[2016] WASCA 159

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	GIUDICE -v- LEGAL PROFESSION COMPLAINTS COMMITTEE [2016] WASCA 159
CORAM	**:**	NEWNES JA MURPHY JA
HEARD	**:**	22 APRIL 2016
DELIVERED	**:**	14 SEPTEMBER 2016
FILE NO/S	**:**	CACV 38 of 2015
BETWEEN	**:**	PETER GEORGE GIUDICE Appellant AND LEGAL PROFESSION COMPLAINTS COMMITTEE Respondent

ON APPEAL FROM:

Jurisdiction	**:**	STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA
Coram	**:**	JUDGE T SHARP (DEPUTY PRESIDENT) MS S GILLETT (MEMBER) MR C PHILLIPS (SENIOR SESSIONAL MEMBER)
Citation	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and GIUDICE [2015] WASAT 10
File No	**:**	VR 113 of 2011

Catchwords:

Legal practitioners - Finding appellant/practitioner reckless as to whether statement in affidavit he prepared was true - Professional misconduct - Failure to consider whether appellant conscious of risk that statement might be untrue - Agreement of parties to set aside finding of professional misconduct and substitute unsatisfactory professional conduct - Reprimand and fine - Consent orders made

Legislation:

Nil

Result:

Appeal allowed
Order that appellant engaged in unsatisfactory professional conduct
Appellant reprimanded and fined $5,000

Category: B

Representation:

Counsel:

Appellant	:	Mr C G Colvin SC
Respondent	:	Mr M D Cuerden SC

Solicitors:

Appellant	:	D L Armstrong
Respondent	:	Legal Profession Complaints Committee

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

Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Legal Profession Complaints Commission and Giudice [2015] WASAT 10
Legal Profession Complaints Committee and Giudice [2012] WASAT 144

1 **JUDGMENT OF THE COURT**: The appellant seeks to appeal from a decision of the State Administrative Tribunal, made pursuant to s 438 of the *Legal Profession Act 2008* (WA) (the Act), that he had engaged in professional misconduct. The appellant requires leave to appeal: *State Administrative Tribunal Act 2004* (WA), s 105(1).

2 After the appellant's case had been filed but before the respondent was required to file its answer, the parties reached agreement on the terms on which they sought to have the appeal disposed of. The parties filed a consent notice seeking, in substance, orders that leave to appeal be granted, the appeal allowed and the orders of the Tribunal set aside. The parties seek, in lieu of the Tribunal's orders, a finding of unsatisfactory professional conduct against the appellant under s 402 and s 438 of the Act, and an order that he be reprimanded and pay a fine of $5,000 to the Legal Practice Board of Western Australia.

3 As the appeal involved disciplinary proceedings against a legal practitioner, the matter was called on to hear the parties as to why orders of that nature should be made. Having heard senior counsel for the appellant and the respondent respectively, and having considered the papers on the appeal, we consider that, for the following reasons, it is appropriate that those orders should be made.

Procedural history

4 The matter, which relates to events which occurred in 2009, has, regrettably, a rather lengthy history. In June 2011, the Legal Profession Complaints Committee (the Committee) made an application to the State Administrative Tribunal seeking a finding pursuant to s 438(1) of the Act that the appellant had engaged in professional misconduct.

5 In July 2012, the Tribunal concluded that the appellant had not engaged in professional misconduct but found that he was guilty of unsatisfactory professional conduct: see ***Legal Profession Complaints Committee and Giudice*** [2012] WASAT 144.

6 An appeal by the appellant to this court was allowed and the matter remitted to the Tribunal for further consideration: see ***Giudice v Legal Profession Complaints Committee*** [2014] WASCA 115.

7 In ***Legal Profession Complaints Commission and Giudice*** [2015] WASAT 10, the Tribunal reconsidered the matter and (by a majority, Senior Sessional Member Phillips dissenting) made a finding of

professional misconduct. That decision is the subject of the present appeal.

Background

8 The Tribunal made the following findings of fact in its original decision and the majority of the Tribunal adopted them for the purposes of their decision on the remittal of the matter by this court.

9 The appellant's client separated from his wife in October 2006. The client and his wife had two children. In addition, two children of the client's wife from a previous relationship were ordinarily members of the household. Following the separation of the client and his wife, all four children continued to live with the client's wife at the former matrimonial home.

10 In November 2008, the appellant's client was charged with seven charges of indecently dealing with, and two charges of sexual penetration of, a child under the age of 13 years. In each case, the complainant was one of the children of the client's wife from her previous relationship. Following his arrest, the client was granted bail in the Magistrates Court subject to a number of conditions, one of which was a condition to the effect that the client was 'not to contact or attempt to contact the complainant or the complainant's family by whatever means'.

