
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : FULL BENCH

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE -v- PALUMBO [2005] WASCA 129

CORAM : STEYTLER P
WHEELER JA
MCLURE JA

HEARD : 13 MAY 2005

DELIVERED : 11 JULY 2005

FILE NO/S : LPD 2 of 2003
LPD 2 of 2004

MATTER : Two Reports, dated 12 March 2003 (LPD 2 of 2003) and undated (LPD 2 of 2004), by the Legal Practitioners Disciplinary Tribunal to the Full Court of this Honourable Court under the *Legal Practitioners Act 1893*, s 29A(2)(a) and s 30 and the *Legal Practice Act 2003*

Catchwords:

Legal practitioners - Disciplinary proceedings - Removal from Roll - Finding by Legal Practitioners Disciplinary Tribunal of illegal conduct - Possession of cocaine and conspiracy to defeat the course of justice - Whether practitioner fit and proper person to remain a member of the legal profession - Turns on own facts

Legislation:

Legal Practitioners Act 1893 (WA), s 29A(2)(a), s 28C, s 30(1), s 30(2)
Legal Profession Act 1987 (NSW), s 127(1)
Misuse of Drugs Act 1981 (WA), s 6(2)

Result:

Practitioner struck off the Roll

Category: B

Representation:

Counsel:

Applicant : Mr B J H Goetze
Respondent : Mr L M Levy

Solicitors:

Applicant : Minter Ellison
Respondent : Laurie Levy & Associates

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

A Solicitor v Council of the Law Society of New South Wales (2003)
216 CLR 253
Barristers' Board v Darveniza (2000) 112 A Crim R 438
Barristers' Board v Young [2001] QCA 556
Coe v New South Wales Bar Association [2000] NSWCA 13
Howes v Law Society of Tasmania [1998] TASSC 112
In re Davis (1947) 75 CLR 409
In re Johnson 488 NW 2d 682 (South Dakota 1992)
Prothonotary of the Supreme Court of New South Wales v P [2003]
NSWCA 320
Re a Barrister and Solicitor (1979) 40 FLR 1
Re a Practitioner [2002] WASCA 93
Re a Practitioner; Ex parte Legal Practitioners Disciplinary Tribunal (2004)
145 A Crim R 557
Re a Solicitor [2004] WASCA 283
Re B [1981] 2 NSWLR 372
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Ziems v The Prothonotary of the Supreme Court of New South Wales (1957)
97 CLR 279

Case(s) also cited:

Re Evatt; Ex parte New South Wales Bar Association [1967] 1 NSW 695

New South Wales Bar Association v Bryson [2003] NSWADT 19

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

Re a Practitioner; Ex parte the Legal Practitioners Disciplinary Tribunal [2001]
WASCA 204

1 **STEYTLER P:** There are two motions brought by the Legal Practitioners Complaints Committee ("Complaints Committee") for orders that Allesandro Palumbo ("practitioner") be struck off the Roll of Practitioners of this Court. Each motion relies on a report made by the Legal Practitioners Disciplinary Tribunal ("Tribunal") pursuant to s 29A(2)(a) of the former *Legal Practitioners Act 1893* (WA) ("Act"). Section 30(1) of the Act provides that the report is "conclusive as to all facts and findings therein mentioned or contained". Section 30(2) provides that this Court may, upon motion, and upon reading the report, make an order of the kind mentioned in that section, including an order suspending the practitioner from practice or one striking him off the Roll of Practitioners.

2 The practitioner is 36 years old. He was admitted to practise in 1996. His conduct giving rise to the two reports took place during the second half of 2001.

The first report

3 The Tribunal's first report was the result of a reference to it (Reference 33 of 2002) by the Complaints Committee under s 28C of the Act. The reference, dated 2 August 2002, alleged that the practitioner was guilty of illegal conduct in that, on 20 November 2001, he had in his possession a prohibited drug, cocaine, contrary to s 6(2) of the *Misuse of Drugs Act 1981* (WA).

4 The Tribunal's report, dated 12 March 2003, reveals that, at about 6.30 pm on 20 November 2001, the practitioner drove to a house in Sorrento. He had with him in his car a Sydney practitioner. The practitioner went into the house, leaving the Sydney practitioner in the car. There he obtained two packets of cocaine, each weighing approximately .6 of a gram. His car was stopped by a policeman during his return journey. The car was searched and the two packets of cocaine were found in its centre console. The practitioner was subsequently charged with possession of cocaine with intent to supply it to another. However, the prosecution subsequently accepted a plea of guilty to the offence of possession only. The practitioner was fined \$1500 and ordered to pay the costs of the prosecution. He received a spent conviction order. He had previously notified the Complaints Committee of his intention to plead guilty to the charge of possession. He undertook to retire from legal practice "for the time being" as and from 17 April 2002, being the date of his appearance in the Court of Petty Sessions.

