

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : FULL BENCH

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE -v- DUTTON [2014] WASC 457

**CORAM** : MARTIN CJ  
McKECHNIE J  
ALLANSON J

**HEARD** : 4 DECEMBER 2014

**DELIVERED** : 4 DECEMBER 2014

**FILE NO/S** : LPD 3 of 2014

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

GEOFFREY PAUL DUTTON  
Respondent

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*Catchwords:*

Legal practitioners - Disciplinary proceedings - Removal from Roll of practitioners - Whether practitioner fit and proper person to remain a member of the legal profession - Unauthorised withdrawal of trust funds - Failure to keep proper records - Substantial failure to maintain a reasonable standard of competence and diligence

*Legislation:*

*Legal Practice Board Rules 2004 (WA), r 52, r 57*

*Legal Profession Act 2008 (WA), s 137, s 215, s 226, s 227, s 228, s 260, s 262, s 438, s 444*

*Legal Profession Regulations 2009 (WA)*

*State Administrative Tribunal Act 2004 (WA), s 56*

*Result:*

Order that name of practitioner be removed from the Roll of practitioners

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms P E Le Miere  
Respondent : No appearance

*Solicitors:*

Applicant : Legal Profession Complaints Committee  
Respondent : No appearance

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

Legal Profession Complaints Committee and Dutton [2014] WASAT 124

Legal Profession Complaints Committee v Masten [2011] WASC 71

Legal Profession Complaints Committee v McLean [2012] WASC 297

1     **JUDGMENT OF THE COURT:** The Legal Profession Complaints Committee (the Committee) seeks an order that Geoffrey Paul Dutton (the practitioner) be removed from the Roll of legal practitioners.

2             The State Administrative Tribunal (the Tribunal) has made and transmitted a report to this Court pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA) (the Act). Pursuant to s 444(1) of the Act, the report is to be taken as conclusive as to all facts and findings mentioned or contained in the report. The report is provided with a recommendation, pursuant to s 438(4)(b) of the Act, that the practitioner's name be removed from the Roll of practitioners.

3             The practitioner has filed a Notice of Intention Not to Oppose Application and consents to his name being struck from the Roll of practitioners.

**The findings against the practitioner**

4             The facts, and findings of the Tribunal, are set out in the Tribunal's reasons for decision in *Legal Profession Complaints Committee and Dutton*.<sup>1</sup> Those reasons and a schedule of the practitioner's legal trust ledger accounts comprise the report of the Tribunal.

5             The Committee alleged before the Tribunal that the practitioner engaged in unsatisfactory professional conduct and professional misconduct in the course of acting for a number of different clients between about 2007 and 2012. The Tribunal ordered that the matter be referred to mediation, and following mediation the Committee and the practitioner agreed to settle the matter pursuant to s 56 of the *State Administrative Tribunal Act 2004* (WA).

6             The practitioner agreed to facts and consented to findings of unsatisfactory professional conduct and professional misconduct by the Tribunal. The agreed facts as set out in the Tribunal's reasons for decision can be summarised as follows.

1.     In the course of acting for a client, Malcolm, between March and November 2011, the practitioner engaged in professional misconduct by:
  - (a)     contravening the costs disclosure obligations in s 260 of the Act in that the practitioner:

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<sup>1</sup> [2014] WASAT 124.

- (i) incorrectly advised Malcolm as to the Costs Determination applicable in the absence of a costs agreement;
  - (ii) incorrectly advised Malcolm that his matter fell within the civil jurisdiction of the Magistrates Court;
  - (iii) did not provide an adequate estimate of the total legal costs; and
  - (iv) incorrectly advised Malcolm of the range of costs that Malcolm might recover or be ordered to pay;
- (b) failing to deposit trust money in the amount of \$20,000 received on behalf of Malcolm in a general trust account in contravention of s 215(2) of the Act;
  - (c) without the authority of Malcolm, knowingly using some or all of the \$20,000 of trust money for the practitioner's own benefit; and
  - (d) failing to account to Malcolm for the \$20,000 in trust money, by failing to provide Malcolm with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
2. In the course of acting for a client, David, between February 2010 and May 2012, the practitioner engaged in professional misconduct by:
- (a) failing to deposit trust money in the amount of \$50,000 received on behalf of David in a general trust account in contravention of s 215(2) of the Act and contrary to David's instructions;
  - (b) failing to comply with an order of the Family Court of Western Australia;
  - (c) contravening the costs disclosure obligations in s 260 and s 262 of the Act in that the practitioner:
    - (i) did not provide any costs disclosure to David in writing until 9 months after being retained by him;