11 The client retained the appellant to act on his behalf shortly after the grant of bail. Subsequently, the client instructed the appellant that he intended to plead guilty to the charges which had been brought against him, and that he wished to have the bail conditions varied so as to allow him to have contact with his children.

12 In early January 2009, the appellant represented the client in the Magistrates Court and, in accordance with the client's instructions, entered pleas of guilty to all of the charges. The client was remanded to appear in the District Court for sentencing some months later. Bail was renewed on the same terms, including the condition precluding any contact between the client and his children.

13 In the meantime, without informing the appellant, the client had filed an application for a variation of the bail conditions. That application came on for hearing in the Magistrates Court on 19 January 2009. Mr Arndt, who was a lawyer employed in the appellant's office, happened to be in court on another matter and, with the consent of the client, appeared on his behalf on the hearing of the application. In the event, the

magistrate adjourned the application for some days to enable a report to be obtained.

14 The matter came back on for hearing on 22 January 2009. Mr Arndt again appeared on behalf of the client. After hearing evidence and submissions, the magistrate agreed to vary some of the conditions of bail to enable the client to retrieve some personal effects.

15 In relation to the application to vary the condition of bail which prohibited contact between the client and his children, the magistrate said:

> I don't disagree with much of what Mr Arndt said that it is inevitable that there be some contact between [the Client] and his children and that is likely to be resolved in family law proceedings. For those reasons and because of the suitability of family law proceedings resolving the appropriate interests of the parties, I would be prepared to vary bail only to this extent to provide that there be no contact or attempt to contact the complainant or the complaint's family by whatever means except as regards [the client's children] as provided in any order made in proceedings under the Family Law Act to which [the client's wife] is a party [31].

16 Mr Arndt made a handwritten note of the proceedings, including a reference to this aspect of the magistrate's decision. He also made an electronic entry in the records maintained by the appellant's firm in relation to his appearance before the magistrate on behalf of the client. That note recorded an order by the magistrate to the effect that the client was 'not to contact the complainant or siblings, except as regards the two natural children, as ordered in any Family Court proceedings to which the wife is a party'.

17 Mr Arndt wrote to the client reporting on the arguments which had been presented during the hearing, including the fact that the client's wife was concerned that contact with the client might have a detrimental effect upon the children, that the Department for Child Protection had concerns with respect to the emotional risks to the children, although they had the capacity to supervise any contact, and that the prosecutor had opposed any variation to the conditions of bail. The letter reported:

> The Magistrate formed the view that it was not appropriate to vary your bail conditions to allow the contact you sought, but was prepared to vary your bail so that you may have contact with the children as provided by any order of a Court exercising powers under the *Family Law Act* to which their mother is a party.

18 In early February 2009, the client retained the appellant to act on his behalf for the purposes of applying to the Magistrates Court, sitting as the Family Court of Western Australia. The client was seeking an order permitting him to have contact with his biological children prior to being sentenced in the District Court, and to have telephone contact with those children after being sentenced.

19 The appellant delegated the task of drafting the application and the affidavit of the client in support of that application to a law clerk. The law clerk, Ms Armstrong, had only been working with the appellant for a few weeks and had no prior experience as a law clerk. She prepared the client's affidavit under the supervision of the appellant and with some assistance from Mr Arndt and another law clerk. Paragraph 20 of that affidavit stated:

> My original bail conditions of 27 November 2008 were that I was not to contact or attempt to contact the complainant or the complaint [sic] family by any means, [sic] On 22 January 2009 my bail conditions were varied so that I may spend time with the children supervised.

20 The affidavit was settled by the appellant and, on 17 February 2009, the client signed the affidavit in the presence of a local Justice of the Peace. After it had been sworn, Ms Armstrong arranged for it to be filed at the Magistrates Court and a copy served on the solicitors acting for the client's wife in the Family Court proceedings. The client was subsequently charged with making a false statement in the affidavit, a charge that was later withdrawn

21 As mentioned earlier, in June 2011 the Committee made an application to the State Administrative Tribunal pursuant to s 438(1) of the Act seeking a finding that the appellant had engaged in professional misconduct. The Tribunal found that:

1. par 20 of the affidavit contained a false statement, as the magistrate had not varied the client's bail condition to allow the client 'to spend time with the children supervised' [62];

2. it was unlikely that the appellant knew the statement was false when he settled its terms [65];

3. in light of the nature of the offences with which the client was charged, the appellant should have considered that the words of the affidavit warranted at least further enquiry and that by not making further enquiry the appellant 'was more than careless and

> showed a culpable indifference as to whether it was true and to the consequences' [72].