5 Although the practitioner had used cannabis on what was described as "a recreational basis", he was not addicted to any substance. He said that he had "no drug problem". At the time of the commission of the offence the practitioner was involved as counsel in an eight-week criminal trial in which three men were facing drug charges involving cocaine and amphetamine. The Sydney practitioner was also involved in the trial. He asked the practitioner to obtain cocaine for him. The practitioner initially said that he could not do so. However, the Sydney practitioner, who was older and more experienced than the practitioner, persisted and the practitioner gave in. The practitioner said that he had a friend who he had seen use cocaine. He contacted that friend and arranged to pick up the two packets of the drug. One packet was for the practitioner and the other was for the Sydney practitioner.

6 A number of mitigating circumstances were placed before the Tribunal. These encompassed the practitioner's plea of guilty and his co-operation in voluntarily ceasing to practise. He had separated from his wife in 1999 in circumstances which were described as "traumatic". While the drug offence took place some two years later, the practitioner's counsel told the Tribunal that it had taken the practitioner some time to get over this trauma. The practitioner was said to have been adversely affected by the publicity given to his offending and has struggled to find alternative employment. He and a friend had established a roof restoration business which had, at that stage, provided only a small amount of income (the practitioner now works as a sales representative for a building company). A number of references were produced which spoke favourably of the practitioner's character. He had no prior criminal record and was contrite in respect of his offending.

7 The Tribunal was divided as to the appropriate outcome. The Chairman, Mr Rowland QC, regarded the case as being on the borderline but thought it appropriate to suspend the practitioner for a period of 18 months rather than make a report to this Court. He said that he was "not convinced that ... [the practitioner's conduct] reflects sufficiently adversely on his practice as a solicitor or the professional [*sic*] as a whole to warrant the ultimate sanction sought by the Complaints Committee". The Chairman mentioned that he was authorised by the community representative on the Tribunal (who did not have a vote) to advise that he shared the Chairman's opinion. The voting majority, Ms N Johnson QC and Ms A Liscia, considered that possession of cocaine was "so inconsistent with acceptable standards for a legal practitioner that the only appropriate disposition of the matter ... [was] to report to ... [this] Court with a recommendation that the practitioner should be struck off".

The second report

8 The second report (made pursuant to Reference 21 of 2003) reveals that in the early hours of the morning of 23 July 2001 the practitioner drove his car through a red light at a Scarborough intersection. A conviction for that offence would have resulted in the practitioner gaining demerit points sufficient, when taken with those which he already had, to result in the automatic suspension of his driver's licence. On the evening of 23 July 2001 the practitioner contacted his nephew, who was then in Queensland, and asked him to take responsibility for the infringement. He did so by sending an SMS message on his mobile telephone. The nephew telephoned the practitioner a short while later. He agreed to take responsibility for the infringement provided that he was paid \$100 for each demerit point, making up a total of \$300. \$200 of this was to be paid by cancelling a debt owed by the nephew to the practitioner. The balance of \$100 was to be deposited directly into a bank account nominated by the nephew. The money was paid into that account on 31 July 2001. At the time of these events the practitioner's telephone was being monitored by police for reasons which are not apparent.

9 On 2 September 2001 the practitioner signed a form electing to have the alleged infringement dealt with by a Court on the basis that the charge would be defended. Some two months later, on 13 November 2001, he was interviewed by police with respect to the traffic infringement. He denied that he had been the driver of the vehicle. He said that he had looked at the police photograph and checked his diary and that he could not have been the driver at the time. He nominated three possible drivers, one of these being his nephew. Police interviewed the nephew on 15 November 2001 but he denied being the driver.

10 On 4 April 2002, the practitioner was again interviewed by the police. This time, they told him that his telephone calls had been intercepted. At first, the practitioner did not admit that he had been the driver at the time of the traffic offence. After a short while, he did so. He said that he had not told the police, in November, that he had been the driver, because he did not know that he had been so. He said that he had nominated his nephew as a possible driver only because he was someone who had previously driven his car. He said that he did not realise that his nephew had been in Queensland at the time. He suggested that this was "all a misunderstanding". Later, he admitted that he had told his nephew that he had gone through a red light and that he wanted the nephew to take the three demerit points on his behalf. He eventually admitted putting

money into his nephew's account, although he denies that this was in furtherance of the conspiracy.

