
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : FULL BENCH

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE -v- MIZEN [2021] WASC 434

CORAM : QUINLAN CJ
KENNETH MARTIN J
CURTHOYS J

HEARD : 6 DECEMBER 2021

DELIVERED : 6 DECEMBER 2021

PUBLISHED : 6 DECEMBER 2021

FILE NO/S : LPD 1 of 2021

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

DAVID CHARLES MIZEN
Respondent

Catchwords:

Legal practitioners – Disciplinary proceedings – Removal from roll of practitioners – Professional misconduct – Possession and distribution of child exploitation material – Practitioner not a fit and proper person to remain a legal practitioner

Legislation:

Legal Profession Act 2008 (WA)

Result:

Order that the practitioner's name be removed from the roll of practitioners

Category: B

Representation:

Counsel:

Applicant : A J Musikanth SC

Respondent : No Appearance

Solicitors:

Applicant : Legal Profession Complaints Committee

Respondent : No Appearance

Cases referred to in decision:

Legal Profession Complaints Committee v Oud [2019] WASC 287

Profession Complaints Committee and Mizen [2021] WASAT 80

JUDGMENT OF THE COURT:

1 On 6 December 2021 the Court ordered that the name of the
respondent, David Charles Mizen (the **respondent**), be removed from
the roll of legal practitioners.

2 These are our reasons for making that order.

3 The Legal Profession Complaints Committee (the **Committee**)
applied by originating motion for orders that the respondent's name be
removed from the roll of practitioners pursuant to s 444(2)(b) of the
Legal Profession Act 2008 (WA) (the **Act**).

4 On 26 May 2021 the State Administrative Tribunal (the **Tribunal**)
made orders, pursuant to s 438(2)(a) of the Act, that it make and
transmit a report to this Court on the Tribunal's findings that the
respondent is guilty of professional misconduct, with a
recommendation that the name of the respondent be removed from the
roll of legal practitioners.

5 The report of the Tribunal was transmitted to this Court on 2 June
2021. The report consisted of the Tribunal's reasons for decision in
Legal Profession Complaints Committee and Mizen,¹ and was
transmitted with a copy of the exhibit in the proceedings, the transcript
of the proceedings and submissions filed.

6 Pursuant to s 444(1) of the Act, the report is taken to be conclusive
as to all facts and findings mentioned or contained in the report.

The findings against the respondent

7 The facts and findings of the Tribunal are set out in its reasons for
decision and may be summarised as follows.

8 Following an investigation, police identified that between
30 January 2019 and 31 January 2019, an IP address allocated to the
respondent's computer by his internet service provider was part of a
'Peer 2 Peer' (P2P) network which allowed files containing child
exploitation material to be requested and made available via the
respondent's IP address. The child exploitation material which was
made available was from a collection of child exploitation material
which the respondent had in his possession. Participation in the P2P
network permitted the respondent to download material, and relevantly

¹ *Profession Complaints Committee and Mizen* [2021] WASAT 80.

meant that other users on the network were able to upload child exploitation material which the respondent had stored on those of his devices that were connected to the internet during that period.

9 The police executed a search warrant at the respondent's workplace and home. They located a laptop in his office, together with a USB thumb drive. They found an external hard drive connected to a laptop at his home. The thumb drive and the external hard drive contained images and videos of child exploitation material.

10 The images and videos of child exploitation material were counted and categorised according to the Child Exploitation Material Sentencing Classification Scheme. Under that scheme, images and videos are categorised by reference to five categories of an increasingly serious sexual nature. By way of example, category 1 involves depictions of children involving nudity, underwear, sexually suggestive poses, genital areas, and solo urination, but no sexual activity. Category 3 involves non-penetrative sexual activity between children and adults. Category 5 concerns depictions involving sadism, bestiality and child abuse.

11 The thumb drive contained 35 images and 90 videos categorised as falling within categories 1 through to 5. The images and videos falling within categories 1 to 4 involved children ranging from 5 to 12 years of age. Eight videos were categorised as falling within category 5 and involved children ranging from 6 to 9 years of age depicted in acts of bondage and bestiality.