22 It found that the appellant had failed to reach to reach the standard of competence and diligence that a member of the public is entitled to expect from a practitioner. The Tribunal was not satisfied, however, that the failure constituted a substantial or consistent failure and found that the appellant was guilty of unsatisfactory professional conduct rather than professional misconduct.

23 An appeal to this court by the appellant against the finding of unsatisfactory professional conduct was allowed. It is unnecessary to canvass the reasons of the court in detail. Suffice it to say that each member of the court, in separate judgments, found that the Tribunal had applied the wrong test in coming to the conclusion that the appellant had recklessly disregarded the truth or falsity of par 20 of the affidavit, in that it had applied an objective test, rather than a subjective test, in determining that the conduct was reckless. Martin CJ noted that the allegation of reckless disregard of the truth could only be made out if it was established that the practitioner's actual state of mind was that of indifference to the truth of the relevant statement [44]. His Honour noted in respect of the Tribunal's reasons that:

> Significantly omitted is any finding that the appellant did in fact consider that the words [of par 20] warranted further enquiry but made no such enquiry because he was indifferent to their truth [49].

24 Buss JA (as his Honour then was) observed that there were two subjective elements involved in such a finding: it must be established, first, that the appellant was aware when he settled the affidavit that there was a risk that the statement in par 20 was untrue and, secondly, that the appellant consciously disregarded that risk [95]. Both elements were subjective in that they were concerned with the appellant's actual state of mind [96]. See also Edelman J at [130].

25 The court set aside the Tribunal's orders and remitted the matter to the Tribunal for reconsideration without the hearing of further evidence.

26 On the rehearing, the Tribunal (Judge Sharp and Ms S Gillett, member) found that the appellant was guilty of professional misconduct. Mr Phillips (senior sessional member), dissenting, would have dismissed the complaint. The majority found that:

1. It was unlikely the appellant knew the statement was false when he settled its terms [48].

2. When he settled its terms, all that the appellant knew of the terms of the bail conditions was contained in Mr Arndt's file note, his letter to the client and the appellant's discussion with Mr Arndt; that the contents of the note and letter were contrary to what was stated in par 20 of the affidavit; that it followed that the appellant knew that there was a risk that the statement in par 20 might be wrong [60].

3. The appellant consciously disregarded the risk that par 20 was false [61]. It rejected the appellant's contention that the Family Court could not possibly be misled as it would have been obvious to a Family Court magistrate from the fact that the application was being made to the Family Court that contact was subject to an order of the Family Court. The Tribunal concluded that the appellant, knowing there was a risk that the affidavit contained a statement which might be untrue or false, consciously disregarded that risk when he settled the affidavit. It found that the appellant made a decision that he would not check the original bail conditions, even though he knew that par 20 of the affidavit might contain an incorrect statement, because the Family Court could work the matter out for itself [67].

4. The reckless disregard by the appellant as to whether the statement was true or false constituted professional misconduct [71]. In arriving at that conclusion, the Tribunal referred to the importance, in the circumstances of the application to the Family Court, that the court was fully and properly informed [72]; the serious consequences of allowing his client to provide a false statement on oath [73]; and that the Family Court had been misled by the appellant [74].

27 Mr Phillips (in dissent) reached a quite different conclusion. Having reviewed the evidence afresh, he concluded that in settling the affidavit the appellant had in mind that, in the context of an application to the Family Court for an order permitting the client to have contact with his biological children, it was necessarily implicit that contact with the children under the variation to the bail condition was subject to an order of the Family Court and unnecessary expressly to say so in the affidavit. He rejected the contention that the appellant had recklessly disregarded

whether the statement in par 20 true or false. Mr Phillips would have dismissed the complaint.

The grounds of appeal

28 The grounds of appeal are as follows:

> 1) The Tribunal erred in fact and law in finding that the appellant was aware of the risk that the statement was untrue or false because the Tribunal's reasons were based on evidence as to what the appellant knew when the Tribunal should have considered the evidence as to whether the appellant consciously appreciated the risk that the affidavit was false and proceeded with indifference as to that risk;
>
> 2) The Tribunal erred in fact in finding that the appellant was aware of the risk that the statement was untrue or false and that the appellant consciously disregarded that risk; and
>
> 3) Alternatively, that the Tribunal erred in fact and law in characterising the appellant's conduct as misleading in determining the penalty when there was no finding that the appellant had any intention to mislead the court or that the court was in fact misled.

29 The error of law alleged in ground 1 is that the Tribunal did not properly consider the state of mind of the appellant that the affidavit was wrong, but rather considered the evidence as to what he knew, which did not distinguish between matters subjectively and objectively known.