11 The practitioner was subsequently charged, on indictment, with the offence of conspiracy to defeat the course of justice. He pleaded guilty and, on 30 May 2003, was fined \$3000. The sentencing Judge described the practitioner's conduct as "a piece of ... sustained dishonesty, perpetrated by a person who by reason of his occupation ... should have known better".

12 At the hearing of the reference, the practitioner's counsel said that the offence occurred at a time when the practitioner was under great stress, as he then had a number of substantial financial obligations. If he had lost his licence, his practice would have been affected. It was largely a criminal practice and he was required to visit a number of his clients in prisons which were spread out around the metropolitan area. The practitioner was said to have panicked and, after consuming some alcohol, to have conceived the plan of getting his nephew to accept responsibility for the traffic offence. The practitioner said that the sum of \$100 deposited into his nephew's account was not paid as a result of the conspiracy. His counsel told the Tribunal (as he had told the sentencing Judge) that the conspiracy had, by then, fallen away and that this sum was paid to his nephew by way of a loan.

13 In mitigation, the practitioner's counsel submitted that the combination of events concerning the practitioner had been "economically ... [and] socially calamitous to him" and that he had had a very public downfall. He was said to have been profoundly affected by all that had occurred.

14 On this occasion the Tribunal was unanimous in its conclusion that a report should be made to this Court recommending that the practitioner be struck off. It said that the offence struck at "the heart of justice and when ... committed by a practitioner ... perhaps [struck] even harder". It expressed the hope that both reports would be considered at the same time.

Applicable principles

15 Disciplinary proceedings of this kind against a legal practitioner are not instituted in order to punish the practitioner. Where offences have been committed, punishment is the province of the criminal law. The sole object of disciplinary proceedings is the protection of the public and maintenance of proper standards in the legal profession: *Re a Barrister*

and Solicitor (1979) 40 FLR 1 at 24 - 25, per Blackburn CJ, Connor and Davies JJ; *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12 at 25, per Malcolm CJ, with whom Kennedy and Franklyn JJ were in agreement. Whether or not a practitioner should be struck off the Roll depends upon the answer to the question whether he or she is a fit and proper person to remain a member of the legal profession: *In re Davis* (1947) 75 CLR 409 at 416; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 288; *Re Maraj*, at 25; and *A Solicitor v Council of the Law Society of New South Wales* (2003) 216 CLR 253 at 265 - 266 [15], per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ. Fitness to practise is assessed as at the time of the hearing: *Solicitor v Law Society (NSW)* at 268 [21].

16 Consequently, where a practitioner has engaged in illegal conduct, much will depend upon the nature of the conduct engaged in. In *Ziems*, at 298, Kitto J said (in a passage which has often since been quoted):

"It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task."

17 In the same case, at 290, Fullagar J said:

"Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbaring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister: see, e.g. *In re Davis* ... But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must

have a much more direct bearing on the question of a man's fitness to practise than the former."

18 What was said by each of Kitto and Fullagar JJ was seemingly approved by the High Court in *A Solicitor v Law Society (NSW)* at 267 [19] and [20]. The Court there observed (in the course of considering the definition of "professional misconduct" in s 127(1) of the *Legal Profession Act 1987* (NSW)), at [20], that, even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. The Court stressed the need to examine "the whole position" (page 266 [18]), encompassing consideration of the detailed subjective and objective circumstances of the offending behaviour (page 268 [22]). It acknowledged (page 274 [35]) that it is appropriate to have regard to the combined significance of different acts of misconduct on the part of a practitioner.

19 Most cases involving drug abuse have involved practitioners who have become addicted. Two recent examples in this State are *Re a Practitioner* [2002] WASCA 93 and *Re a Solicitor* [2004] WASCA 283. The first of those cases concerned a practitioner who became addicted to heroin and then committed various petty crimes in order to obtain money to feed her habit. The second concerned a practitioner who was a user of cocaine and who had become involved in the importation of a commercial quantity of that substance. In both cases the practitioner was struck off.