- (ii) incorrectly advised David as to the Costs Determination applicable in the absence of a costs agreement;
  - (iii) incorrectly advised David that his matter fell within the civil jurisdiction of the Magistrates Court;
  - (iv) did not provide an adequate estimate of the total legal costs; and
  - (v) incorrectly advised David of the range of costs that David might recover or be ordered to pay;
- (d) without the authority of David, knowingly using \$20,289.51 of the \$50,000 of trust money for the practitioner's own benefit;
  - (e) failing to take adequate steps to carry out David's instructions to effect property transfers; and
  - (f) failing to account to David for part of the \$50,000 in trust money as well as a further \$3,000 in trust money, by failing to provide David with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the remainder of the trust money after accounting for reasonable fees and disbursements when the practitioner did not carry out or complete the retainer.
3. In the course of acting for a client, Express Group, between September 2011 and March 2012, the practitioner engaged in professional misconduct by:
- (a) failing to deposit trust money in the amount of \$2,500 received on behalf of Express Group in a general trust account in contravention of s 215(2) of the Act;
  - (b) failing to provide any costs disclosure as required by s 260 and s 262 of the Act;
  - (c) intentionally or recklessly misleading a director of Express Group by representing that the practitioner had filed an application for a means enquiry when the practitioner had not;

- (d) failing to progress Express Group's application for default judgment, apply for a means enquiry as instructed to do, or respond to telephone calls or emails from Express Group; and
  - (e) failing to account to Express Group for the \$2,500 in trust money, by failing to provide Express Group with a bill for the fair and reasonable value of the legal services provided, a trust statement, or a detailed account as requested by Express Group; and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
4. In the course of acting for a client, Claire, in proceedings against her former de facto partner SE between December 2011 and March 2012, the practitioner engaged in professional misconduct by:
- (a) failing to deposit trust money in the amount of \$1,650 received on behalf of Claire in a general trust account in contravention of s 215(2) of the Act;
  - (b) failing to provide any of the costs disclosure required by s 260 of the Act;
  - (c) incorrectly advising Claire that the terms of a Family Court order permitted her to relocate to Perth with her children;
  - (d) without instructions from Claire, informing SE's solicitor that Claire consented to an injunction, and failing to inform SE's solicitor or the Family Court when he was instructed by Claire that she opposed the injunction;
  - (e) failing to inform Claire, obtain instructions or provide any advice in respect of another order applied for by SE that would require Claire's children to be returned to Geraldton;
  - (f) failing to respond to emails from Claire;
  - (g) failing to seek disclosure of SE's financial position as instructed to do; and
  - (h) failing to account to Claire for the \$1,650 in trust money, by failing to provide Claire with a bill for the fair and reasonable value of the legal services provided or a trust

statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.

5. In the course of acting for a client, Karen, between February 2012 and April 2012, the practitioner engaged in professional misconduct by:
  - (a) failing to deposit trust money in the amount of \$3,000 received on behalf of Karen in a general trust account in contravention of s 215(2) of the Act;
  - (b) failing to provide any of the costs disclosure required by s 260 of the Act;
  - (c) failing to attend an appointment arranged with Karen, carry out Karen's instructions to commence children's proceedings in the Family Court pursuant to a grant of Legal Aid, or carry out Karen's instructions to commence property proceedings in the Family Court in circumstances where the practitioner had advised Karen to commence those proceedings and knew that she had taken out a loan to do so; and
  - (d) failing to account to Karen for the \$3,000 in trust money, by failing to provide Karen with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
  