30 The appellant's submissions included detailed reference to the evidence before the Tribunal concerning the state of mind of the appellant at the relevant time.

Disposition of the appeal

31 When the matter came on for hearing, senior counsel for the respondent conceded ground 1 of the appeal. In light of, among other things, the material referred to in the appellant's written submissions, we consider that concession was properly made. A finding that the appellant was reckless as to whether the statement in par 20 of the affidavit was true or false required the Tribunal to find as a fact that the appellant was subjectively aware there was a risk that it was false and that he consciously disregarded that risk. The findings of the majority of the Tribunal do not sustain a conclusion that the appellant was subjectively aware there was a risk that it was false.

32 The substance of the Tribunal's findings on that issue were (1) that the statement in par 20 of the affidavit was false in that the magistrate did not vary the bail condition so as to allow the client to 'spend time with the children unsupervised' [46]; (2) that it was unlikely the appellant was actually aware when he settled the affidavit that par 20 was false [48]; (3) but in light of the discrepancy between the information provided by Mr Arndt and the terms of par 20, the appellant was aware there was a risk that the statement in par 20 might be wrong. It said:

> We find that all that the [appellant] knew of the terms of the bail conditions at the relevant time was derived from Mr Arndt's file note, his letter to the client and his conversation with Mr Arndt. However, the contents of that note and letter are contrary to what is asserted in paragraph 20 of the affidavit. It follows that the [appellant] knew that either the statement in paragraph 20 was wrong or the information in the letter and file note was wrong. We find that the [appellant] knew that there was a risk that the statement in paragraph 20 of the affidavit might have been wrong [60].

33 The reasoning of the majority in the Tribunal was, with respect, flawed. The fact that the bail conditions were contrary to the terms of par 20 and that the appellant knew the terms of the bail conditions, did not of itself establish that that the appellant actually appreciated that the statement in par 20 was contrary to the terms of the bail conditions and that the statement in par 20 might be wrong.

34 A finding that at the time the appellant settled the affidavit he was conscious of the discrepancy and of the risk that as a result par 20 was untrue, required an examination of all the relevant circumstances in which the affidavit came to be settled. Those circumstances included, as the appellant pointed out, the significance of the discrepancy in the context that the affidavit was in support of the very application to the Family Court that the bail condition in question required to be made, and the appellant's evidence that he considered the requirement under the bail conditions for the approval of the Family Court was implicit in the fact of the application.

35 It appears from the reasons of the majority that that is not a task they undertook. In the absence of a proper finding as to the appellant's actual state of mind at the time he settled the affidavit, it could not be found that he was in fact conscious of the risk that par 20 might be untrue.

36 Once it is accepted that ground 1 of the appeal must be upheld, as the respondent properly concedes is the case, the question that would ordinarily follow is whether the matter should be remitted to the Tribunal

for fresh consideration or whether this court could and should determine the matter itself. On the hearing before us, senior counsel for the respondent said that had the appeal proceeded it would have been the respondent's submission that this court should determine the matter, but if the court decided against that course the respondent would not have invited the court to remit the matter to the Tribunal for a third hearing but would have accepted that the complaint should be dismissed.

37 As Edelman J observed (at [156]) in the earlier decision of this court, the appellant's evidence, if accepted, was that he was not reckless. This court is not in a position to assess the appellant's credibility.

38 It is now some seven years since the relevant events occurred and over five years since the proceedings in the Tribunal were first instituted. The orders proposed in the consent notice are orders that this court is entitled to make on the appeal: *State Administrative Tribunal Act*, s 105(9), and in our view they are not inconsistent with the evidence before the Tribunal. In the circumstances, including the time and cost that the matter has already consumed, it is appropriate that the matter be resolved on the terms agreed between the parties and we would so order.

Conclusion

39 There should be orders in terms of the minute of consent orders dated 25 February 2016 as follows:

1. The appellant have leave to appeal.

2. The appeal is allowed.

3. The orders of the State Administrative Tribunal dated 5 February 2015 and 23 June 2015 respectively be set aside.

4. In lieu thereof there be orders as follows:

    a) on or about 17 February 2009 the appellant engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct in causing to be prepared under his supervision, settling and causing to be sworn, filed and served in Family Court proceedings, an affidavit sworn by his client which contained an incorrect (although not intentionally false) statement fell short of the standard of competence and diligence that a member of the public is

entitled to expect of a reasonably competent Australian legal practitioner;

b) the appellant is reprimanded;

c) the appellant is to pay a fine to the Legal Practice Board of Western Australia of $5,000 to be paid within one month of the date of these orders; and

d) each party shall bear its own costs of the proceedings before the Tribunal.

5. There be no order as to the costs of the appeal.