[2009] WASAT 42 (S)

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and TROWELL [2009] WASAT 42 (S)
MEMBER	**:**	JUDGE J ECKERT (DEPUTY PRESIDENT) MR C EDMONDS SC (SENIOR SESSIONAL MEMBER) MS B HOLLAND (SESSIONAL MEMBER)
HEARD	**:**	15 - 19 SEPTEMBER 2008 FINAL WRITTEN SUBMISSIONS RECEIVED 18 NOVEMBER 2008
DELIVERED	**:**	13 MARCH 2009
SUPPLEMENTARY DECISION	**:**	3 APRIL 2009
FILE NO/S	**:**	VR 177 of 2007
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND MARK TERENCE TROWELL Respondent

Catchwords:

Appropriate penalty - Reprimand - Relevance of seniority in legal profession - Whether fine appropriate - Mitigating factors - Exceptional

case - One transaction principle - Previous good character - References - Role of disciplinary proceedings

Legislation:

Legal Practice Act 2003 (WA), s 185, s 187

Result:

Respondent legal practitioner reprimanded

Category: B

Representation:

Counsel:

Applicant	:	Mr SD Hall SC and Mr S Davies
Respondent	:	Mr MJ McCusker AO, QC and Ms A Plaisted

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Stables Scott

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

Law Society of NSW v Foreman (1994) 34 NSWLR 408
New South Wales Bar Association v Davison (2005) NSWADT 252
NSW Bar Association v Cummins (2001) NSWCA 284
NSW Bar Association v Meakes [2006] NSWCA 340
Quinn v Law Institute of Victoria Limited [2007] VSCA 122
The Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 13 March 2009, the Tribunal handed down its decision and reasons in the substantive proceedings ([2009] WASAT 42), finding the practitioner guilty of unsatisfactory conduct by unprofessional conduct. That was on the grounds that the practitioner, in each case without his client Ms Corby's consent, disclosed confidential information of Ms Corby and (based on the same disclosures) made statements to the media concerning Ms Corby.

2 On 3 April 2009, the Tribunal heard submissions on penalty and costs. At the conclusion of that hearing the Tribunal gave short oral reasons for its decision on penalty on the basis that it would subsequently provide detailed written reasons. The Tribunal ordered that:

1) the practitioner be reprimanded; and

2) that its decision with respect to the LPCC's application for costs be reserved pending the filing of consent orders by the parties.

3 On 21 April 2009, the parties filed consent orders, which the Tribunal issued on 22 April 2009, that the practitioner pay the LPCC's costs of the application of $55,000.

Background

4 In the substantive proceedings the Tribunal found pursuant to s 185 of the *Legal Practice Act 2003* (WA) (LP Act) that the practitioner was guilty of unsatisfactory conduct by way of unprofessional conduct. The Tribunal found that the practitioner failed to recognise Ms Corby as his client and that he breached the duty of confidentiality that he owed her by disclosing various matters to the press without Ms Corby's consent to do so.

5 The parties each filed comprehensive written submissions on penalty which they supported orally at the hearing.

6 These are the reasons for the decision on penalty that the Tribunal advised it would issue at the penalty hearing on 3 April 2009. They formed the basis of and reasoning behind the orders that we made on that day.

The LPCC's submissions on penalty

7 The Legal Practitioners Complaints Committee (LPCC) sought orders that the practitioner:

1) pay a fine of between $17,000 and $22,000; and

2) pay the LPCC's costs of $55,000.

8 The LPCC made reference to specific findings of the Tribunal. These included:

1) Ms Corby became a client of the practitioner on 6 June 2005. At that time Ms Corby was in jail in Indonesia having been sentenced to 20 years' imprisonment. She had appealed against that judgment and the practitioner was engaged in part to assist on the appeal;

2) shortly after 6 June 2005, over the course of 11 days, the practitioner made five separate disclosures concerning Ms Corby's matter to the media. These disclosures related to criticism of members of Ms Corby's Bali legal team in their handling of the appeal and their request for money from the Australian Government to bribe the appeal judges in Bali;

3) the disclosures were made by the practitioner with no or little regard for the consequences to Ms Corby and without believing that they were in her interests. They were in fact not in her interests and were made at a time when she was in an extraordinarily vulnerable situation;

4) the practitioner's motivation in making the disclosures was, in part, in pursuit of his dispute with members of the Bali legal team and to promote himself in the media as a legal expert approached by the Australian Government and whose services were not being availed of by the Bali lawyers;

5) the practitioner did not at the time believe that Ms Corby was his client, but a responsible barrister in his position would have been acutely aware of the situation which Ms Corby was in and whether she was in fact his client; and

6) the Tribunal found that in those circumstances the practitioner was guilty of a serious breach of professional conduct.