6. In the course of acting for a client, Mr W, between April 2008 and April 2012, the practitioner engaged in professional misconduct by:
  - (a) failing to advise Mr W as to the appropriate jurisdiction in which to commence proceedings, of time limits that might apply to commencing proceedings, or with respect to enforcement of a default judgment of the District Court of Western Australia;
  - (b) seeking to commence proceedings in the Family Court to enforce the default judgment where the Family Court had no jurisdiction to grant enforcement, and in relation to various applications in the Family Court failing to seek leave to apply in an application where leave was required,

comply with the requirements of the Family Court Act 1997 (WA), respond to a requisition of the Family Court or take steps to progress Mr W's matter; and

- (c) failing to account to Mr W for \$6,039.90 paid by Mr W to the practitioner on account of costs and disbursements, by failing to provide Mr W with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the \$6,039.90 when the practitioner did not carry out or complete the retainer.

7. In the course of acting for clients, Mr and Mrs C, between January 2011 and April 2012, the practitioner engaged in professional misconduct by:

- (a) failing to deposit trust money in the amount of \$8,000 received on behalf of Mr and Mrs C in a general trust account in contravention of s 215(2) of the Act;
- (b) failing to provide any of the costs disclosure required by s 260 of the Act;
- (c) in relation to District Court proceedings, failing to inform Mr and Mrs C of their obligation to provide discovery, of applications by another party to strike out part of Mr and Mrs C's defence and for a springing order, of orders made in the proceedings, or of the consequence of non-compliance with those orders, with the consequence that judgment was entered against them; and
- (d) failing to account to Mr and Mrs C for the \$8,000 in trust money, by failing to provide Mr and Mrs C with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.

8. In the course of acting for a client, CTBM, between December 2009 and April 2012, the practitioner engaged in professional misconduct by:

- (a) failing to deposit trust money in the amount of \$5,500 received on behalf of CTBM in a general trust account in contravention of s 215(2) of the Act;

- (b) failing to provide any of the costs disclosure required by s 260 of the Act;
  - (c) failing to take any or adequate steps to progress CTBM's proceedings in the Magistrates Court in a timely manner, to inform CTBM of orders made in those proceedings, to respond to emails from CTBM, or to inform CTBM that his practising certificate had been suspended; and
  - (d) failing to account to CTBM for the \$8,000 in trust money, by failing to provide CTBM with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
9. In the course of acting for a client, W, between October 2010 and April 2012, the practitioner engaged in unsatisfactory professional conduct and professional misconduct by:
- (a) failing to deposit trust money in the amount of \$3,000 received on behalf of W in a general trust account in contravention of s 215(2) of the Act;
  - (b) contravening the costs disclosure obligations in s 260 of the Act in that the practitioner incorrectly advised W as to the Costs Determination applicable in the absence of a costs agreement;
  - (c) failing to take adequate steps to progress W's proceedings in the Magistrates Court, and in particular failing to file a Statement of Claim on time when the practitioner had advised W that he would cease acting for W if he did not receive the \$3,000 in trust money, and W paid the \$3,000 in trust money in particular for the preparation of the Statement of Claim; and
  - (d) failing to account to W for the \$3,000 in trust money as well as a further payment of \$2,000, by failing to provide W with a bill for the fair and reasonable value of the legal services provided or an itemised invoice as requested by W, and by failing to repay the trust money when the practitioner did not complete the retainer.

10. In the course of acting for a client, JT, between June 2010 and April 2012, the practitioner engaged in professional misconduct by:
  - (a) failing to deposit trust money in the amount of \$3,000 received on behalf of JT in a general trust account in contravention of s 215(2) of the Act;
  - (b) failing to provide any of the costs disclosure required by s 260 of the Act; and
  - (c) failing to account to JT for the \$3,000 in trust money, by failing to provide JT with a bill for the fair and reasonable value of the legal services provided, a trust statement, or an invoice as requested by JT; and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
  
11. In the course of acting for a client, WD, between April 2012 and June 2012, the practitioner engaged in professional misconduct by:
  - (a) failing to deposit trust money in the amount of \$1,700 received on behalf of WD in a general trust account in contravention of s 215(2) of the Act;
  - (b) failing to prepare and send a letter of demand as instructed when the matter was urgent and the practitioner had been paid the \$1,700 in trust money in advance to do so; and
  - (c) failing to account to WD for \$550, being the balance of the \$1,700 in trust money not refunded to WD, by failing to provide WD with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the \$550 when the practitioner did not carry out or complete the retainer and had agreed to refund the entire \$1,700 in trust money.
  