20 However, drug use (even when it involves an addiction) will not, of itself, necessarily result in the striking off of a practitioner. In *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320 the practitioner, a solicitor, had pleaded guilty to importing a trafficable quantity of cocaine and had served a short sentence of imprisonment. She had, at the time, been addicted to heroin. In the period of almost four years since her release from prison (during which time she had voluntarily suspended herself from practice) she had been drug free and had shown genuine remorse. There was considerable evidence of good character. She undertook to agree to the attachment of a condition to her practising certificate requiring her to undergo regular urinalysis or other medical examination. The Court dismissed an application to have her removed from the Roll of Legal Practitioners. Similarly, Ross: *Ethics in Law*, 3rd ed, (2001) refers (page 172, [7.56]) to a Canadian case concerning a lawyer who, being addicted to cocaine, made defalcations from his trust account. He had voluntarily revealed the fact of his addiction. The Court did not strike him off the Roll or

Practitioners. Rather, it suspended him from practice for two years, although he was required to remain under supervision for a period of five years, during which time he had to undergo random drug testing and had no authority to sign on his trust account.

21 These cases might be compared with that of *In re Johnson* 488 NW 2d 682 (South Dakota 1992), in which a practitioner was disbarred for using marijuana 100 times and cocaine once. However, the Court there considered that, because the practitioner was a Deputy State Attorney, "his position required of him a greater standard of conduct to preserve the public trust in ... [the] system of justice" (at 685)).

22 Conduct involving dishonesty has generally been regarded very seriously by the courts, even where it occurs outside professional practice. In *Coe v New South Wales Bar Association* [2000] NSWCA 13 a barrister was struck off the Roll for falsely swearing an affidavit with intent to mislead the Family Court in a matter in which he was a party. The affidavit was knowingly false as regards his financial circumstances. In *Barristers' Board v Young* [2001] QCA 556, a barrister was struck off the Roll for intentionally giving false evidence to the Criminal Justice Commission's inquiry into electoral fraud. In *Re a Practitioner; Ex parte Legal Practitioners Disciplinary Tribunal* (2004) 145 A Crim R 557, a solicitor was struck off the Roll after committing four counts of perjury. He had made false statements in affidavits in court proceedings in order to conceal his dereliction of duty in allowing a judgment to be entered against his client in default of defence. He had also committed a minor offence of shoplifting, and had offered no adequate explanation in respect of it.

23 Honesty and integrity are essential prerequisites to a right to practise law. In *Barristers' Board v Darveniza* (2000) 112 A Crim R 438 (a case involving the supply of drugs by the practitioner and his subsequent filing of dishonest affidavits denying his use of illegal drugs), Thomas JA (with whom McMurdo P and White JA were in agreement) said, at 445 [33]:

"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 [in] which he or she practises."

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24 To similar effect is the observation of Wright J in *Howes v Law Society of Tasmania* [1998] TASSC 112. His Honour there referred with approval to what had been said by Crawford J, at first instance, as follows:

"... Honesty and candour are essential attributes for a legal practitioner, and certainly so when dealing with the Court and his or her professional body. The deliberate making of untrue statements on oath in particular reveals a person lacking in qualities essential for a practitioner. ..."

Application of these principles to this case

25 Accepting that striking off is reserved for those serious cases in which the character and conduct of the practitioner is inconsistent with the privileges of further practice (*Darveniza*, above, at 446 [38]), it seems to me that this is a case in which that outcome, rather than a period of suspension (a disposition urged upon us by the respondent's counsel), is the only appropriate one.

26 The practitioner has shown a very substantial disregard for the law and for the proper operation of the system of justice of which he was an integral part. His engagement in a conspiracy to pervert the course of justice was especially serious. As the Tribunal said, it struck at the heart of justice. Even if it was short lived, as his counsel contended, it was engaged in by the practitioner after an opportunity for some hours of reflection, rather than on the spur of the moment. It is of the utmost importance that the Court is able to be satisfied that those appearing before it will not mislead it and will conduct themselves in accordance with the law and discharge their duty even when not subject to scrutiny: *Re B* [1981] 2 NSWLR 372 at 382, per Moffit P. The dishonest way in which the practitioner has acted, and his disregard for the law, so severely undermine the confidence which can be placed in his conduct as a practitioner as in my opinion to render him unfit for practice, notwithstanding the mitigating circumstances raised on his behalf.

27 I would consequently order that the practitioner be struck off the Roll of Practitioners of this Court.

28 **WHEELER JA:** I have had the advantage of reading in draft the reasons for decision of Steytler P. I agree with those reasons and have nothing to add.

29 **MCLURE JA:** I agree with Steytler P.