9 In his oral submissions, Mr McCusker QC for the practitioner did not dispute these were relevant findings.

10 The LPCC submitted that by virtue of the practitioner's position as a Queen's Counsel he was expected to demonstrate the highest professional standards and that a failure to meet the requisite standards 'must be considered more harshly than for a junior practitioner', citing ***NSW Bar Association v Cummins*** (2001) NSWCA 284 (***Cummins***).

The practitioner's submissions on penalty

11 The practitioner in his submissions referred to a number of matters as 'facts in mitigation', as follows:

1) there is no finding of dishonesty, nor of an intention to cause Ms Corby detriment;

2) this is an exceptional case because:

a) the Tribunal found that the practitioner did not believe Ms Corby was his client;

b) the relevant information that was disclosed was not given by or on behalf of Ms Corby; and

c) Ms Corby had made no complaint and there was no evidence she suffered detriment by the disclosure and it assisted her to effect the dismissal of her Bali lawyers. (In support of this the practitioner refers to a paragraph from S. Corby and K. Bonella, *Schapelle Corby: My Story* (1st ed, 2006));

3) by reference to the 'one transaction principle' as it applies in sentencing principles in criminal proceedings, the statements made on the five occasions ought to be considered as part of a continuing episode over a comparatively short time, being 11 days. Further, the penalty must be confined to a consideration of the alleged and proven offence;

4) the circumstances at the time of the making of the statements included that:

   (a) the practitioner believed there was some justification for making adverse comments about Ms Corby's Bali legal team including in relation to their intent to seek to bribe the Balinese judiciary; and

   (b) the media approached the practitioner in relation to the bribery allegation.

5) the practitioner received no financial benefit from his efforts; and

6) the practitioner is a person of previous good character. The practitioner tendered a large number of character references from members of the legal profession and the community. The Tribunal's finding of unprofessional conduct adversely reflects on the practitioner's professional reputation and will impact on his earning capacity. He has suffered public humiliation from the publicity surrounding the proceedings and the Tribunal's finding. The practitioner has endured the pressure of these proceedings over the past four years.

12 In these circumstances, the practitioner submits that the appropriate penalty is a reprimand. The practitioner also challenges the costs claimed. Costs were ultimately agreed by the parties without Tribunal intervention. Whether they were relevant to the substantial fine sought by the LPCC or were to be treated independently of it, as the LPCC submitted, did not require determination.

13 In oral submissions in response, Mr Hall SC, for the LPCC, challenged a number of these matters. In turn, they were supported by Mr McCusker.

The legal principles

14 Section 187 of the LP Act provides that the Tribunal may make a range of orders with respect to a practitioner where , pursuant to s 185, the Tribunal finds that a legal practitioner is guilty of unsatisfactory conduct, as is the case in these proceedings. The Tribunal may, for example, suspend the practitioner from practice (s 187(1)(a)), impose a fine of up to

$25,000 on the practitioner (s 187(1)(d)) or reprimand the practitioner (s 187(1)(e)).

15 The LPCC submits that an important object of disciplinary proceedings is the protection of the public, and conducive to that, the maintenance of proper professional standards. Their object is not the punishment of the practitioner. In order to protect the public and the reputation of the profession, the consequences for the practitioner may need to be more severe than if the only object of the proceedings was one of punishment. The LPCC cites the relevant authorities as mentioned in ***The Legal Practitioners Complaints Committee v Lashansky*** [2007] WASC 211 at [19].

16 The practitioner, by his submissions, submits that whilst the role of the LPCC is to protect the public and maintain the standards of the profession, and that this is the primary purpose of the imposition of a penalty in disciplinary proceedings, that does not mean that the Tribunal may ignore the punitive effects on the individual. The practitioner's submissions also rely on usual sentencing principles and specifically 'the one transaction principle'. The practitioner's tender of character references is also directed to the personal circumstances of the practitioner.

17 There is some tension between the parties' respective positions.

18 That the disciplinary jurisdiction is based on the protection of the public, including by maintaining professional standards, rather than punishment as such, is well established, particularly in serious cases where the issue is whether a practitioner may continue to be held out as fit to practice. The proceedings are not criminal in nature. A practitioner whose integrity is not in question but whose capability is impaired may, in the interests of the public, be precluded from practising. The object of protection of the public includes not only deterring the practitioner in question from future conduct the subject of the complaint, but also by publicly denouncing that conduct, deterring others who might be tempted to engage in it. The imposition of a fine of the nature which the LPCC proposes can only be understood as operating in the nature of a deterrent. Moreover, recent cases in Australia recognise that whilst the object of the proceedings is the protection of the public, the punitive effects on the practitioner are not to be ignored.