12. In the course of acting for a client, Ms T C, between August 2011 and February 2012, the practitioner engaged in professional misconduct by:
  - (a) failing to deposit trust money in the amount of \$550 received on behalf of Ms T C in a general trust account in contravention of s 215(2) of the Act;

- (b) failing to take any or adequate steps to obtain a grant of Letters of Administration as instructed, and failing to respond to emails and telephone calls from Ms T C; and
  - (c) failing to account to Ms T C for the \$550 in trust money, by failing to provide Ms T C with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
- 13. In the course of acting for a client, Mrs M, between November 2011 and April 2012, the practitioner engaged in professional misconduct by:
  - (a) failing to deposit trust money in the amount of \$2,500 received on behalf of Mrs M in a general trust account in contravention of s 215(2) of the Act;
  - (b) failing to provide any of the costs disclosure required by s 260 of the Act; and
  - (c) failing to account to Mrs M for the \$2,500 in trust money, by failing to provide Mrs M with a bill for the fair and reasonable value of the legal services provided or a trust statement, and by failing to repay the trust money when the practitioner did not carry out or complete the retainer.
- 14. The practitioner further engaged in professional misconduct by:
  - (a) on over 90 occasions between about July 2007 and March 2010, withdrawing without authority and using for his own benefit funds from the general trust account of his law practice and thereby causing a deficiency in the trust accounts of certain clients, in contravention of s 137(1)(b) of the *Legal Practice Act 2003* (WA) (the 2003 Act) until 28 February 2009 and in contravention of s 226(1)(a) of the Act from 1 March 2009;
  - (b) between about March 2007 and 28 February 2009, failing to maintain books of account in the manner required by r 52 and r 57 of the *Legal Practice Board Rules 2004* (WA) and thereby contravening s 140 of the 2003 Act, and between 1 March 2009 and about November 2011, failing to maintain books of account in the manner required by the

*Legal Profession Regulations 2009* (WA) and thereby contravening s 228(3) of the Act.

- (c) between 1 March 2009 and about April 2012, failing to give notice to the Legal Practice Board of irregularities with the practitioner's trust accounts and trust ledger accounts, in contravention of s 227(1) of the Act; and
- (d) failing to respond to a letter from the Senior Trust Account Inspector dated 22 December 2012 requesting confirmation of findings in the Inspector's report on the practitioner's records, and failing to take the action requested to rectify various matters referred to in that report.

### **Relevant principles**

7 The principles to be applied in applications of this kind were set out by this court in *Legal Profession Complaints Committee v Masten*<sup>2</sup> as follows:

The principles to be applied in an application of this kind are well established. The jurisdiction of the court to remove a practitioner from the Roll is not exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the legal profession: *Re Maraj (a legal practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ, Kennedy & Franklyn JJ agreeing); *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279, 286 (Dixon CJ, McTiernan, Fullagar & Kitto JJ agreeing); *Legal Profession Complaints Committee v Brennan* [2010] WASC 198 [10] (Martin CJ, Murray & Hall JJ agreeing). Since the object is to protect the public and the reputation of the profession, the consequences for the practitioner may be either more or less severe than they would be if the only object of the proceedings was one of punishment: *Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 [19].

The critical question to be addressed by the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner: *Ziems* (297 - 298); *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253 [15]; *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 [43]. Fitness to practise law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges: *In re Davis* (1947) 75 CLR 409, 420 (Dixon J), *Thorpe* [43], and *Brennan* [11]. The personal circumstances of the practitioner may be

<sup>2</sup> [2011] WASC 71.

relevant to explain the conduct of the practitioner, which is discussed in further detail below.

Striking off 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': *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 112 A Crim R 439 [38]. In that case, Thomas JA observed that '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 which he or she practises' [33].