12 The external hard drive contained 1,413 images and 230 videos, depicting children between the ages of 1 and 14 years. Those images and videos spanned categories 1 to 5. Those in category 5 comprised 261 images and seven videos depicting children in acts of sadism, bestiality and bondage.

13 On 22 December 2020, the respondent was convicted on his plea of guilty, to one count of distributing child exploitation material, contrary to s 219(2) of the *Criminal Code* (in relation to the respondent's participation in the P2P network), and to two counts of possession of child exploitation material (in relation to the thumb drive and external hard drive respectively), contrary to s 220 of the *Criminal Code*.

14 The offences carried a maximum penalty of 10 years imprisonment and 7 years imprisonment respectively. The respondent

was sentenced to 12 months immediate imprisonment on the first count, to 14 months immediate imprisonment on the second count, and to 2 years immediate imprisonment the third count. Following some accumulation of the sentences the respondent was sentenced to a total effective sentence of 3 years immediate imprisonment. He was made eligible for parole.

15 It was not disputed by the respondent that in their search of his office and home, the police seized 27 devices. Across all of those devices there were 17,554 images and 1,391 videos of child exploitation material, across the full range of categories for such material. The possession of all of that material was not the subject of the charges. The respondent admitted that he had been engaged in the possession of child exploitation material for at least 10 years.

16 The respondent was 52 years of age when he committed the offences. He had been practising as a lawyer since about 2005.

Characterisation of the respondent's conduct

17 In finding the respondent guilty of professional misconduct, the Tribunal said:

The three offences for which the Practitioner has been convicted are serious offences as defined in the [*Legal Profession Act*]. There is no doubt that the conduct which constituted those offences constituted professional misconduct, in that while it was conduct which occurred otherwise than in connection with the practice of law, it was conduct which undoubtedly justifies a finding that the practitioner is not a fit and proper person to engage in legal practice.

Integrity is an essential prerequisite to the right to practice law. The heinous conduct which constituted the offences of which the Practitioner was convicted not only manifested a complete disregard for compliance with the law itself, but was criminal conduct of a most serious kind. That conduct demonstrates that the Practitioner has a complete lack of integrity, had engaged in conduct of that kind over an extended period, and is a person who clearly could not command the personal confidence of his clients, fellow practitioners or judges. Put another way, this is a case where the conduct of the Practitioner showed a defect of character incompatible with membership of the profession. The sentencing judge found that there was no significant indication of remorse for the Practitioner's conduct. There could hardly be a clearer case of a practitioner demonstrating that he is not a fit and proper person to be an Australian legal practitioner.

Relevant principles

18 The principles to be applied in an application such as this are well established. They were summarised by this Court in *Legal Profession Complaints Committee v Oud*² and the relevant principles include the following:

- (a) the court's jurisdiction with respect to the regulation of the legal profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession;
- (b) where the motion is to remove a practitioner from the roll, the critical question for the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner;
- (c) fitness to practice law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges;
- (d) removal from the roll is an order reserved for very serious cases, where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice; and
- (d) integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner.

Application to the present case

19 As noted above, the Tribunal said of the respondent's misconduct that there could hardly be a clearer case of a practitioner demonstrating that he is not a fit and proper person to be an Australian legal practitioner.

20 We agree.

21 The respondent has no place in the legal profession. His criminal offending, and what it reveals about his character, is wholly

² *Legal Profession Complaints Committee v Oud* [2019] WASC 287 [17] (Quinlan CJ, Kenneth Martin & Smith JJ).

inconsistent with the integrity required of a legal practitioner. The respondent, who did not oppose the order sought by the Committee, did not suggest otherwise.

22 There can, in the circumstances, be only one conclusion. The respondent is not a fit and proper person to remain a legal practitioner.

23 For these reasons, the Court was satisfied that the appropriate order, in order to protect the public and maintain the reputation and standards of the legal profession, was that the respondent's name should be struck from the roll of legal practitioners.

24 As the motion was not opposed, the Committee did not seek an order for the costs of the motion. We, therefore, made no order as to costs.

I certify that the preceding paragraphs comprise the reasons for decision of the Supreme Court of Western Australia.

AK

Principal Associate to the Honourable Chief Justice Quinlan

6 DECEMBER 2021