19 The principles applicable to sentencing (just punishment, specific and general deterrence, denunciation, protection of the community,

rehabilitation) apply by analogy - ***Quinn v Law Institute of Victoria Limited*** [2007] VSCA 122 at [29-35]; ***NSW Bar Association v Meakes*** [2006] NSWCA 340 at [109-114]; ***Law Society of NSW v Foreman*** (1994) 34 NSWLR 408 (***Foreman***) (reference to principles of double jeopardy, continuous course of conduct at 413, 417). That does not of itself operate to the benefit of the practitioner under investigation. Such factors may operate more severely against an individual practitioner than if regard is limited to the protection of the public (***Foreman*** at 441-446, 471).

20 As a practical matter, courts and tribunals dealing with the appropriate penalty in disciplinary proceedings often have regard to factors such as the gravity of the charge, the effect of the misconduct on the client, the practitioner's previous good character, her or his level of co-operation with the regulating authority and the effect of the penalty (and an order for costs) in the circumstances. We are prepared to consider the practitioner's submissions of 'facts in mitigation' on this basis.

21 By the same principle, in determining penalty we take the view that we are required to consider all the material circumstances supporting and relating to the charges; that is, both the 'aggravating' as well as the 'mitigating' circumstances. The issue is not merely finding a penalty appropriate to the specific charge without regard to the facts supporting it, as the practitioner's submissions at some points appear to suggest.

22 We have been troubled by the LPCC's submission that by reason that the practitioner is one of Her Majesty's Counsel, his failure to meet the appropriate professional standards 'must be considered more harshly than for a junior practitioner'. The decision in ***Cummins*** concerned a barrister who had not filed taxation returns over some 40 years. He had not admitted that his actions had jeopardised the reputation and standing of the legal profession. Chief Justice Spigelman said [at 30] that 'the conduct of a barrister, particularly a barrister who has received the distinction of a Commission as one of Her Majesty's Counsel, who has behaved in such complete disregard of his legal and civic obligations, was necessarily such as to bring the entire profession into disrepute'.

23 The present matter does not concern conduct committed outside the practitioner's professional practice which has brought the profession into disrepute. It concerns conduct which violates the practitioner's duty of confidentiality to his client. That is a serious matter and in determining that the practitioner ought to have taken greater care in considering whether Ms Corby was his client, we have taken into account the

practitioner's seniority. But we do not think in relation to penalty that ***Cummins*** (or ***New South Wales Bar Association v Davison*** (2005) NSWADT 252 also referred to by Mr Hall) stands for the general principle that, by reason only of his being a senior practitioner, a more severe penalty applies than would otherwise.

24 Neither are we prepared to apply such a principle on general considerations, at least in the circumstances of this case. We think it requires considerably more argument than was provided. For instance, if a practitioner's seniority were to be considered, it seems to us we would also need to take into account that by reason of that fact, the matter is likely to have attracted greater publicity than otherwise and corresponding greater hurt to the individual concerned (***Foreman*** at 418.)

Mitigating factors

25 We have considered all the mitigating factors identified by the practitioner. We deal shortly with those that were challenged by the LPCC.

26 Without accepting all the grounds relied on and having regard to others, we think there is support for the practitioner's view that the circumstances of this matter are unusual. The practitioner was approached by the Australian Government rather than directly by the client or her solicitors. He was acting pro bono without the benefit of instructing solicitors. His client was in a foreign jurisdiction and the trial and appeal were subject to the laws of Indonesia and Bali in particular. The case was attended by extraordinary publicity. The journalist who published the bribery allegations approached the practitioner with a version of events he said he was going to publish.

27 In those circumstances, the need for general and specific deterrence is diminished. We note in this context that whilst the practitioner's written submissions were not forthcoming in expressing regret for his conduct and there is no suggestion of an apology given to Ms Corby, the practitioner, through Mr McCusker, expressed sincere regret in failing to recognise Ms Corby as his client. The Tribunal takes the view that having suffered the stress of these proceedings and the humiliation and hurt arising from our finding of unprofessional conduct and, as determined, the issuing of a reprimand (and, we would hope, from a reflection on how his conduct impacted on Ms Corby), it is unlikely that the practitioner would re-offend.

28 In this context we place little reliance on the practitioner's claims that:

1) the relevant information that was disclosed was not given by or on behalf of Ms Corby; in fact, in the substantive decision we found that the information was provided on behalf of Ms Corby;

2) there is no evidence Ms Corby suffered detriment by the disclosure; in the substantive decision we found that she was disadvantaged by the disclosures; and

3) the disclosure of the bribery allegation assisted Ms Corby to effect the dismissing of the Bali lawyers.