Honesty and integrity are essential characteristics required of legal practitioners. The court has generally taken a very serious approach to cases in which a practitioner's conduct has involved dishonesty: see *Brennan* [15], *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 [23]; *Legal Practitioners Complaints Committee v De Pardo* [2007] WASC 266 [14]. Honesty is particularly important where practitioners are dealing with monies entrusted to them by their clients. Some of the minimum standards expected of practitioners in respect of money held on trust are set out by Malcolm CJ in *Re Maraj*:

Integrity, reliability and an appropriate level of efficiency in the administration of money held on trust are all qualities which any reasonably experienced practitioner may be expected to demonstrate, in addition to being professionally competent in pursuing his or her clients' interests (25).

In this context, the Tribunal correctly stated that the public is entitled to expect that practitioners will act 'with meticulous care and complete honesty and accountability': *Legal Profession Complaints Committee and Masten* [2010] WASAT 47 (S) [21].

As observed by the Tribunal the misuse of trust funds by a legal practitioner is an extremely serious matter: *Masten* [21]. However, there have been several cases in which the inability to keep a trust account adequately has not lead to the practitioner being struck off the roll: see *Council of the Queensland Law Society Inc v Cummings; Ex parte Attorney-General of Queensland and Minister for Justice* [2004] QCA 138; *Attorney-General and Minister for Justice (Qld) v Priddle* [2002] QCA 297; *Legal Practitioners Complaints Committee v Edward* [2007] WASC 287. Importantly, in these cases the lack of dishonesty on behalf of the practitioner was a significant factor in the decision to impose a lesser penalty.

In contrast, the courts will generally strike off defaulting practitioners in serious cases of trust account defalcation, particularly where dishonesty is a factor: *Cummings* [22] (McMurdo P, Davies JA & Fryberg J agreeing); see also *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42; *Brennan*. The need for such an approach was emphasised in the

oft-cited passage of Street CJ in *Law Society of New South Wales v Jones* (Unreported, NSWCA, 27 July 1978):

Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities belonging to a solicitor. Members of the public, many of them wholly inexperienced and unskilled in matters of business or of law, inevitably must put great faith and trust in the honesty of solicitors in the handling of moneys on their behalf. The Court must ensure that this trust is not misplaced (10).

Where a practitioner has dishonestly misused trust monies, authority clearly establishes that, almost inevitably, the most appropriate order will be to strike the practitioner off the Roll. [16] - [23]

### **Application of principles to this case**

8 The practitioner has admitted to numerous instances of professional misconduct over a period of around 5 years. He has used trust monies for his own benefit. He has repeatedly and consistently failed to deposit trust monies in a general trust account. He has failed to properly maintain his trust accounts over a significant period.

9 In his misuse of trust monies, the practitioner acted dishonestly. It is clear that he cannot be relied upon to handle monies entrusted to him by his clients with reliability, integrity or accountability.

10 The practitioner has repeatedly acted in a manner that is not professionally competent in the pursuit of his clients' interests. He has on multiple occasions failed to carry out the instructions of his clients or take any steps to progress their matters, in circumstances that have caused serious consequences for some of his clients. He has persistently failed to respond to communications from his clients. He has on multiple occasions failed to provide proper bills or trust statements to his clients, and failed to return trust monies to his clients when he did not carry out their retainers. As the Tribunal correctly observed, no client could have any confidence in the practitioner's honesty or integrity.<sup>3</sup>

11 The practitioner's conduct undermines his trustworthiness and leads inevitably to the conclusion that he cannot be trusted to deal fairly within the system in which he practises. Striking the practitioner off the Roll of practitioners is required to protect the public. The practitioner is not a fit and proper person to practise law.

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<sup>3</sup> *Legal Profession Complaints Committee and Dutton* [11].

**Costs**

12 In its Notice of Originating Motion, the Committee seeks its costs of this application. However, as noted above, the practitioner indicated that he did not intend to be heard in relation to this application and consented to his name being struck off the Roll of practitioners. In circumstances in which the practitioner does not oppose the orders sought by the Committee, it is appropriate to regard the costs of these proceedings as part of the cost of regulating the profession and to make no order as to costs.<sup>4</sup>

**Conclusion**

13 For these reasons, the Court will order that the name of the practitioner be removed from the Roll of practitioners, and makes no order as to the costs of these proceedings.

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<sup>4</sup> *Legal Profession Complaints Committee v McLean* [2012] WASC 297 [16].