mr B J H Goetze

Practitioner : Mr I L K Marshall

*Solicitors:*

Legal Practitioners

Complaints Committee : Minter Ellison

Practitioner : N/A

**Case(s) referred to in judgment(s):**

Re A Barrister and Solicitor (1979) 40 FLR 1

Re A Practitioner, unreported; FCt SCt of WA; Library No 970354; 18 July 1997

Re A Practitioner, unreported; FCt SCt of WA; Library No 970467; 19 September 1997

Re A Practitioner, unreported; FCt SCt of WA; Library No 980654; 13 October 1998

**Case(s) also cited:**

New South Wales Bar Association v Evatt (1968) 117 CLR 177

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

1     **JUDGMENT OF THE COURT:** On 2 May 2001 there were two motions before the Court for the practitioner Patrick Edward Mullally to be struck off the Roll of Practitioners or otherwise dealt with pursuant to s 30 of the *Legal Practitioners Act 1893* ("the Act").

2             In two separate proceedings before the Legal Practitioners Disciplinary Tribunal the practitioner was, in each case, found guilty of illegal conduct. In each case the Disciplinary Tribunal made and transmitted a report to this Court pursuant to s 29A(2)(a) of the Act. By s 30(1) these reports are conclusive before this Court as to all facts and findings mentioned or contained in the reports.

3             The practitioner has been suspended from practice, by order of a Judge of this Court pursuant to s 58I of the Act, since 18 April 1994. That suspension from practice followed the conviction of the practitioner on indictment in the District Court on 13 April 1994 on a count of obtaining money by false pretences. In respect of this conviction the practitioner had been sentenced on 15 April 1994 to 18 months' imprisonment with eligibility for parole. At the same time and on the same indictment the practitioner was also convicted of two charges of stealing, but those convictions were subsequently quashed by the Court of Criminal Appeal.

4             By Reference R27 of 1994 the Legal Practitioners Complaints Committee alleged before the Disciplinary Tribunal that the practitioner was guilty of illegal conduct by virtue of the conduct that led to his conviction on the charge of obtaining money by false pretences. That Reference was heard and determined by the Disciplinary Tribunal on 14 March 1997 and the Disciplinary Tribunal found that the practitioner had been guilty of illegal conduct as alleged in the Reference. That finding is the subject of the first of the two reports now before this Court.

5             On 21 October 1999 the practitioner was convicted, following trial on indictment in the District Court, on a count of stealing. On 22 October 1999 the practitioner was sentenced to a term of 2 years imprisonment with eligibility for parole in respect of that conviction. By Reference R10 of 2000 the Legal Practitioners Complaints Committee alleged before the Disciplinary Tribunal that the practitioner was guilty of illegal conduct by virtue of the conduct which led to that conviction of stealing. That Reference was heard and determined by the Disciplinary Tribunal on 21 December 2000 and the Disciplinary Tribunal found that the practitioner was guilty of illegal conduct as alleged in that Reference. That finding is the subject of the second of the reports before this Court.

6           There has been some delay in these matters being referred to, and heard and determined by, the Disciplinary Tribunal and in the reports coming on for hearing before this Court, particularly in the case of the earlier of the two convictions. As the practitioner had been suspended from practice, these delays occurred to enable the practitioner to pursue what so far have proved to be unsuccessful appellate procedures in respect of the two criminal convictions.

7           The earlier of the two criminal convictions which led to the first report before this Court was in respect of an indictment that alleged that between 1 October 1988 and 15 October 1988 at Malaga, by falsely pretending to Bernard Charles O'Donnell that a Caterpillar road grader was his own property and free of liens and encumbrances and that he was able to pass a valid title thereto, the practitioner obtained from O'Donnell the sum of \$19,000 in money with intent thereby to defraud. The facts as found by the Disciplinary Tribunal were in summary that the practitioner had caused a lease agreement to be entered into in the Northern Territory in 1986 by a company, of which he was a director, with a financier in respect of the Caterpillar road grader. Subsequently, the grader was moved to Western Australia. It was a term of the lease agreement that the lessee could not part with possession of the grader without the approval of the lessor. Well knowing that the grader was the property of the company, could not be sold without approval of the lessor, and that there were arrears of rental owing, the practitioner dealt directly with O'Donnell and made representations to the effect alleged in the indictment. The practitioner purported to sell the grader to O'Donnell and in return received the sum of \$19,000 from O'Donnell. This was paid in reliance on the representations.