29 As mentioned, the practitioner made reference to a passage from *Schapelle Corby: My Story*. The book had not been relied on in the substantive hearing. The passage reads:

> The perfect chance to sack them [Ms Lubis and Mr Rasiah] arose when one of the QC's (rather stupidly) stated publicly that Vasu [Rasiah] had asked the Australian Government for [A]$500,000 in bribes. Merc [Mercedes Corby] and I talked it over and agreed: 'This is it, they're gone.' No doubt that was exactly what the comments had been designed to do.

30 The 'QC's' are identified as the practitioner and Mr Percy QC, being 'two QC's [who] had offered to work pro bono for my appeal'. To the extent the practitioner was so motivated, he did not admit to this in his evidence. As we said in the substantive decision, the practitioner might properly have raised the subject of the bribery allegation, giving Ms Corby the opportunity to dismiss those responsible for it, without disclosing it to the press.

31 As regards the disclosed statements being considered as part of a continuing episode over a period of 11 days, it is true that there was a degree of repetition or enlargement of earlier statements on the same or related topics. We have taken that into account but bearing in mind, as Mr Hall points out, that there was only one charge of unprofessional conduct arising from the disclosures.

32 We think that the practitioner's belief that he was justified in making adverse comments about Ms Corby's Indonesian legal team and its members, including in relation to their intent to seek to bribe the Balinese judiciary, is of limited persuasion. It goes without saying that the

disclosures would have been even less justifiable if there was no evidence of that belief.

33 We are mindful that the practitioner agreed to undertake to provide assistance to Ms Corby without fee and that he travelled to and stayed in Bali at his own cost.

34 We also accept that the practitioner is a person of previous good character and is highly respected within the criminal bar and in the broader legal community. We have read all 48 references. As might be expected, we have found these to be of varying degrees of assistance and their impact was not ultimately dependant on the number of references submitted. We give less weight to the referees (however eminent) who seek to discount the seriousness of the subject conduct or where it is apparent that the referee has not read our substantive reasons. The references generally express the author's views that the practitioner's conduct found to be unprofessional was out of character and unlikely ever to be repeated. One referee referred to his knowledge of the personal anguish suffered by the practitioner by reason of these proceedings. Taken as a whole, the references are a testimony to the high regard in which the practitioner is held within the legal profession, by the police and within the community. They support the following observations about the practitioner:

1) he has a reputation for working fearlessly to achieve justice within the criminal system, for hard work and for competence;

2) he has a reputation for honesty, fairness and assisting clients in need of legal assistance in disregard of his own financial benefit and personal circumstances;

3) he is regarded as a leader of the criminal bar in Perth, committed to his profession and encouraging of junior members; and

4) in the pursuit of matters of concern to him, he has been known to talk out of turn, including to the press.

35 None of the references was challenged. We are entitled to have regard to them in seeking a just outcome in all the circumstances. We think the situation might be expressed this way: 'It remains a grave lapse. But it is one to be evaluated in the context of the life of a person who has

made contributions beyond the usual to the activities of the law in this community.' (***Foreman*** at 415.)

Determination

36 The law and those entrusted with maintaining professional standards attach a high value to the trust and confidence which clients do, and are encouraged to, place in their lawyers. It is the rationale underlying legal professional privilege, a principle which has been described as an important common law right (or immunity) and sometimes even as a fundamental human right. The importance of the professional obligation of confidentiality was never in question during these proceedings. But the professional (and legal and equitable) duties owed to a client are necessarily dependent upon the lawyer's recognition of a person as their client, or a person to whom they might otherwise owe a duty of confidence. Failure in that respect may lead to a serious breach of professional duty.

37 In these proceedings, the practitioner failed to appreciate that Ms Corby was his client. His publication of matters confidential to her was exacerbated because of her extraordinarily vulnerable position (including, on the practitioner's evidence, because of inadequate representation on her appeal) and because publication was made to the press and was in part motivated by his personal interests.

38 In those circumstances, we understand the reasons underlying the LPCC's submission that a substantial fine is the appropriate remedy.

39 However, we do not think that protection of the public nor the nature of the conduct requires such a penalty. Having regard to the unusual circumstances of this case, the practitioner's previous good character and commendable legal service, the unlikelihood that he would ever re-offend and the other matters to which we have referred, we think the appropriate penalty is a reprimand which we order pursuant to s 187(1)(e) of the LP Act.

40 It only remains to say, for the benefit of members of the public who might have taken an interest in this matter, that whilst a reprimand does not have the financial consequences of suspension or the imposition of a fine, the issuing of a reprimand by a Tribunal following its finding of unprofessional conduct, is a serious matter. It would certainly be a relevant, and perhaps a decisive, consideration in the event of a re-offence.

Orders

41 The Tribunal orders that:

1. The practitioner be reprimanded; and

2. The practitioner pay the costs of the Legal Practitioners Complaints Committee fixed in the sum of $55,000.

I certify that this and the preceding [41] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE J ECKERT, DEPUTY PRESIDENT