8           The second of the two criminal convictions, which led to the second report to this Court, was in respect of an indictment that alleged that between 2 December 1992 and 31 December 1993 at Subiaco the practitioner stole the sum of \$26,678.23 in money, the property of Boltrans Nominees Pty Ltd (Receiver and Manager Appointed) trading as New England Freight Lines, and being the amount of a general deficiency. This general deficiency was in the trust account which, by virtue of s 34 of the Act, the practitioner was required to maintain in respect of his legal practice. The facts in respect of this conviction, as reported to this Court by the Disciplinary Tribunal, may be summarised as being that the practitioner wrongly applied moneys that he held in trust in the course of his legal practice to his own use. The practitioner had been retained by the sole directors of a company in respect of which a receiver and manager had been appointed pursuant to a security. The directors were

husband and wife. The practitioner was instructed to do what was legally possible to bring to an end the appointment of the receiver and manager and to protect the interests of the directors against the bank which held the security. After the appointment of the receiver and manager, moneys due to the company were still being received from its customers. Some of these moneys were received at the company address or its post office box. Others were received at the residential address of the directors. Six cheques, which were made out either to the company or to its trading name, came into the hands of the directors after the receiver and manager had been appointed. On the practitioner's advice these moneys were paid to him and deposited in his trust account. The practitioner's instructions were to hold the money until the difficulties with the bank were resolved. Well knowing of the appointment of the receiver and manager and of that official's interest in the moneys the subject of the cheques the practitioner subsequently withdrew those moneys from the trust account and applied them to his own use. They totalled \$26,678.23. At trial, the practitioner asserted that he acted in an honest claim of right to the moneys on the basis that they were paid to him as security for costs for legal work done on behalf of the directors. This was clearly rejected by the jury. Quite apart from the legal interest of the receiver and manager, it was the evidence of the male director that this was not the case and that the practitioner had in fact been paid legal fees totalling some \$3,300 from a separate source of funds. It was also the evidence that despite repeated requests the practitioner had failed to provide a bill of costs in respect of the legal work the practitioner had undertaken. It was only after the practitioner had been suspended from practice and his practice had been taken over by another practitioner that the directors discovered that the moneys were no longer held in the practitioner's trust account.

9           It is noted that in reaching each of its findings that the practitioner had been guilty of illegal conduct the Disciplinary Tribunal relied on the respective convictions on indictment of the practitioner as contemplated by s 31AA(1) of the Act.

10          There is no issue as to the principles to be applied by this Court in dealing with these two motions. Their essence has been captured by Blackburne CJ, Connor and Davies JJ sitting in the Full Court of the Supreme Court of the Australian Capital Territory in *Re A Barrister and Solicitor* (1979) 40 FLR 1 at 24-25 where their Honours said:

"The object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession. Disciplinary proceedings are not taken by way of

punishment, per Barwick CJ in *Harvey v Law Society of New South Wales* 49 ALJR 362 at 364, or to exact retribution, per Fox, Blackburne and Woodward JJ in *Ex parte Attorney General for the Commonwealth; Re A Barrister and Solicitor* (1972) 20 FLR at 244. In the former case, Barwick CJ said that the function of the Court is '... to examine the material proffered to it in order to determine whether that material establishes that the solicitor has failed, by action or inaction, to maintain in his conduct the standards required of him as a member of the profession. The Court's duty is to ensure that those standards of the profession are fully maintained.' (1975) 49 ALJR at 364. In the latter case, Fox, Blackburne and Woodward JJ said that the object of disciplinary action is '... to protect the public and the reputation of the profession' (1972) 20 FLR at 244. Their Honours discussed the principles to be applied in determining whether the conduct of the practitioner has been of such a nature as to justify the intervention of the court. We respectfully adopt the principles enunciated by their Honours. Their Honours said:

'When it is a question of removal from the roll, there is, in the end, a single question, namely, whether the legal practitioner who has been charged is a fit and proper person to remain a member of the profession (see per Latham CJ in *Re Davis* (1947) 75 CLR 409 at 416).''

These observations have been cited with approval by this Court on a number of occasions; see *Re A Practitioner*, unreported; FCt SCt of WA; Library No 970354; 18 July 1997; *Re A Practitioner*, unreported; FCt SCt of WA; Library No 970467; 19 September 1997; and *Re A Practitioner*, unreported; FCt SCt of WA; Library No 980654; 13 October 1998.

11 No particular matters in mitigation are placed before us for the practitioner. He was first admitted as a practitioner in 1974 and is now in his mid-50s.

12 The two acts of illegal conduct involve criminal conduct which is inherently dishonest and by which others suffered financial loss. In respect of each of them the practitioner has been convicted on indictment and sentenced to a significant term of imprisonment. In respect of the more recent conviction the circumstances are particularly aggravated as the moneys were trust moneys in the possession of the practitioner in the course of his legal practice and the conduct of the practitioner was in

breach of his obligations, both professional and statutory, in respect of those trust moneys.

13           Given the nature and seriousness of each of these two illegal acts it is clear that the practitioner can no longer command the respect and confidence of the Court, other members of the profession or the public. In each case the practitioner has acted in gross breach of the standards of conduct required of a legal practitioner. In respect of each of the illegal acts, and also, of course, when they are considered cumulatively, it is our view that the protection of the public and the reputation of the profession require that the practitioner be removed from the roll. Regrettably, but clearly, it is our view that the practitioner has clearly demonstrated that he is no longer a fit and proper person to remain a member of the legal profession.

14           It was for these reasons that, when the matter was before us on 2 May 2001, this Court ordered that the practitioner be struck off the Roll of Practitioners. At that time we indicated our reasons would be published at a later date. This we now do.